

ELAINE HUSSELL, et al.,

Grievants,

v.

DOCKET NO. 96-26-073

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, [\(See footnote 1\)](#) members of the Roosevelt Elementary Faculty Senate, filed this grievance against Respondent Mason County Board of Education, alleging that the Board violated West Virginia State Board Policy 2510, by requiring Roosevelt teachers to work beyond an 8-hour workday for the period August 28, 1995, through February 26, 1996. Grievants also claim Respondent violated W. Va. Code §§ 18A-4-16 and 18A-4-5a, alleging other elementary teachers are not required to cover bus duty, or are paid extra compensation if they are. [\(See footnote 2\)](#) Grievants seek as relief payment at one and one-half (1-1/2) their hourly rate of pay for any time exceeding the 8-hour workday, that the undersigned find an implied extracurricular contract existed for that period of time, which should continue through the end of the 1995-96 school year, as well as continue through the 1996-97 school year, and that Grievants be compensated as well for those periods of time. They also ask that Respondent eliminate "overtime" situations, and for the benefit of the students, restructure the bus routes to lessen the time students wait for buses.

Following adverse decisions at the lower levels, Grievants appealed to level four on February 22, 1996. Hearing was held on May 13, 1996, and this case became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or about June 3, 1996.

The underlying facts relevant to this matter are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievants are employed as teachers of Respondent assigned to Roosevelt Elementary School.
2. Grievants were required to perform bus duty, either in the morning or the evening, August 28, 1995 through February 26, 1996. Each Grievant was assigned bus duty approximately every 8 days, for various amounts of time. See Grievant's Level One Grievance Statement.
3. Performance of the bus duty required Grievants to work beyond eight (8) hours on those days.
4. Grievants did not enter into extracurricular contracts with Respondent for the bus duty.
5. Respondent devised and instituted a new work schedule at Roosevelt following the level three decision denying the grievance, which ensured that no teacher would be required to perform the bus duty beyond an 8-hour day.
6. The school's principal was directed to perform the morning bus duty. When the principal is absent or has a schedule conflict, one teacher at Roosevelt has volunteered to take over those duties and may be compensated for that time.

Discussion

There is no dispute that Grievants worked, from time to time, beyond an 8-hour work day. when performing bus duty. The issue is whether Respondent violated any statute, policy or law in requiring Grievants to perform bus duty beyond 8 hours, and if so, to what relief, if any, are Grievants entitled?

First, Grievants allege requiring them to perform bus duty beyond an 8-hour day violates West Virginia State Board of Education Policy 2510 which defines "work day" as:

Time allocated for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development that may not exceed eight clock hours.

Grievants rely upon the above-cited policy for the proposition that they cannot be required to work more than 8 hours per day without additional compensation. However, when read in its entirety, it is clear that Policy 2510 was designed to guide the State and county boards of education in formulating and implementing "general, vocational and special education programs that are to improve the quality of teaching and learning in the public schools and to assure that equal educational opportunities for all students include but are not limited to: comparably high quality programs of study, support programs,

personnel, facilities and instructional materials, supplies and equipment." Id. Thus, the purpose of Policy 2510 is to ensure a high quality education for West Virginia students. It does not anywhere address teachers' compensation or benefits.

A "school day" is simply a day when students attend classes, and a "regular school day" is synonymous with "work day", each referring to the entirety of those days on which school is in session and students receive instruction. Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775 (W. Va. 1992). A "regular school day" is a work day on which both teachers and students report to school and instructional activities take place. The "instructional day", during which actual teaching occurs, is merely a component of the larger "work day" or "regular school day." Id.

Based upon a full reading of Policy 2510 and the above analysis, the undersigned finds that the definition of "work day" in Policy 2510 was not meant to restrict the amount of time a professional educator can be required to work in a given day, but rather, is meant to limit the amount of time that students may be required to spend in the school for instructional purposes. [\(See footnote 3\)](#) The undersigned also concludes that "bus duty" is not part of the "work day" as defined in Policy 2510. If the purpose of Policy 2510 is to limit the amount of time students may spend in instructional activities during a day, the inclusion of time spent in loading, unloading, and perhaps waiting in a holding area until the school day actually begins, would severely limit a county board of education's ability to schedule needed instructional activities during the day, particularly in large rural counties with consolidated schools. As defined in Adkins, supra, a "school day" or "work day" is when students attend classes and when instructional activities take place. This does not encompass the time getting on or off a bus, and waiting until the "school day" begins.

Therefore, one must conclude that "bus duty" falls within the definition of "extracurricular" pursuant to W. Va. Code § 18A-4-16, which Grievants also claim Respondent has violated. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. Code § 18A- 4-16. Bus duty involves providing support services and caring for the needs of the students, occurs on a regularly scheduled basis, and in this case, occurred at times other than regularly scheduled working hours.

It is true that some teachers are compensated for performing extracurricular assignments for their

county boards of education, including bus duty. [\(See footnote 4\)](#) Indeed, Grievants point to professionals in Mercer County who apparently are compensated for performing bus duty. However, W. Va. Code § 18A-4-16 does not mandate that county boards of education compensate professionals who perform those duties. It merely provides that, when a county board of education chooses to do so, it must follow the provisions of that Code Section. It may be that county boards of education would not be able to find professionals willing to perform extracurricular duties without additional compensation, but there is nothing in that, or any other Code Section, that mandates that county boards of education always compensate professionals for performing extracurricular duties.

In the instant case, Respondent did not choose to compensate Grievants, professional educators, for performing bus duty once every 8 days during the school term when students were in attendance. It did not have to. For that reason, the undersigned declines to find an "implied" extracurricular contract existed between Respondent and Grievants for the 1995-96 school year or beyond, as Grievants have requested.

Nevertheless, this situation presents a quandry. Respondent presented Grievants with a bus duty schedule at the beginning of the 1995-96 school year which Grievants did not wish to perform. Rather than simply refuse to perform the bus duty, Grievants chose to obey their employer's directive and file a grievance. This is what this Board encourages employees to do when faced with a directive they do not agree with.

It is well-established that in order to obtain recovery under the equitable doctrine of "quantum meruit", there must have been a promise, express or implied, to pay for services made by the person receiving such services. See Bennett/Dean v. FayetteCounty Bd. of Educ., Docket No. 91-10-231/235 (May 13, 1992). It is clear that no such promise was made by Respondent to Grievants. However, it is also clear that an extracurricular assignment can only be made by mutual consent of the parties and Grievants cannot be found to have consented to the extracurricular assignment, nor did they volunteer for the assignment. See W. Va. Code § 18A-4-16.

Consequently, pursuant to W. Va. Code § 18-29-5(b), which authorizes hearing examiners to provide such relief as is deemed fair and equitable, the undersigned finds that principles of fairness dictate that Respondent compensate Grievants at one (1) times their hourly rate for the actual amount of time each spent performing bus duty for the period August 28, 1995 through February 26, 1996, as set forth in Grievants' attachments to the level one grievance statement.

Additionally, Grievants claim Respondent violated the "uniformity" provision of W. Va. Code § 18A-4-5a, which provides:

County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.

Counties may fix higher salaries for teachers placed in special instructional assignments, for those assigned to or employed for duties other than regular instructional duties, and for teachers of one-teacher schools, and they may provide additional compensation for any teacher assigned duties in addition to the teacher's regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day. Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county:

Grievants allege that, because they were required on certain days to work beyond 8 hours, this, in effect, diminishes their overall salary in comparison with other teachers in the county. Again, there is nothing in the Code or other policy or law, or indeed, in the teachers' contracts, that specifically limits their work day to 8 hours, providing compensation for anytime spent working beyond those eight hours. In any event, Grievants failed to produce any evidence that other teachers in the county were not required to work beyond an 8-hour day from time to time without additional compensation.

Further, Code § 18A-4-5a merely provides that county boards of education may provide additional compensation for teachers assigned duties in addition to their regular instructional duties. It does not provide that they must. Grievants have also failed to show that any other teacher within the county is paid extra compensation for working bus duty. ([See footnote 5](#))

Finally, Grievants' claim that the length of the school day at their school is not conducive to the students' learning and request that Respondent restructure the bus routes for elementary students so as to lessen the time spent en route to or from school. Even if Grievants were found to have standing to assert the rights of students to shorter transit time, Grievants have failed to meet their burden of proof on this issue. Grievants offered little or no evidence to prove that the bus routes inordinately extend the day for students in a harmful way, and they offered no expert testimony or valid studies to support their theory, which must be presented to prove such a case. See Maynor v. Kanawha County Bd. of Educ., Docket No. 96-20-008 (Mar. 7, 1996).

Conclusions of Law

1. It is incumbent upon Grievants to prove the allegations of their complaint by a preponderance of the evidence.
2. West Virginia State Board of Education Policy 2510 defines "work day" as "time allocated for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development that may not exceed eight clock hours.
3. Policy 2510 does not address teachers' compensation or benefits and does not limit a teacher's work day to 8 hours, after which they are entitled to additional compensation.
4. Grievants have failed to prove that they are entitled to additional overtime compensation for working beyond an 8-hour day. See Smith v. Mingo County Bd. of Educ., Docket No. 95-29-530 (Mar. 18, 1996); Oblinger v. Lincoln County Bd. of Educ., Docket No. 89-22-552 (Jan. 5, 1990).
5. Grievants have failed to prove that Respondent has violated W. Va. Code § 18A-4-5a by not compensating for the time spent performing bus duty during the 1995- 96 school year.
6. Grievants have failed to prove by expert testimony or valid studies that the Respondent's bus routes inordinately extended the day for students in a harmful way. Maynor v. Kanawha County Bd. of Educ., Docket No. 96-20-008 (Mar. 7, 1996).
7. Grievants have proven Respondent violated W. Va. Code § 18A-4-16 in requiring Grievants to perform an extracurricular assignment without their mutual consent.
8. W. Va. Code § 18-29-5(b) authorizes hearing examiners to provide such relief as is deemed fair and equitable.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Respondents are hereby **ORDERED** to compensate Grievants one (1) times their hourly salary rate for the actual amount of time spent performing bus duty for the period August 28, 1995, through February 26, 1996, as more fully set forth in the attachments to Grievants' level one grievance statement.

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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ
Administrative Law Judge

Dated: July 24, 1996

[Footnote: 1](#)

Elaine Hussell, Susan Sayre, Jeannette Sayre, Cynthia Barker, Joann Cullen, Shaun Sergeant, O.L. Fallon, Rebecca Hun, Julie S. Bibbee, Judy Dorst, Rogert Keefer, Kathy Lovell, Karen King, Vickie Johnson, and Susan Pyles.

[Footnote: 2](#)

Grievants raised, for the first time at level four, allegations concerning improprieties at the level three proceeding, and a claim of "retaliation" on behalf of the principal of Roosevelt Elementary. Respondent objected to these new claims, and the undersigned ruled that the claims could not be raised at level four. Grievants then withdrew these additional claims.

[Footnote: 3](#)

In any event, Grievants' claim that this policy provides they are entitled to overtime compensation must fail. Teachers are salaried, professional employees and, as such, are not entitled to overtime compensation for hours worked beyond their regularly scheduled work day. See Smith v. Mingo County Bd. of Educ., Docket No. 95- 29-530 (Mar. 18, 1996); Oblinger v. Lincoln County Bd. of Educ., Docket No. 89-22-552 (Jan. 5, 1990). Indeed, teachers often perform duties beyond their regularly scheduled work day, including grading papers, participating in parent-teacher conferences, and tutoring at-risk students, for which they are not compensated beyond their salary.

[Footnote: 4](#)

There is no "extra duty" assignment for professionals equivalent to those provided for service personnel under W. Va. Code § 18A-4-8b.

[Footnote: 5](#)

Grievants also alleged they were being discriminated against. This argument must also fail based upon the above observations and lack of evidence.