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**JOSEPHINE STAFFORD**

**v.**

**Docket No. 89-15-385**

**HANCOCK COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

Grievant Josephine Stafford is a nineteen-year employee-bus operator for respondent Hancock County Board of Education (HCBE). She filed a level four grievance July 21, 1989, in which she alleged violations of applicable law governing extra-duty driving assignments because she was not permitted, under certain circumstances, to avail herself of said assignments. Hearings were scheduled and continued for cause in August and September 1989. After the September continuance the parties requested a decision based on the record developed below. Subsequently, it was discovered that a decision had not been rendered following the March 3, 1989, level two hearing.<sup>1</sup> Thereafter, the grievance was remanded to level two for written

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<sup>1</sup>The grievance was denied at level one on January 30, 1989, a level two decision was not issued and, at level three, HCBE waived the grievance to the "state hearing examiner" on July 14, 1989.

decision only. On January 18, 1990, HCBE submitted, presumably as its official position in the matter, the level two decision which apparently had been prepared in May 1989, but not signed by then-Assistant Superintendent Carl Foder. The parties were subsequently notified to submit proposed findings of fact and conclusions of law, if they so desired, no later than January 31, 1990, and the case is thus mature for decision.<sup>2</sup>

The essential facts in this case were not controverted. Grievant holds a seven-hour contract consisting of morning and afternoon runs, and a supplemental early childhood (EC) run. While no mention was made of grievant's work hours for the regular morning and afternoon runs, her EC run was scheduled from approximately 10:50 until 11:45 a.m. Over the course of many years, grievant signed up for inclusion on both extra-duty rosters HCBE separately maintains. The "curricular" roster is used to allocate extra driving assignments among bus operators for runs occurring during the instructional day, and an "extra-curricular" roster, so designated by HCBE, is used for runs occurring after school hours. These transportation needs

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<sup>2</sup>HCBE did not file a brief or fact-law proposals. On January 30, 1990, the undersigned received grievant's counsel's request for a level four hearing. The request was denied. Ordinarily, grievants have an absolute right to a level four hearing; however, in this case grievant's representative waived such hearing over three months earlier. Moreover, the late-breaking request cited no compelling reason to reopen the record or delay decision on the grievance. Finally, an earlier filed request would have been considered. As matters stood, both parties had been advised that no extensions would be granted on filing briefs, and a request for hearing received one day before the deadline for submission was simply untimely.

include periodic field trips, athletic events, and the like, as well as some regularly scheduled school-time functions occurring at irregular times in any given day or week and EC runs which become available when a driver holding those duties reports off for sick or personal leave or opts for an extra-duty run which preempts the regular driving schedule.

Sometime at the beginning of the 1988-89 school year, grievant was informed by verbal directive that she and other similarly situated operators holding EC runs could no longer vie for curricular extra-duty runs which overlapped with the EC runs. Charles Pugh, transportation director, testified that he issued the directive for the "block-out" time, 11:00 a.m. until noon in grievant's case, because of complaints about EC drivers who received double payment for their work time in such situations.

The policy did not preclude grievant from accepting curricular runs that displaced either her regular morning or afternoon runs. In those cases a substitute driver was employed to cover the run. A curricular run that encompassed her entire work day was also permitted. Again, substitutes were hired for the regular runs, but the EC run was placed on the curricular roster for regular employees to bid on. Grievant was eligible for all after-school "extracurricular" runs because the hours involved did not affect her regular work day. Grievant testified that she had availed herself of all such opportunities during the school year.

Grievant was not permitted to accept curricular runs that intruded, time-wise, into the EC run. It appears from the record that the block-out prohibited extra-duty runs which overlapped with the EC run, even though both could be accomplished but created a "double-dip" wage situation. She was also precluded from accepting runs which conflicted solely with the EC run but did not preempt her entire day's schedule. The parties agreed that because of the policy grievant missed opportunities to drive two January 1989 "athletic games," sports activities conducted during regular school hours, as of the time of the second level hearing in March 1989. However, grievant stated in her testimony that she was not seeking back wages, and no particulars on the matter were introduced at the hearing.<sup>3</sup>

Mr. Pugh attempted to explain the situation and the rationale for his directive. Apparently, as far as preparing the payroll goes, bus operators receive daily wages based on the amount of his or her contracted hours, all other factors being equal. If a driver accepts an extra-duty run, she receives

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<sup>3</sup>Grievant's level four filing noted, "Grievant requests compensation . . . for extra-duty runs of Jan. 6 and 13, 1989." W.Va. Code §18-29-3(k) provides that "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." It is noted that HCBE did not consent to a change in relief. In addition, grievant submitted this matter for decision on the record and did not supplement the record with information or evidence necessary for a proper determination on back wages. Finally, the record was deemed closed January 31, 1990, and grievant's counsel did not submit a brief or proposals on the matter, see n. 2. Accordingly, the change of relief is disallowed.

extra hourly wages for all work hours beyond the contracted-for hours.<sup>4</sup> Thus, a seven-hour driver who works his regular hours and a one-hour extra-duty assignment would be entitled to eight hours' wages for the day.

Mr. Pugh's scenario of the salary "double-dip," in essence, is as follows: A seven-hour driver, for example, could hold a 10:00 to 11:00 a.m. EC run. The calculated time to perform the duty is based on starting the run at the bus garage. At some time that driver could become eligible, i.e., his name rotated to the top of list, for a one-hour curricular extra-duty run which might not conclude until 10:15 or 10:20, overlapping the EC run's time. Because the driver and bus are already away from the garage, and indeed the bus need not be returned to the garage to complete the extra-duty run, the EC run can be started and completed with less time needed than if that run had begun at the garage. The net effect on the driver's time and wages is that he would be credited with eight hours for seven hours and forty minutes' work, according to computations presently utilized by HCBE.

Grievant requests that she be allowed to vie for all extra-duty runs. She cites violation of W.Va. Code §18A-4-8b(b) and argues that the oral directive excluding certain personnel from extra-duty work at certain times is without effect because

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<sup>4</sup>This is actually a simplification of Mr. Pugh's explanation. For example, in some instances regular hours not worked are actually deducted, and the extra-duty hours instead are counted. The overall effect on wages is the same.

State Board of Education Policy No. 5300 requires that all county board of education policies affecting hours and wages be in writing, approved by the board and promulgated. Conversely HCBE argues that employees may not receive double pay for work performed; that a supervisor has the managerial authority to efficiently assign personnel; and that "[n]o violation of the equal pay,<sup>5</sup> classification of employees or seniority provisions of the West Virginia Code has been established by the Grievant."

W.Va. Code §18A-4-8b(b) requires that all employees be given an opportunity for extra-duty assignments. The statute provides in pertinent part:

Notwithstanding any other provisions of this chapter to the contrary, decisions affecting [service] personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, extra-duty assignments are defined as irregular jobs that occur periodically or occasionally, such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

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<sup>5</sup>Grievant's level four filing complaint about violation of W.Va. Code §18A-4-5b is not reached because the record was utterly devoid of any evidence or argument on the subject of uniformity of pay.

HCBE permits its drivers to give up or waive their regular runs to accept extra-duty work. It also allows waiver of EC runs in conjunction with an all-day extra-duty assignment which preempts an entire day's driving schedule. For it to prohibit drivers from waiving only an affected EC run in order to be available for extra-duty work in that time frame is arbitrary, under the circumstances. While HCBE's management should not be precluded from making reasonable work assignments, the requirements for allocating extra-duty work are clearly defined in the statute. In that regard, HCBE's transportation director violated §18A-4-8b(b) because the alternative procedure he instituted was not approved by HCBE's members or affirmed by the bus operators.

However, the statute does not require that an employee be given an extra-duty assignment when that employee also retains a conflicting previously-scheduled commitment and the end result is double wages. §18A-4-8b(b) does not contemplate or endorse a method by which an employee could conceivably earn money for time not spent on work. On the other hand, Mr. Pugh's directive does not seem to be the most efficient<sup>6</sup> arrangement to resolve the "overlapping" problem<sup>7</sup> and other alternatives exist.

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<sup>6</sup>HCBE's Conclusion of Law, No. 2 stated:

A supervisor has authority, within the confines of the employment contract, to assign their personnel in such a manner to best establish a well arranged and efficient school system.

<sup>7</sup>Part of the time allocated to complete an extra-duty run is the return trip to the garage, but a driver who overlaps to  
(Footnote Continued)

Grievant and her peers could vie for extra-duty work which overlaps the EC runs and not be unjustly enriched. Those drivers could be required to spend the calculated overlap time on bus maintenance or some other chore or the overlap time could be deducted in hours or portions thereof from the wages to be paid. A final alternative, one which would not entail the benefits to HCBE that the overlap provides, would be to require the EC driver to give up or waive an EC run to a regular operator on the curricular roster if he or she elected to take an extra-duty run which overlapped with the EC run. HCBE would be in conformance with the spirit of Code §18A-4-8b(b) if it permitted its affected operators to elect their own reasonable alternative to the double-wage situation from among those cited herein.<sup>8</sup>

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(Footnote Continued)

begin the EC run saves that time by not returning the bus to the garage and instead starting the EC run while on the road. A second trip from the garage to initiate the EC bus duty is also unnecessary. Consequently, gas, mileage and wear and tear on the bus are saved for both runs, for the extra-duty run to the garage and for the EC run from the garage.

<sup>8</sup>For some further background and information on this matter, see Parsons/Witherow v. Hancock Co. Bd. of Educ., Docket No. 15-88-249 (July 31, 1989). The dispute in Parsons/Witherow arose because of the same directive as is cited herein although those grievants did not hold EC runs and instead had late-afternoon commitments. However, those grievants were affected in a different manner because they were precluded from accepting most after-school runs, and those runs are more likely to generate more substantial extra hours and wages.

It is noted that the problem herein may be moot because negotiations in the Parsons/Witherow matter produced an agreement that "all drivers should receive equal opportunity to rotate into extra-duty bus runs" and that the directive would be rescinded. See Parsons/Witherow, Findings of Fact 4 and 5.  
(Footnote Continued)



In addition to the foregoing discussion and determinations, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. Grievant holds a seven-hour contract which includes a regular morning run, a supplemental 11:00-12:00 EC run and a regular afternoon run. According to HCBE's long-standing practice and procedure, she could elect extra-duty assignments in lieu of her contracted-for driving assignments.

2. Grievant availed herself of all extra-duty driving assignments, posted on two separate extra-duty driving rosters, until an oral directive from the transportation director prohibited her from accepting runs which conflicted solely with her EC run requiring her to give up the EC run to the curricular roster. She was also excluded from accepting runs which overlapped with her EC run but time-wise allowed her to complete both runs.

3. Under wage and hour calculations in effect prior to the directive, if grievant worked an extra-duty run which overlapped with her EC run, she would derive wages for time not actually spent performing the runs as scheduled from the garage and back.

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(Footnote Continued)

However, the parties herein have not informed the undersigned of any resolution in the instant matter.

4. When overlap work was permitted, gas, mileage and wear and tear on buses were reduced because a return trip to the garage as well as a departure trip from the garage were eliminated. However, HCBE's transportation director did not explore alternatives other than the block-out time directive to avoid paying double wages.

#### CONCLUSIONS OF LAW

1. Extra-duty assignments shall be assigned by giving the employee with the greatest length of service time . . . priority in accepting such assignments followed by other fellow employees on a rotating basis . . . until all such employees have had an opportunity to perform similar assignments. W.Va. Code §18A-4-8b(b); Mayle v. Barbour Co. Bd. of Educ., Docket No. 01-89-039 (Dec. 21, 1989).

2. An alternative method of making extra-duty assignments may be utilized if the procedure is approved by both the county board of education and two-thirds of the employees within the affected classification of employment. Code §18A-4-8b(b); Mayle; Terek v. Ohio Co. Bd. of Educ., Docket No. 35-87-276-3 (Apr. 4, 1988).

3. "[A] school board is required to abide by and uniformly apply the policies and practices it properly establishes to conduct school affairs. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977." Terek.

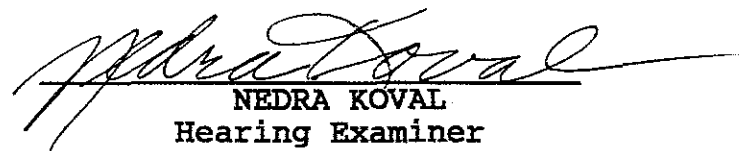
4. HCBE's transportation director arbitrarily instituted alternatives to long-standing practices for the allocation of extra-duty driving without approval by HCBE's members and ratification by the employees.

5. Grievant has shown a violation of W.Va. Code §18A-4-8b(b) on the part of HCBE's school officials in this matter.

Accordingly, the grievance is **GRANTED**. HCBE is Ordered to permit grievant and similarly situated bus operators to vie for all extra-duty assignments, even those that conflict solely with EC runs, and moreover to resolve the overlap, double-wage problem by means that are consistent with the Decision herein.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

DATED: January 31, 1990

  
NEDRA KOVAL  
Hearing Examiner