KAREN COOK,

Grievant,

v. DOCKET NO. 96-26-105

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Karen Cook, filed her grievance on December 26, 1995, as follows:

> Grievant is a regular employee classifified (sic) as a Bus Operator. Grievant alleges that Respondent has violated a written agreement to pay Grievant extra compensation in return for her agreement to accept an addition to her daily schedule. Grievant seeks the compensation guaranteed by the written agreement.

Grievant's immediate supervisor was without authority to grant the grievance at level one, and a level two hearing was held on February 13, 1996. The grievance was denied at level two on February 14, 1996, and Grievant proceeded to level four on March 8, 1996. Hearing was held on May 22, 1996, and this case became mature for decision on June 21, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant has been a regularly employed Bus Operator of Respondent Mason County Board of Education since April 1980.

2. At the beginning of the 1995-96 school year, Grievant's bus run consisted of the New Haven, Hartford, Mason and Wahama area. Her assigned morning run began at 7:08 a.m. and ended at 8:00 a.m. Her assigned evening run began at 3:35 p.m. and ended at 4:31 p.m.

3. On or about October 2, 1995, after the school year began, Grievant's supervisor, Darrell Gandee, approached her about possibly changing her route to encompass Hanging Rock Road, in order to allow some students to leave home later, and return earlier, each day. Under the proposal, another bus would assume a portion of Grievant's original route. Grievant declined the opportunity.

4. On October 11, 1995, Superintendent Michael Whalen left a message for Grievant to contact him. When she finally was able to contact him on October 19, 1995, they discussed the need to adjust her route. Over the course of the next couple of days, the Superintendent finally offered Grievant an hour's extra pay per day to make the schedule change proposed by Mr. Gandee. Grievant agreed, and she, the Superintendent and Mr. Gandee signed an agreement dated October 25, 1995, which read in full as follows:

> I, Karen S. Cook, Bus Operator at the Transportation Department, mutually agree to a route extension around Hanging Rock Road, back of Mason for an additional $11.10 per day. I will be picking up approximately thirty-five (35) students.

LII G. Ex. 1. Although Grievant would be picking up about 35 students, she also gave up 25 students which she had been picking up under her original schedule.

5. The Board was never informed of, nor did it vote to approve, this agreement.

6. Grievant began driving the new route on October 30, 1995. As compared to her prior schedule, the new schedule required that she begin her morning route 13 minutes earlier, at 6:55 a.m., although she finished the morning route 5 minutes earlier than before, at 7:55 a.m. It also required that she start her afternoon run 13 minutes earlier than before, at 3:22 p.m., although she finished her afternoon run one minute earlier than before, at 4:30 p.m. All told, the schedule change added a total of 20 minutes per day to Grievant's run, and it added six-tenths of a mile to both her morning and afternoon routes.

7. When Respondent's other drivers became aware that Grievant was being paid $11.10 per day to drive the new route, 21 of them filed a grievance on November 27, 1995. In it, they emphasized that

> [i]n the past, every bus route and bus operator has had an extension added to their route at one time or the other, and no additional compensation has been offered to any of the operators, so why was this operator singled out and treated any different than the rest of the bus operators? We feel that all full time bus operators are entitled to the same compensation.

LII. A. Ex. 1. When the above grievance was appealed to level two, a prehearing conference resulted in a settlement under which the Assistant Superintendent of Schools, George Miller, agreed to stop paying Grievant for the schedule change. 8. True to the settlement agreement with the 21 bus operators, Assistant Superintendent Miller issued a written directive to Grievant on December 21, 1995, with copies to the Superintendent and Mr. Gandee, which stated, in part:

> Please be advised that effective DECEMBER 21, you are directed to run your present route with no additional compensation. According to W. Va. Code, the change in your route is allowable under the guidelines set forth by the code.

Grievant continued to drive the route without compensation, and filed this grievance. The 21 bus operators agreed to withdraw their grievance provided that Grievant no longer received compensation for the rescheduled bus route.

Discussion

Grievant asserts she signed a written agreement with the Superintendent and Mr. Gandee to run the route for additional pay, and seeks the enforcement of that agreement. Respondent asserts that the Superintendent's act of entering into a written agreement with Grievant for additional compensation, without Respondent's approval, was an ultra vires act, which it should not be bound to follow. Further, Respondent contends that the change in Grievant's bus route was only a slight alteration and therefore not unlawful under W. Va. Code § 18A-4-8a, which provides that boards of education may not change the daily schedule of a school service employee during the school year without said employee's written consent. Therefore, Grievant could be required to continue to make the bus run through the end of the 1995-96 school year without additional compensation.

Unfortunately for Grievant, the Superintendent's act of entering into a written agreement with her which provided additional compensation, without Board approval,constitutes an ultra vires act, which the Board is not bound to follow. A contract of employment between a county board of education and a service employee, whether regular full-time or extracurricular, can be made only with the board's approval. See
W. Va. Code §§ 18A-2-5 and 18A-4-16. A superintendent's recommendation or approval, in and of itself, will not suffice. See W. Va. Code § 18-4-10(2). Here it is undisputed that the Board never knew about or approved the October 25, 1995 agreement with Grievant. Moreover, even if a board of

education could delegate its contracting and salary schedule powers to its superintendent, there is no evidence the Board did so in this case.

Ultra vires promises are nonbinding when made by public officials, their predecessors, or subordinates functioning in their governmental capacity, and such ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); see also Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34- 063 (June 29, 1994). Thus, ultra vires acts are not enforceable, and the written agreement between Grievant, the Superintendent and Mr. Gandee is not enforceable.

With respect to Respondent's second contention that Grievant could be required to continue to make the rescheduled bus route through the end of the 1995-96 school year, this Grievance Board has held numerous times, that "slight alterations of a bus operator's driving schedule during a school year may be necessary due to need" and only "arbitrary alteration, which adds time or distance to the operator's workday andwhich serves no useful purpose, constitutes an unlawful schedule change as contemplated by W. Va. Code § 18A-4-8a." Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). See Connor v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). Here, the change in Grievant's schedule was not arbitrary, but was made to accommodate the students' needs. Furthermore, the change resulted in the addition of only six-tenths of a mile each way, and a total of 20 minutes, to Grievant's original route. This constitutes a slight alteration in Grievant's route, which she could have been required to make over her objection.

Conclusions of Law

1. As this is a non-disciplinary matter, Grievant bears the burden of proving her case by a preponderance of the evidence.

2. Grievant has failed to prove that Respondent is bound by the Superintendent's ultra vires act in entering into a written agreement with her which provided additional compensation, without the Board's knowledge or approval. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); see also Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas Co. Bd. of Educ., Docket No. 93-34-063unty (June 29, 1994). Thus, the agreement is unenforceable.

3. Grievant has failed to prove that the change in her bus schedule after the beginning of the school year was a significant or arbitrary change constituting an unlawful schedule change as contemplated by W. Va. Code § 18A-4-8a.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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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MARY JO SWARTZ

Administrative Law Judge

Date: August 19, 1996