KAY BROUGHMAN

v. Docket No. 94-48-068

TYLER COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, a full-time bus operator employed by Respondent Tyler County Board of Education (TCBE), filed the following grievance at level four on or about March 1, 1994:

Grievant was not compensated for an extra-duty assign ment performed on October 15, 1993 in violation of West Virginia Code, 18A-4-8[a] and 18A-4-8b. Grievant seeks compensation for 3 hours at the statu tory rate.

Following a brief hearing on August 24, 1994 to augment the lower-level record with the testimony of TCBE Superintendent Sandra Weese, the parties completed a responsive briefing schedule on October 25, 1994.1

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1After the level four appeal was filed, the parties remained uncertain about whether or not a hearing would be necessary. After deposing some witnesses in Tyler County, they finally requested said hearing. In addition to the evidence adduced at level four (T4._), the record in this case includes the adverse decisions rendered at levels one and two on November 10, 1993 and February 18, 1994, respectively, a copy of the transcript of the December 20, 1993 level two hearing (T2._), and a copy of the depositions taken on May 24, 1994.

The underlying facts in this case are not in dispute. In the early 1980s, TCBE set an eight-hour work day for service

personnel, including bus operators. TCBE also has in place Policy EEAD, which states, in part, that bus operators, on a rotational basis and without any extra compensation, must transport students for in-county educational field trips or other such activities that occur during normal school hours, i.e., the curricular day, or arrange for a replacement driver if he or she cannot drive that day.2. According to Ms. Weese, this practice and particular component of Policy EEAD is long-standing and has been in existence during her entire nineteen-year tenure as TCBE's superintendent. T4.15.

Grievant, a bus operator with TCBE for at least eleven years, T2.5, is responsible for a morning run, from 6:30 to 8:10 a.m., and an afternoon run, from 2:30 to 4:50 p.m., which totals a four-hour per day work schedule. She testified that she is not interested in obtaining any occasional extra-duty driving for extra wages.

About a week prior to October 15, 1993, Grievant's name came up on the alphabetical rotation to perform a "free" trip. She was notified at that time that she would be assigned on October 15 to transport biology students on a field trip during normal school hours, in conjunction with their biology students. The assignment was completed during Grievant's work day between

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2In the case of a late-breaking emergency, a driver is also permitted to simply notify the transportation office of his or her unavailability.

her regular morning and afternoon bus runs. Grievant's actual work time transporting the students amounted to about three hours. She commenced the trip at 8:30 a.m., transported the

students to the field trip site and returned to the garage by 10:00 a.m. According to Grievant, she was supposed to wait with the students until their activities were over, but the teacher in charge told her she could leave and come back later. Thus, Grievant was free until 1:30 p.m. when she departed the bus garage to pick up the class; she deposited them back at their school at around 3:00 p.m.

After Grievant completed the trip she submitted a time sheet and requested three hours' pay. In accordance with Policy EEAD, TCBE declined to pay the additional money, and Grievant filed the within action.

During the level two hearing, Grievant conceded that, in conjunction with the bus operators' eight hour workday, she is properly in an "on call" status during the curricular day between her morning and afternoon runs. However, in her view, the only time the on-call status should require her to perform additional driving duties is when an emergency situation occurs, such as early dismissal due to weather conditions. T2.14.

In support of her position that she is entitled to compen sation for the driving in question, Grievant relies on the portion of W.Va. Code 18A-4-8b which sets forth the method for assigning extra-duty work. The statute also defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips."

Grievant argues that a field trip is listed as an extra-du ty assignment in 18A-4-8b, and the statute does not except field trips because the site is local or because the event occurs during the curricular day. Therefore, Grievant insists, transporting students to a field trip between her regular

morning and afternoon runs on October 15, 1993 was an extra-duty assignment under Code 18A-4-8b, entitling her to the proper compensation pursuant to 18A-4-8a for said extra-duty work.3 While Grievant acknowledges that a "conflict" exists between the statutes and TCBE's Policy EEAD, she maintains that a board of education's policy cannot "supplant" State law which requires payment for the performance of extra-duty work such as the driving at issue. T2.4-5.

TCBE defends its long-standing practice of assigning its bus drivers to occasionally drive a so-called "free" curricular trip. As authority, it cites its written policy EEAD "Extra-Cur ricular and Curricular Transportation Buses and/or Private Vehicles," which states in part:

If any school activity requires student transportation from school to school or a field trip with its desti nation being within the Tyler County legal boundaries during school hours, it is the duty of bus operators to make these trips without charge.

3Code 18A-4-8a provides, in pertinent part, that the "minimum hourly rate of pay for extra-duty assignments as defined in [Code 18A-4-8b] shall be no less than one seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment . . . ."

a. "Free" trips are assigned alphabetically each year and each year the list begins wherever it ended the previous year. If a driver is unable to take his/her free trip, the driver is responsible for obtaining a replacement. If a

driver is unable to obtain a replacement in an emergency situation or due to illness, the driver should call the Transportation Director.

TCBE claims that its policy has withstood scrutiny in a State Superintendent's (West Virginia Department of Education) Opinion issued on September 2, 1988. In general, TCBE's counsel argued that the Opinion supported a board of education's option to determine what constitutes the workday and extra-duty driv ing, via written policy, employment contract and custom and tradition, and its right to continue a practice of not paying extra wages for on-call driving during the regular workday, providing it had never made such payments. Under those circum stances, it is argued, the "extra-duty amendment" of 18A-4-8b would not apply. TCBE urges that a board of education "may require bus drivers to perform additional work during their work hours without extra compensation," and that such work, when authorized by policy and practice, does not constitute an extra-duty assignment. See, TCBE's Brief and T2.27-28. While Grievant's arguments are worthy, TCBE's are more persuasive. Policy EEAD's requirement that a bus operator assume an occasional "free" driving duty within the county during the workday was in effect before Grievant began her employment and signed her first contract. These factors were conditions of employment which Grievant apparently accepted. Grievant admitted she was aware of TCBE's long-standing Policy EEAD with its requirement that each bus operator occasionally drive a non-compensated trip during the work day when his or her name came up on the driving roster. In fact, Grievant admitted at the level two hearing that she knew when she accepted the assignment in question she would not be compensated and that she

had not expected any extra pay. T2.11.

In effect, Policy EEAD defines any in-county driving for field trips or other school activities requiring school-to-school transportation as required additional duties within the bus operators' workday. This does not necessarily run counter to 18A-4-8b's definitions of specific extra-duty assignments, basically because extra-duty work must ordinarily be considered that work which is performed outside the regular workday. In order to find that a task involves an extra-duty assignment per 18A-4-8b, the name (or nature) of the task is not nearly as important as the time in which the work is performed.

For example, a "banquet" is defined in 18A-4-8b as an extra-duty assignment. However, a school's cook may be re quired, on occasion, to spend some part of the regular workday preparing food for a large banquet to be held later that night and not be required to actually serve at the banquet. Thus, the "extra-duty amendment" of 18A-4-8b would not apply even though the cook's work that day involved a banquet, surely an event which occurs only "periodically or occasionally." Likewise, a school janitor may be involved with an "athletic event," also defined as an extra-duty assignment, but only to the extent that he or she is required to prepare the gymnasium during the workday for the later event, or perhaps be required to spend extra time during the workday following the athletic event to clean up the area and restore it to normal use. Certainly, under those circumstances the janitor would not be entitled to extra-duty compensation.

In short, by policy, Grievant and all her peers are occa sionally required to drive students from school to school for some event or to transport students to a field trip, between

their morning and afternoon runs, but also within their regular work day. Given those circumstances, it is determined that the "extra-duty amendment" of 18A-4-8b and the extra-duty rate of of 18A-4-8a would not apply. This is not to say that a board of education is precluded from paying its bus operators for driving assignments, of whatever nature, which are performed in addition to the regular morning and afternoon runs. This option would also be exercised through written policy, contract or custom and practice.

It is noted that some other school boards schedule their bus operators for rotational driving between the operators' morning and afternoon runs, or other times within the workday, and pay no extra compensation. When challenged by affected drivers through the grievance procedure, these practices have been held not to be violative of any statutes. See Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047 (May 19, 1992); Dennison v. Braxton County Bd. of Educ., Docket No. 04-88-251 (Mar. 17, 1989).

In Dennison, the board of education scheduled certain bus operators, between the operators' morning and afternoon runs, to transport vocational students in a construction program to an off-campus work site without extra compensation. The workers performed the run on a rotating basis, driving an extra two and one-half hours every eighth workday. An operator who had performed the duty for several years grieved because he learned two operators had been removed from the construction rotation and because occasional driving assignments in conjunction with other vocational disciplines/programs were paid runs. The grievant alleged a violation of Code 18A-4-8b and raised issues of favoritism, discrimination and wage uniformity.

Just as Grievant here seeks payment for the day she drove between her morning and afternoon runs, the grievant in Dennison essentially sought payment for the days he drove to the con struction site. That grievant did not prevail because the administrative law judge agreed with the school board as to the reasonableness and fairness in which the assignments in question were made.4

In addition to the foregoing, the following findings and determinations are properly made.

4Grievant notes that this case can be distinguished from Dennison. Without any further explanation or in-depth analysis of Dennison, Grievant contends the trip at issue here "was clearly a field trip and met the definition of a field trip" and was "not a part of Grievant[']s regular daily schedule." Gr. Brief at 3. Actually, the trips taken by the grievant in Dennison were not part of his regular, daily schedule. He drove the run in question once every eight days.

Findings of Fact

1. In conjunction with TCBE's long-established policy and practice regarding curricular, in-county bus trips other than established morning and afternoon runs, Grievant's name came up on the rotational roster of bus operators, and she was required to transport students to and from a field trip between her regular morning and afternoon bus runs, but within her workday, on October 15, 1993.

2. Grievant, a bus operator for at least eleven years, knew that her additional driving duty on October 15 was consid ered by the policy to be a "free" trip, and she expected no

additional compensation for the work.

3. After Grievant completed the trip, she submitted a request for payment for the three hours it took to drive the students to the field trip and return them to their school afterward.

4. TCBE denied payment on the basis of its policy, and Grievant filed the within action.

Conclusions of Law

1. TCBE's Policy EEAD, "Extra-Curricular and Curricular Transportation Buses and/or Private Vehicles," states in part:

If any school activity requires student transportation from school to school or a field trip with its desti nation being within the Tyler County legal boundaries during school hours, it is the duty of bus operators to make these trips without charge.

2. W.Va. Code 18A-4-8a and 18A-4-8b do not prohibit a county board of education from requiring bus operators to be assigned on a rotational basis for in-county bus trips during regular school hours without additional compensation.

3. In that TCBE has a long-standing practice and policy which requires its bus operators to remain on standby status between their morning and afternoon bus runs to perform occa sional uncompensated emergency driving or other additional driving during the regular work day, such work becomes part of the operators' work day and not work for which additional compensation must be paid. See Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047 (May 19, 1992); Dennison v. Braxton County Bd. of Educ., Docket No. 04-88-251 (Mar. 17, 1989).

4. Given the circumstances presented in this case, a violation of W.Va. Code 18A-4-8a and 18A-4-8b is not found.

5. Grievant has failed to support her claim that she is entitled to be compensated for the trip she drove between her morning and afternoon runs on October 15, 1993.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Tyler 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: January 20, 1995