EARLENE BLANKENSHIP,

Grievant,

v. **Docket No. 96-29-334**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Earlene Blankenship (Grievant), a regular Bus Operator employed by the Respondent Mingo County Board of Education (MCBE), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on May 1, 1996, alleging that MCBE violated W. Va. Code §§ 18A-4-8a and 18A-4-8b by assigning her to drive an irregular mid-day bus run without compensation beyond her regular daily rate of pay. (See footnote 1) The grievance was denied at Level I and Grievant appealed to Level II on May 3, 1996. A Level II hearing was conducted on June 13, 1996, and a decision denying the grievance was issued by the Superintendent's designee, Tom Sammons, on August 21, 1996. Grievant elected to waive Level III, as permitted under W. Va. Code § 18-29-4(c), and appealed to Level IV on August 27, 1996. A Level IV evidentiary hearing was conducted in this Grievance Board'soffice in Charleston, West Virginia, on October 17, 1996. Thereafter, this matter became mature for decision on November 18, 1996, following receipt of written post-hearing arguments from the parties.

The pertinent facts in this matter are not in dispute. Accordingly, the following Findings of Fact have been developed from the record created at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Mingo County Board of Education (MCBE) as a regular School Bus Operator.

2. Grievant drives a morning bus run transporting students to school, and an afternoon bus run transporting students to their homes. In addition, she is required to perform certain preliminary and postliminary work on her bus before and after each run. 3. On March 21, 1996, Matewan High School Principal Jada Hunter requested Grievant to transport some special education students on a thirty-mile round trip from the high school to the Mingo County Court House and Williamson Daily News in Williamson, West Virginia, for an educational field trip to be conducted on April 4, 1996. Because the students would be gone during the lunch hour at the school, they were also to be taken to a Pizza Hut in Kentucky, approximately one mile from Williamson, for lunch.

4. On March 27, 1996, Ms. Hunter repeated her request to Grievant in writing. See R Ex 1.

5. Grievant was informed that she would not receive any additional compensation, beyond her regular daily pay as a Bus Operator, for performing this assignment. Grievant indicated that she would only perform the assignment under protest, alleging that she was entitled to additional compensation. 6. On April 4, 1996, Grievant transported twelve students and two teachers from Matewan High School to Williamson and back, substantially as described in Finding of Fact Number 3. This bus run started at 9:45 a.m. and concluded at 2:00 p.m.

7. As of April 4, 1996, MCBE had the following written policy in effect within its Transportation Department:

EDUCATIONAL FIELD TRIPS

> Trips that are scheduled in the middle of a school day that have been requested by the school principal on proper forms, including educational and participation requirements, and approved by the Central Office and meet all State and County guidelines with proper notification (minimum of 3 days) given to the Transportation Department far enough in advance to insure that all routes and schedules are covered, will be assigned to the bus operators by seniority on a rotating basis. These will begin with the youngest operator in that particular area/work station, until each have had an opportunity to perform similar assignments. It will also be understood that these trips will be within the Mingo County School area and will not interfere with the scheduled runs nor exceed the operator's scheduled work day. Payment for said trips will be discretionary; it is not a requirement unless trip exceeds the normal working hours of the operator or the program has been funded and transportation is included.

R Ex 1 (emphasis in original).

8. Consistent with the foregoing policy, MCBE Bus Operators are only paid for mid- day runs, such as the one at issue, when funds are available from an outside source, such as a grant or private

funding. No such funds were available to compensate Grievant for the trip at issue.

9. When a Bus Operator is unable to drive a mid-day run due to a pre-existing conflict, MCBE Superintendent of Transportation William Kirk will pass over that operator, at least until each operator has driven a mid-day run. 10. MCBE's Bus Operators have never approved an alternative procedure for making extra-duty assignments as authorized by W. Va. Code § 18A-4-8b.

DISCUSSION

In grievances that are not disciplinary in nature, grievants have the burden of proving the allegations in their complaints by a preponderance of the evidence. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994). See W. Va. Code § 18-29-6.

This Grievance Board previously addressed a substantially identical situation in Broughman v. Tyler County Board of Education, Docket No. 94-48-068 (Jan. 20, 1995), aff'd, Circuit Court of Kanawha County, No. 95-AA-54 (Nov. 6, 1995). In Broughman, the Tyler County Board of Education had a similar policy in effect, requiring Bus Operators to perform "on-call" driving during the regular work day without receiving additional compensation. As noted in Broughman, such a policy does not necessarily run afoul of the provisions in W. Va. Code § 18A-4-8b dealing with extra-duty assignments, since extra- duty work ordinarily involves "work which is performed outside the regular workday." Broughman, supra (emphasis in original).

The Broughman ruling is consistent with a 1988 opinion of the State Superintendent of Schools introduced by Grievant. That opinion notes that if a county has been paying Bus Operators for duties during the school day, such as irregular co-curricular field trips, it must continue to do so. G Ex B. However, "if the board has treated this additional work as simply work done while the bus operator is on call for work during his or her regular workday, and, therefore, has not been paying extra for it, then it can continue not paying specially for it . . . ." G Ex B. Not only is this opinion consistent with this Board'ssubsequent decision in Broughman, but such an opinion, rendered pursuant to the State Superintendent's authority under W. Va. Code § 18-3-6, is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E. 2d 775 (1992); Smith v. Board of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See Chafin v. Boone County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989). A

preponderance of the evidence indicates that MCBE has been paying its Bus Operators for mid-day bus runs only when funds were available from an outside source. As there has been no showing that any such funds were made available for the mid-day run at issue, MCBE did not violate W. Va. Code § 18A-4-8b by failing or refusing to pay Grievant for driving this bus run. (See footnote 2)

Grievant also claims that requiring her to drive this irregular mid-day run without compensation violates the federal Fair Labor Standards Act (FLSA). The FLSA, 29 U.S.C. §§ 201, et seq., is a statute under which Grievant works, within the meaning of W. Va. Code § 18-29-2(a). See generally Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Therefore, this Grievance Board has jurisdiction to determine if MCBE violated the FLSA, by requiring Grievant to drive the mid-day run at issue. Mayle v. Bd. of Trustees, Docket No. 95-BOT-581 (July 11, 1996); Belcher v. W. Va. Dept. of Transp., Docket No.94-DOH-341 (Apr. 27, 1995). See Brutto v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-076 (July 24, 1996).

The FLSA requires that employers compensate each employee for his or her hours of work in excess of forty hours per week at a rate of not less than one and one-half times the regular rate at which he or she is employed. 29 U.S.C. § 207(a)(1). In this case, Grievant has failed to demonstrate that she was required to work in excess of forty hours during the week in which she drove the mid-day bus run at issue. Moreover, MCBE's policy, as applied in this matter, does not violate the U.S. Department of Labor's regulations regarding on-call and off duty time under the FLSA. See 29 C.F.R. §§ 785.16 & 785.17 (1996). Accordingly, no violation of the FLSA has been shown.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Weaver v. Mason County Bd. of Educ., Docket No. 94-26- 129 (Nov. 22, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994). See W. Va. Code § 18-29-6.

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." Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995).

3. Where a county board of education has a long-standing practice and policy requiring its bus operators to remain on standby status between their morning andafternoon bus runs to perform occasional 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. Broughman, supra. 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. Under W. Va. Code § 18-29-2(a), this Grievance Board has jurisdiction over grievances concerning wage and hour claims arising under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. See Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

5. Given the circumstances presented in this case, Grievant failed to demonstrate by a preponderance of the evidence that her employer violated the FLSA by requiring her to drive a mid-day curricular bus run on April 4, 1996.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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: April 22, 1997

Footnote: 1

In accordance with W. Va. Code § 18-29-2(a), Roger Staten, Nellie Mahon, Roy Damron, Gary Kinder, Ray Mullins, Phillip Daniels, Imojean Simpkins and Charles Hatfield, also employed as Bus Operators, joined in the grievance at Level I.

Footnote: 2

Although MCBE arguably violated the explicit terms of its policy on educational field trips by allowing the bus to go into

Kentucky for lunch, such a deviation was de minimus in the context of this grievance, and would not entitle Grievant to additional compensation in any event. See Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Payton v. Lincoln County Bd. of Educ., Docket No. 89-22-653 (Feb. 16, 1990).