CLARA STEVENS

v. Docket No. 94-48-067

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, 1994:1 Grievant performed an "extra-curricular trip" on September 18, 1993 (Saturday) which lasted 4-1/2 hours. Grievant was paid for 4-1/2 hours at the extra-duty assignment rate. Grievant contends she is due a full day[']s pay pursuant to West Virginia Code, 18A-4-8. Grievant seeks the difference between 4-1/2 hours pay at the statutory rate (1/7 of daily rate) and a full day[']s pay at her regular daily rate.

1When Grievant filed at level four, she requested a hearing. Said hearing was scheduled but cancelled while the parties sought other means to augment the record. After the parties deposed some witnesses in Tyler County, TCBE finally requested a hearing to present one additional witness. Besides the evidence adduced at level four, the record contains the decisions rendered at levels one and two on October 26, 1993 and February 18, 1994, respectively, a copy of the transcript of the December 20, 1993 level two hearing and a copy of the depositions taken May 24, 1994. The parties completed an agreed-upon briefing schedule on October 25, 1994.
No controversy is apparent with respect to the specific

facts giving rise to this grievance in 1993, although the parties differ considerably as to the significance of background events which occurred in 1990. As gleaned from the record as a whole, the following findings of fact are made:

Findings of Fact

1. Since January 1990, TCBE has had in place Policy EEAD (EEAD), "Extra-Curricular and Curricular Transportation Buses and/or Private Vehicles." The policy has been updated or amended at least ten times over the years. TCBE Exhibit 1 (12/20/93).

2. Among other things, EEAD establishes that an extra-du ty assignment is either an "extracurricular" trip, a bus run which occurs at times other than the curricular day, or a "curricular" trip, a run which occurs during the school day but outside the legal boundaries of Tyler County.

3. Prior to 1990, TCBE paid regular wages to its bus operators as well as any wages due for extra-duty driving, even when an operator who accepted an extra-duty assignment had a conflict in his or her regular driving schedule which required the employment of a substitute driver to complete part or all of the regular route. Apparently, in a needed cost-containment measure, TCBE eventually barred a driver from accepting an extra-duty run when the assignment overlapped the regular driving schedule. When the disgruntled operators sought advice on this matter from their labor union, they were informed that TCBE had previously paid them illegally for work they had not performed. Apparently, the drivers were also advised to cooper ate with TCBE in any effort to resolve the situation. Thus, at some point immediately prior to January 1990, TCBE's bus opera tors discussed the possibility of alleviating the issue of the

"double-dip" situation, basically so that more operators could have an opportunity to accept extra-duty assignments. One proposal which emerged was that the affected operators (those with a schedule conflict) would help pay for the substitute driver who assumed the regular driving by giving up one and one-half hours of their extra-duty wages when they accepted a half-day extra-duty assignment and three hours of their extra-duty wages when they accepted a full day's assignment. See, level two transcript and depositions taken May 24, 1994.

4. TCBE scheduled at least two formal meetings with its bus operators in early 1990 with the intent of discussing issues relative to extra-duty work and revising Policy EEAD. The precise question of weekend extra-duty work was not raised or discussed at the meetings.

5. With respect to the first meeting, on January 12, 1990, TCBE Superintendent Sandy Weese and Transportation Direc tor Ted Shupe issued a memorandum to "All Bus Operators" which referred to a "MEETING TO DISCUSS NEW POLICY REGARDING EXTRACUR RICULAR [(Extra-duty)] TRIPS -- January 17, 1990." Those operators who were "interested in developing a policy regarding trips" were urged to attend and provide "input" at the meeting. One area of concern was new legislation which specified an hourly payment rate for extra-duty work and another was the "double-dip" extra-duty wage situation. Attendance was not required at this meeting.

6. According to Ms. Weese, suggestions made at the January 17, 1990 meeting were considered in drafting revisions to EEAD. Thereafter, on January 19, 1990, bus operators were notified of a mandatory meeting on January 25 to consider the proposed revisions. Operators were again advised that the

purpose of the meeting would be to "develop a new policy and procedures for trips." As a result of the second meeting, the modified EEAD was approved by a two-thirds majority of the regular full-time bus operators on January 25, 1990, and unani mously approved by TCBE on February 27, 1990.

7. Essentially, EEAD had adopted the language in Code 18A-4-8a for the payment of extra duty assignments. Thus, under EEAD, bus operators are to be paid "one-seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment . . . ." EEAD continues, "The salary for any fraction of an hour the employee is involved in performing the assignment shall be pro-rated accordingly." The policy makes no distinction between weekend and weekday extra-duty work.

8. Grievant, whose regularly-scheduled work week is Monday through Friday, drove an extra-duty run on Saturday, September 18, 1993 which required over four hours' time to complete. Grievant elected to take the extra-duty trip with full knowledge of TCBE's three and one-half years' practice to pay for only the actual amount of time worked, regardless of what day of the week the trip occurred.

9. When Grievant presented her time sheet for payment, she requested a full day's wages.

10. Based on its interpretation of EEAD and the signifi cance of the agreed-upon 1990 revisions therein, TCBE declined Grievant's request for payment of a full day's wages and paid her only for the hours she actually worked on Saturday.

11. Grievant filed the within action following TCBE's action not to pay the full day's wages she requested.

Discussion

With respect to the alleged violation of W.Va. Code 18A-4-8, Grievant proposes the following:2

1. Should an employee whose regular work week is scheduled from Monday through Friday agree to perform any work assignments on a Saturday or Sunday, the employee shall be paid for at least one-half day of work for each such day he reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, he shall be paid for at least a full day of work for each such day. W.Va. Code 18A-4-8.

Application: The Grievance Board has previously held that Bus Operators are entitled to compensation at a rate of time and one-half their regular rate of pay for assignments performed in a work week that includes a legal holiday. Moss, et al. v. Barbour County Bd. of Educ., Docket No. 88-01-259 [(Jan. 31, 1990)]. If that provision is applicable to all school service personnel, including Bus Operators, the

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2Code 18A-4-8 basically addresses those particulars dealing with regular employment, such as employment terms, deviations from normal "nine to five" employment, classification titles, salary matters and the like. When this statute brings up the matter of weekend work, it does not specify whether the work will be performed instead of, or in addition to the regularly scheduled weekday work.

provision in question must be similarly applicable to all school service personnel, including Bus Operators.

The statutory language clearly indicates it covers all school service personnel without exception.

2. School personnel laws and regulations must be strictly construed and in favor of the employees they are designed to protect. Morgan v. Pizzino 256 S.E.2d 592 (W.Va. 1979).

Grievant's Brief at 2-3.

TCBE denies wrongdoing in this matter. It proposes in its brief that

1. [W.Va. Code]18A-4-8a provides that an alternative minimum hourly rate of pay for performing extra-duty assignments within a particular category of employment may be utilized if the alternative hourly rate of pay is approved both by the county board of education and by the affirmative vote of a two-thirds majority of the regular full-time employees within that classification category of employment within that county.

2. [TCBE] has appropriately adopted an alterna tive minimum rate of pay for extra duty assignments by bus drivers.

3. Grievant has been compensated in accordance with the alternative minimum and is not entitled to additional compensation.

TCBE contends that the policy which bus operators approved in 1990 established an "alternative minimum rate of pay" for extra-duty work which superseded the statutory provision for specific payments for Saturday and Sunday work and covered all work situations, even weekend driving, with wages provided for

only the hours actually worked. TCBE further argues that, since it has compensated its bus operators for over three and one-half years under the policy without objection, "this history of practice" signifies that the drivers understood and accepted the policy as paying for only the time worked and not paying any extra for weekend work.

On the other hand, Grievant maintains that weekend work had not been discussed or voted upon at all at the 1990 meetings, and that EEAD simply does not address the matter of weekend extra-duty work at all. Apparently, Grievant also believes that any "history of practice" with respect to TCBE's payment of extra-duty wages for Saturday and Sunday work is immaterial and that she may challenge TCBE's actions now so as to attain wages allegedly due for the extra-duty trip in question.

After due consideration of the pertinent facts, relevant law and the parties' arguments, it is determined that TCBE must prevail in this dispute.3 Despite Grievant's contention that the drivers never agreed to or understood that extra-duty wages would be paid on the basis of hours worked and no other factors, including what day of the week the work occurred, the record suggests otherwise. Arguably, the parties' actions after 1990 defines the agreement (and the policy terms). TCBE offered extra-duty work on weekends and the bus operators accepted the work and the agreed-upon hourly wages. The fact that the parties acted in this manner under the 1990 revision of EEAD for more than three years and that no operator ever protested about weekend rates until 1993 lends further support to this.

3Due to the outcome in this case, the undersigned declines

to reach the question of whether the rates established in Code 18A-4-8 for weekend work performed by an employee who is regularly scheduled to work Monday through Friday are applicable to extra-duty work as contemplated by Code 18A-4-8b and referenced in revisions to Code 18A-4-8a which established minimum hourly rates for said extra-duty work. In that vein, there is no need to discuss Moss, supra.

Moreover, to the extent that Grievant seems to believe that EEAD contains no reference to weekend work at all, she is not correct. In one portion of the written policy (the fifth page of six) it is clearly stated that mechanics who have qualified as bus operators and are classified as "Mechanic/Sub. Bus Operator" may participate in extra-duty driving "provided trips are after their working hours or on the weekend [emphasis added]."

In short, TCBE's stance that its bus operators agreed to a strictly hourly rate of payment for extra-duty work under Code 18A-4-8b is compelling and holds up under scrutiny. As TCBE maintained, its bus operators had accepted the hourly rate instituted in 1990 without any objection until past mid-1993. This strongly suggests that the bus operators believed that the agreements reached in 1990 covered all extra-duty driving, including weekend driving. In fact, there was no evidence at all that TCBE had ever paid anything but a flat rate for all extra-duty driving, including weekend driving. The fact that weekend extra-duty work was not specifically discussed at the 1990 policy change meetings is not persuasive. Certainly, there is nothing in the record to suggest that the bus operators were precluded in 1990 from raising the issue of weekend work.

One of the bus operators who testified on Grievant's behalf

as to whether or not weekend extra-duty work was discussed at the January 1990 meetings actually stated that the meetings had nothing at all to do with extra-duty driving policies, or at least that she had not perceived the meetings to be relative to policy-making. That that the bus operators did not understand the significance of the meetings is questionable in light of the fact that the meeting notices clearly heralded the topic of policy change. As appears from the record, TCBE's bus operators simply failed in 1990 to bring up the issue of weekend extra-du ty driving and to provide for the inclusion of the special provisions set forth in Code 18A-4-8 for payment of weekend work. Therefore, it is too late for Grievant to raise the issue and seek different policy terms through this action.

In conclusion, in light of the record in this case, it is determined that EEAD represents the complete agreement for the payment of extra-duty assignments on an hourly basis and does not differentiate as to payments for any weekend work. Any further changes to the salary arrangement for extra-duty work contained in EEAD must be "approved both by the county board of education and by the affirmative vote of a two-thirds majority of the regular full-time" bus operators. Code 18A-4-8a.

In addition to the factual and legal determinations con tained in the foregoing discussion, the following formal conclu sions of law are made.

Conclusions of Law

1. The minimum hourly rate of pay for extra-duty assign ments as defined in W.Va. 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[.]" Code 18A-4-8a.

2. Code 18A-4-8a also provides that "an alternative minimum hourly rate of pay for performing extra-duty assignments . . . may be utilized if the . . . rate of pay is approved both by the county board of education and by the . . . regular full-time employees. . . ."

3. Pursuant to Code 18A-4-8a, TCBE permitted its bus operators to consider and agree upon the rate and method of payment for extra-duty driving and appropriately adopted the agreed-upon terms for payment of extra-duty assignments per formed by those drivers on a strictly hourly basis.

4. Grievant has been compensated for the Saturday extra-duty work at issue on an hourly basis in accordance with TCBE's Policy EEAD, a policy accepted by the bus operators and properly adopted by TCBE in 1990; therefore, Grievant is not entitled to the additional compensation for weekend work described in Code 18A-4-8 for that day's work.

5. Given the particular circumstances in this case, Grievant has failed to show a violation of Code 18A-4-8.

Accordingly, this 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.

NEDRA KOVAL

Administrative Law Judge

Date: February 7, 1995