GARY NELSON, et al.,

Grievants,

v. **Docket No. 97-22-575**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Gary Nelson, Gerald Huffman, and Jimmie Skeens (Grievants), initiated grievances pursuant to W. Va. Code §§ 18-29-1, et seq., in October 1997, alleging that their employer, Respondent Lincoln County Board of Education (LCBE), was violating W. Va. Code §§ 18A-4-5b and 18A-4-16, in regard to the compensation they receive for driving certain extracurricular bus runs. Following denial of their grievances at Level I, Grievants appealed to Level II where the grievances were consolidated at a hearing conducted on November 19, 1997. Thereafter, on December 15, 1997, Charles McCann, the Superintendent's designee, issued a decision denying the grievance. Grievants then appealed to Level IV on December 24, 1997, by-passing Level III as authorized by W. Va. Code § 18-29-4(c). Following a series of continuances, each of which was granted for good cause shown, a Level IV hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on April 20 and August 31, 1998. This matter became maturefor decision on September 29, 1998, following receipt of proposed Findings of Fact and Conclusions of Law from the parties. (See footnote 1)

The pertinent facts in this matter are generally undisputed. Therefore, the following Findings of Fact have been determined from the testimony and documentary evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Grievants are employed by the Lincoln County Board of Education (LCBE) as full-time Bus

Operators.

2. Grievant Nelson holds an extracurricular contract to transport students a distance of one mile each way between Hamlin High School and the Yeager Career Center (YCC) at the rate of $5.00 per round trip.

3. Grievant Huffman holds an extracurricular contract to transport students a distance of approximately ten miles each way between Duval High School and YCC at the rate of $7.00 per round trip. Grievant Huffman makes two round trips daily.

4. Grievant Skeens holds an extracurricular contract to transport students a distance of approximately ten miles each way between Guyan Valley High School and YCC at the rate of $7.00 per round trip. Grievant Skeens also makes two round trips daily.

5. John Thompson holds an extracurricular contract to transport students approximately twenty-nine miles each way between Harts High School and YCC at the rate of $14.00 per round trip. Mr. Thompson makes one round trip each day. 6. In the early 1980's, LCBE paid bus operators driving vocational runs $5.00 per round trip. In the middle 1980's, the pay was changed to $14 per day for each driver, including the driver of the Harts - YCC run who made a single trip each day, while the remaining three drivers made two round trips each day. Each of the four drivers then employed to drive these vocational runs agreed to this arrangement. Grievants were not employed to drive vocational runs at that time.

7. As a result of curriculum changes at YCC for the 1996-97 school year, Grievant Nelson began making six round trips each day. LCBE and Grievant Nelson mutually agreed to change his compensation from $14.00 per day to $5.00 per round trip, or $30 per day.

8. At the same time Grievant Nelson's compensation was changed to $5.00 per round trip, the compensation paid to Grievants Skeens and Huffman was revised to $7.00 per round trip, consistent with the $14.00 daily rate they were then receiving.

9. For the 1997-98 school year, Grievant Nelson was reduced to making four round trips per day. He continued to be paid $5.00 per round trip, or $20.00 per day.

10. Due to the schedules of their regular runs, Grievants are foreclosed from bidding on the Harts run, should it become vacant.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of theW. 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 allege that LCBE is violating W. Va. Code § 18A-4-5b. That statute provides in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimum fixed by this article.
>
> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like duties and assignments within the county . . . .

Grievants submit that their duties are substantially like the duties performed by John Thompson, who receives $14 per round trip for driving a vocational run instead of the $5.00/$7.00 round trip compensation which Grievants are receiving.

LCBE argues that W. Va. Code § 18A-4-5b is not applicable to this grievance because the compensation at issue does not constitute a “supplement” to their state- mandated minimum pay in accordance with W. Va. Code § 18A-4-8a. Although this Grievance Board has previously applied W. Va. Code § 18A-4-5b to grievances relating to extracurricular or supplemental assignments, it does not appear that a county school board has previously challenged application of that provision to extracurricular assignments. See, e.g., Fowler v. Mason County Bd. of Educ., Docket No. 94-26-037 (Oct. 6, 1994); Ross v. Preston County Bd. of Educ., Docket No. 91-39-026 (July 12, 1991); Shaferv. Preston County Bd. of Educ., Docket No. 91-39-030 (July 12, 1991). Therefore, this issue will be addressed in this decision.

Clearly, W. Va. Code § 18A-4-5b is a statute intended to protect employees. Such provisions 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). In reading W. Va. Code § 18A-4-5b, it appears that the language, “[f]urther,

uniformity shall apply to all salaries, rates of pay, benefits, increments, or compensation for all persons regularly employed and performing like assignments and duties," (See footnote 2) is sufficiently broad to encompass the issues raised in this grievance. Indeed, the language employed following "further" indicates this provision was intended to apply beyond the narrow limits of county salary supplements for school service personnel. See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988). Therefore, Grievants may rely upon W. Va. Code § 18A-4-5b to support their claim that they are not receiving "uniform" compensation, as required by law.

Prior decisions of this Grievance Board have noted that W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay. Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Fowler, supra. See Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). It is not disputed that the three Grievants are not receiving the same pay as another Bus Operator who drives an extracurricular vocational run. Moreover, there are undeniable similarities in their duties; all four assignments involve transporting students from various high schoolsin Lincoln County to the same central location, a vocational center that serves students throughout the county.

In this context, LCBE could have paid all four Bus Operators the same (whether $5.00 per round trip or $14.00 per round trip) in accordance with Fowler without violating W. Va. Code § 18A-4-5b. Likewise, LCBE could arguably compensate Bus Operators for vocational bus runs on either a standard amount per mile driven or time involved in conducting the vocational run without running afoul of the Code's uniformity requirement. However, the parties established that LCBE has historically elected to differentiate pay rates for vocational bus runs based on rough considerations of the distance driven and time involved in covering that distance, with substantially less consideration for the amount of free time each employee may enjoy during the day between driving his regular and vocational runs.

The undersigned administrative law judge is not persuaded that a superficial absence of uniform pay necessarily indicates that LCBE is treating Grievants contrary to the requirements of W. Va. Code § 18A-4-5b, given the varying distances covered by their respective vocational runs. While less than mathematically exact, LCBE pays each Grievant relatively the same in proportion to the time and distance driven by Mr. Thompson. Indeed, while Grievants Huffman and Skeens receive $14.00

for driving approximately 40 miles daily (two rounds trips covering approximately 10 miles each way), Mr. Thompson receives $14.00 for driving nearly 60 miles daily (one round trip covering approximately 29 miles each way). In these circumstances, Grievants have not established a violation of the uniformity provision in W. Va. Code § 18A-4-8b. In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievants have the burden of proving 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. W. Va. Code § 18A-4-5b applies to extracurricular assignments entered into between school service employees and county boards of education pursuant to W. Va. Code § 18A-4-16. See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

3. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons performing like assignments and duties. Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Mersing v. Preston County Bd. of Educ., Docket No. 89-39- 513 (July 12, 1991); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89-43-74 (Aug. 31, 1989). See Weimer-Godwin, supra.

4. Grievants failed to establish by a preponderance of the evidence that LCBE is in violation of the pay uniformity requirements in W. Va. Code § 18A-4-5b by the manner in which it compensates them for driving extracurricular vocational bus runs, as opposed to the manner in which it compensates John Thompson, a Bus Operator who drives a similar, though substantially longer, extracurricular vocational bus run.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: October 13, 1998

Footnote: 1

Grievants Nelson and Huffman were represented by counsel, John Roush, with the West Virginia School Service Personnel Association. Grievant Skeens was represented by Susan Hubbard, with the West Virginia Education Association. Respondent was represented by counsel, Erwin L. Conrad.

Footnote: 2

W. Va. Code § 18A-4-5b (emphasis supplied).