PEGGY BROWNING and

BERTIE MOORE,

Grievants,

v. **Docket No. 96-23-127**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Peggy Browning and Bertie Moore (Grievants) are school service personnel employed by Respondent Logan County Board of Education (LCBE) as Aide and Bus Operator, respectively. Grievants initiated this grievance pursuant to W. Va. Code §§ 18- 29-1, et seq., alleging that LCBE violated W. Va. Code §§ 18A-4-8b and 18A-4-16 by failing to post a mid-day special education bus run requiring the services of a bus driver and transportation aide. The grievance was denied at Level II by Brenda Skibo, the Superintendent's designee, on March 14, 1996. As authorized by W. Va. Code § 18-29- 4(c), Grievants by-passed Level III, appealing to Level IV on March 26, 1996. Following a series of continuances, each granted for good cause shown, the parties agreed to submit this matter for decision on the record. The parties submitted agreed stipulations of fact to complete the evidentiary record, and agreed to a briefing schedule. In accordance withthat schedule, this matter became mature for decision on January 17, 1997, upon receipt of Grievants' proposed findings of fact and conclusions of law.

All facts pertinent to resolution of this grievance are contained in the Stipulations of Fact entered into between the parties. Therefore, those stipulated facts are hereby adopted into the following findings of fact.

FINDINGS OF FACT

1. Peggy Browning and Bertie Moore, Grievants, are employed by the Logan County Board of Education as school service personnel, and are currently classified as Aide and Bus Operator

respectively.

2. The transportation department of Logan County Schools is divided into three areas: Logan, Man and Chapmanville.

3. The regular working day for Bus Operators is seven hours by county policy.

4. At the beginning of the 1995-96 school year, Respondent needed a Bus Operator and an Aide to transport a handicapped child from the Crooked Creek area: (a) from the child's home in Crooked Creek (Logan attendance area) to South Man Grade School (Man attendance area); (b) from South Man Grade School to Man Hospital for therapy, and then back to South Man Grade School; and (c) from South Man Grade School back to Crooked Creek.

5. These jobs were not posted and filled pursuant to W. Va. Code § 18A-4-8b. Instead, it was assigned to Connie Lawson (Bus Operator) and to Connie Cook (Aide). These jobs were performed in addition to the regular duties already performed by Lawson and Cook. Lawson and Cook received extra compensation for performing these assignments at an hourly rate of one and one-half times their regular hourly rate, because the time involved in performing these assignments caused their daily work schedule to exceed seven hours.

6. Bus Operators who perform extracurricular assignments in addition to their regular duties are compensated for the time involved in performing their extracurricular assignment at a set amount per trip.

7. At the beginning of the 1996-1997 school year, the same services were needed for the child in question. However, since the child had moved to the Man attendance area, the job was assigned under the same terms and conditions to transportation employees in the Man area, Lithonia "Tony" Jeffrey (Bus Operator) and to the substitute Aide temporarily replacing Grievant Peggy Browning. These employees receive a set daily amount for the performance of these duties.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievants contend that the duties in question constitute extracurricular assign ments under W. Va.

Code § 18A-4-16, therefore requiring that the positions be posted in accordance with W. Va. Code § 18A-4-8b. W. Va. Code § 18A-4-16 contains the following provisions pertinent to this grievance:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. 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.

* * *

> (5) The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b], article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classifica tion 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.

According to the stipulated facts, the duties at issue in this grievance fall outside the regularly scheduled working hours of the employees assigned to perform such duties. As these duties arise daily, they occur on a regularly scheduled basis. Therefore, the duties in question meet the definition of extracurricular assignments under W. Va. Code § 18A-4-16. Langmyer v. Ohio County Bd. of Educ., Docket No. 95-35-565 (Mar. 12, 1996). See Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990); Bowman v. Marion County Bd. of Educ., Docket No. 96-24-261 (Apr. 29, 1997).

As there is no evidence that LCBE's employees have approved an alternative procedure for filling extracurricular assignments, LCBE was required under W. Va. Code § 18A-4-16(5) to post these assignments in accordance with W. Va. Code § 18A-4-8b. Langmyer, supra. Grievants did not seek any further relief, and none is warranted by the facts in this matter.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. School boards are required to properly post and fill any extracurricular positions for school service personnel. W. Va. Code §§ 18A-4-16 and 18A-4-8b; Langmyer v. Ohio County Bd. of Educ., Docket No. 95-35-565 (Mar. 12, 1996).

3. Under W. Va. Code § 18A-4-16, a school board may not deviate from posting and hiring requirements for extracurricular service positions unless an alternate method has been approved by the board and affected employees within the classification title. Langmyer, supra.

4. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

5. Grievants have proven a violation of W. Va. Code §§ 18A-4-16 and 18A-4-8b, in that LCBE failed to post and properly fill extracurricular positions for a Bus Operator and Aide, where an alternate method for filling such positions has never been properly established. See Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990); Langmyer, supra.

Accordingly this Grievance is hereby **GRANTED** and Respondent Logan County Board of Education is **ORDERED** to post and fill the extracurricular Bus Operator and Aide assignments in accordance with W. Va. Code §§ 18A-4-16 and 18A-4-8b.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 28, 1997