DENNY SULLIVAN,

Grievant,

v. DOCKET NO. 93-18-369

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This is a grievance by Denny Sullivan (hereinafter Grievant), a General Maintenance/Carpenter II/Locksmith employed by the Jackson County Board of Education (hereinafter JCBE), regarding two issues: (1) Grievant complains that he was not called out to Ravenswood Middle School on the evening of May 6, 1993, to repair or secure a door, an extra-duty assignment that should be rotated by seniority among similarly-situated employees in accordance with W. Va. Code §18A-4-8b; and (2) JCBE has refused to assign a maintenance vehicle to Grievant, a "benefit" that has been extended to other employees within the meaning of W. Va. Code §18A-4-5b. The Grievant submitted his grievance at Level I on June 3, 1993. After the grievance was denied, the Grievant appealed to Level II where a hearing was conducted on July 29, 1993. Following an adverse decision at Level II on August 25, 1993, the Grievant appealed to Level III where the earlier decisions denying the grievance wereaffirmed by JCBE on September 2, 1993. Grievant elected to appeal to Level IV and a hearing was held in the Board's office in Charleston, West Virginia, on October 25, 1993. (See footnote 1)

The facts in this case are essentially uncontroverted. On the evening of May 6, 1993, school custodians at JCBE's Ravenswood Middle School were unable to lock an outside door. Mr. Wayne Eagle, JCBE's Director of Maintenance, was called at home and apprised of the situation. Without benefit of a seniority roster or any listing of available employees, Mr. Eagle called Louie Polk, a mason, to report to the school and secure the door.

Grievant is one of eight maintenance personnel employed by JCBE. Grievant is the only

maintenance employee qualified as a locksmith. Mr. Eagle testified at the Level IV hearing that he called out Mr. Polk because he believed Mr. Polk was the maintenance employee who lived closest to Ravenswood Middle School and could respond to secure the door in the least amount of time. (The sooner the door was properly secured, the sooner the custodians could leave the building, as they were required to remain until the building was secured.) Mr. Eagle also testified that any of the maintenance personnel were capable of securing the door, allowingthe lock to be repaired during normal business hours. (See footnote 2) Thus, Mr. Eagle saw no requirement for a locksmith.

Grievant testified that when he initially questioned Mr. Eagle about why Mr. Polk was called to secure the door rather than he, Mr. Eagle replied that Mr. Polk had one of the school vans, in addition to stating that Mr. Polk lived in the Ravenswood area. (Although Mr. Eagle may have made reference to Mr. Polk's possession of a school van as an afterthought, inasmuch as any of the eight maintenance employees were capable of securing the door, and Mr. Polk did, in fact, live closest to the school, it does not appear that the van assignment was a controlling consideration in Mr. Polk's selection to perform this call-out assignment.)

In regard to the "benefit" of being assigned a school vehicle, thereby allowing an employee to drive from home to work and back at the employer's expense, Mr. Eagle indicated in his testimony that vans were issued to maintenance employees for one of two reasons: (1) employees whose classifications rendered them most likely to be called out after normal working hours to perform emergency repairs; and (2) employees who were assigned to long-term projects. Consistent with the first reason, vans were assigned to two electricians and a plumber. Based upon the second reason, a van was assigned to Mr. Polk. When Grievant had been working on certain long-term projects in the past, he had been assigned a van.

Because this grievance involves two separate and distinct issues, each issue will be addressed in turn, starting with JCBE'salleged failure to call out grievant in accordance with his classification or seniority.

W. Va. Code §18A-4-8b provides, inter alia, regarding assignments of school service personnel such as Grievant, as follows:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting such 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 shall then 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. (emphasis added.)

This Board has previously applied this provision governing extra-duty assignments in at least two cases involving somewhat similar factual circumstances. In Thomas v. Doddridge County Board of Education, (See footnote 3) this Board addressed an "emergency" situation that arose when a water pump froze and it was necessary to adjust school bus runs on the morning in question. The employer there had refused to pay the drivers for an additional run contending that such "emergencies" were covered by a local policy establishing a theoretical seven-hour day for all bus drivers. While granting thedrivers' grievance, this Board found that such additional runs fell within the definition of extra-duty assignments contained in W. Va. Code §18A-4-8b.

In a case that bears a greater resemblance to the instant grievance, Lombardo v. Raleigh County Board of Education, (See footnote 4) this Board dealt with an "emergency" situation where an electrician was called out to repair windows broken by vandals, as well as to inspect possible damage to the school's electrical system. Given that at least a portion of the work required an employee with electrician skills not held by carpenters (who were grieving the fact that they were not called out to cover the broken windows) and that impending foul weather created a true emergency, this Board denied the grievance holding that job assignments which do not fall within a particular §18A-4-8 school service personnel classification may be made in a manner which is not arbitrary or capricious. (See footnote 5)

Initially, the undersigned finds that the work involved in securing a door at a school outside normal working hours constituted an "extra-duty assignment" within the contemplation of W. Va. Code §18A-4-8b. Lombardo, supra; Thomas, supra. (See footnote 6) Moreover, JCBEdid not abuse its discretion, or act in an arbitrary or capricious manner, in determining that work to be performed in securing a door after normal working hours could be performed by a mason. Lombardo, supra. See Fogus v. Greenbrier County Bd. of Educ., Docket No. 89-13-604 (April 30, 1990). Once the Respondent determined that the work that needed to be performed involved securing the door rather than

repairing the lock, it was not constrained by W. Va. Code §18A-4-8 to assign the work to a "locksmith," which is defined therein as a person "employed to repair and maintain locks and safes." Fogus, supra.

The final question to be addressed on this issue is whether W. Va Code §18A-4-8b obligates the Respondent to employ seniority in selecting school service personnel to perform extra-duty assignments when the work could be satisfactorily performed by personnel in multiple categories of employment. The undersigned concludes that the statute does not contain such a limitation.

The statute makes reference to seniority within a "particular category of employment." The Grievant's brief opines that the work in question could have been performed by either a locksmith or a carpenter II. The evidence of record establishes that this work could have been performed by any of the maintenance department employees. Thus, when the employer properly determines that certain work need not legally be performed by an employee in anyparticular classification under W. Va. Code §18A-4-8, the seniority restriction no longer applies. Thus, JCBE could assign the work to any employee who was capable of performing the work, provided it did not assign the work in an arbitrary or capricious manner. See Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687, 690 (W. Va. 1991) citing Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Lombardo, supra. (See footnote 7) Since the available evidence demonstrates that the decision to call out Mr. Polk was primarily based upon his geographic proximity to the school, JCBE established a rational and logical basis for its decision, thereby defeating Grievant's claim that Mr. Polk's selection was contrary to §18A-4-8b.

The second issue raised in this grievance involves JCBE's failure to extend benefits uniformly to similarly situated employees as evidenced by their refusal to issue a maintenance van to Grievant.

W. Va. Code §18A-4-5b provides in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimum fixed by this article.
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> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further,uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like duties and assignments within the county....

Grievant submits that similarly situated employees are not receiving "uniform" benefits in that four of eight school service personnel, all of whom are employed to perform various types of maintenance by JCBE, are being allowed to drive county-owned vehicles from their homes to their place of employment and back. JCBE explains this apparent lack of uniformity by noting that these vans have been assigned to either (1) those employees who are most likely to be called out after normal working hours to perform emergency repairs or (2) employees who are assigned to long-term projects.

Initially, the undersigned finds that assignment of a county vehicle which an employee can drive from their home to their place of employment and back constitutes a "benefit" within the meaning of W. Va. Code §18A-4-5b. An employee who is provided with transportation to and from work by their employer is unquestionably receiving a valuable fringe benefit avoiding considerable out-of-pocket expense. This is particularly true in a rural area where public transportation is virtually nonexistent.

Although this benefit is not extended uniformly to all maintenance employees, JCBE has articulated a logical basis for providing vehicles to selected categories of maintenance employees. Assigning such vehicles to electricians and a plumber allows personnel whose response is most time-sensitive to report to the work site with the necessary tools and equipment to make repairsthat could potentially save the employer considerable expense. (See footnote 8) Likewise, JCBE believes assigning a van to maintenance personnel working on long-term projects saves time by allowing the employee to proceed directly to the work site. (See footnote 9) The undersigned finds that JCBE demonstrated these vehicles are provided primarily for its benefit in accomplishing its work in a more efficient manner. See Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Moreover, based upon a preponderance of the available evidence, JCBE has uniformly applied this unwritten policy in a manner that does not result in unlawful discrimination against the Grievant.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. On the evening of May 6, 1993, school custodians at Ravenswood Middle School encountered an exterior door that could not be secured.

2. Mr. Wayne Eagle, JCBE's Director of Maintenance, was contacted at home and he called out Mr. Louie Polk to secure the door.

3. Grievant is employed by JCBE as a multi-classed General Maintenance/Carpenter II/Locksmith. Mr. Polk is employed by JCBE as a Mason.

4. There are eight school service personnel employed in JCBE's maintenance department. Mr. Polk lived closest to Ravenswood Middle School of any of those eight employees.

5. Mr. Polk reported to Ravenswood Middle School and secured the door that evening. Grievant repaired the lock the following day during normal working hours.

6. Although Grievant was the only JCBE employee trained to repair locks, any of the eight JCBE maintenance employees were capable of securing the door.

7. JCBE has assigned school vans to four of its eight maintenance personnel. Personnel assigned a school van are authorized to take the van home and drive to and from their place of employment.

8. JCBE assigns vans to maintenance employees under an unwritten policy authorizing such assignment to either (1) employees most likely to be called out to perform emergency work, or (2) employees assigned to long-term projects.

9. Mr. Polk was assigned a van as of May 6, 1993, as he was working on a long-term project.

10. Other maintenance employees assigned school vans were (1) Mr. Kessell, an Electrician II; (2) Mr. Sayre, an Electrician II/Heating and Air Conditioning Mechanic II; and (3) Mr. Braden, a Plumber.

11. Grievant was not assigned a van as of May 6, 1993, as he was not then working on a long-term project. However, Grievant had been assigned a van on previous occasions while assigned to long-term projects.

CONCLUSIONS OF LAW

1. When a county board of education calls out one or more school service personnel to secure a building outside normal working hours, that work is considered an extra-duty assignment subject to the provisions of W. Va. Code §18A-4-8b. Thomas v. Doddridge County Bd. of Educ., Docket No. 90-09-072 (Jul. 31, 1990). See Lombardo v. Raleigh County Bd. of Educ., Docket No. 91-41-342

(Jul. 31, 1992).

2. JCBE did not abuse its discretion in determining that an insecure door could be secured by a mason rather than repaired by a locksmith. Fogus v. Greenbrier County Bd. of Educ., Docket No. 89-13-604 (Apr. 30, 1990).

3. Once JCBE determined that after-hours work to be performed on a call-out basis involved securing a door, as opposed to repairing a lock, Respondent was not constrained by W. Va. Code§18A-4-8 to call out Grievant, the only locksmith employed in its maintenance department. Lombardo, supra. See Fogus, supra.

4. When an extra-duty assignment can be performed by school service personnel in any of several categories of employment as defined in W. Va. Code §18A-4-8, seniority requirements in W. Va. Code §18A-4-8b are no longer controlling, but the work must be assigned in a manner that is not arbitrary or capricious. See Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687, 690 (W. Va. 1991) citing Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Smith v. Ohio County Bd. of Educ., Docket No. 92-35-428 (Apr. 16, 1993) appeal docketed, Civil Action No. 93-AA-112 (Ohio County Cir. Ct. 1993); Lombardo, supra; Fogus, supra.

5. JCBE did not abuse its discretion or discriminate against the Grievant by acting in an arbitrary or capricious manner in deciding to call out a mason to secure a door at Ravenswood Middle School after normal working hours, given that the mason resided in closest proximity to the school of the eight maintenance department personnel capable of accomplishing the job in question.

6. JCBE did not violate W. Va. Code §18A-4-5b by assigning school vans to selected school service personnel in its maintenance department who were either assigned to long-term projects or likely to be called out after normal working hours to deal with genuine emergencies involving plumbing, electrical or heating/air conditioning matters. See Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Accordingly, this Grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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 not any of its Administrative Law Judges is a party to such appeal and should not be so named. Any

appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: January 26, 1994

Footnote: 1During the Level IV hearing, JCBE waived any objection regarding timeliness of Grievant's appeal to Level II. At the close of the hearing, both parties were offered an opportunity to make written post-hearing submissions. Timely submissions were received from both parties and this grievance became mature for decision on December 9, 1993.

Footnote: 2Indeed, Grievant repaired the lock on the following day.

Footnote: 3Docket No. 90-09-072 (Jul. 31, 1990).

Footnote: 4Docket No. 91-41-342 (Jul. 31, 1992).

Footnote: 5While Lombardo resulted in a finding that the School Board acted properly in calling out an electrician rather than a carpenter, it is implicit from the decision that W. Va. Code §18A-4-8b applied to the work in issue as an extra-duty assignment.

Footnote: 6Although the examples of extra-duty assignments set forth in W. Va. Code §18A-4-8b all share the attribute of normally being scheduled in advance, the undersigned rejects Respondent's contention that "emergency" call-outs constitute a separate category of work that falls outside the scope of §18A-4-8b, given this Board's earlier holdings in Thomas and Lombardo.

Footnote: 7Had the supervisor determined that a particular classification, such as a plumber, was required to perform an extra-duty assignment, and more than one plumber was available, §18A-4-8b would arguably require seniority in that particular category of employment to be employed in determining which plumber should be called out. Similarly, had the supervisor determined that the lock needed to be repaired, §§18A-4-8 and 18A-4-8b suggest that, as Grievant was the only JCBE employee classified as a locksmith, awarding the first opportunity to perform this call-out assignment to Grievant would be mandatory.

Footnote: 8Although the facts adduced at the Level II and Level IV hearings in this matter demonstrated that the plumber and electricians were not called out most frequently, the reasons for which they were called out (e.g., repair sewer, repair warehouse freezer) are consistent with JCBE's desire to maintain a time-sensitive response capability. Thus, JCBE

articulated a legitimate, non-pretextual basis for discriminating between otherwise similarly situated employees.

Footnote: 9While the evidence of record indicates that the long-term project Mr. Polk was assigned to at the time was located in a school building virtually adjacent to the maintenance department, the fact that JCBE saves only a few moments of the employee's time each day through assignment of a school van does not render their articulated basis for assigning this benefit pretextual. See Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).