ARNOLD JUSTICE,

Grievant,

v.

DOCKET NO. 98-50-252

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Arnold Justice, filed the following grievance on March 9, 1998, against his employer, the Wayne County Board of Education ("Board"):

> Grievant is currently employed as a school bus operator. Grievant alleges that he was denied an extra-duty assignment on March 2, 1998 in violation of West Virginia Code §18A-4-8b, local county practice and policy. Grievant seeks compensation for the assignment with interest.

The grievance was denied at level one on March 9, 1998, by Grievant's immediate supervisor, King Queen, Transportation Director. A level two hearing was held on April 16, 1998, and the grievance was denied on July 9, 1998 by James J. Ross, Director of Personnel. The grievance was waived at level three in accordance with W. Va. Code § 18- 29-4, and appealed to level four on July 20, 1998. A hearing was held in the Grievance Board's Charleston, West Virginia, office on September 14, 1998, and became mature for decision on September 18, 1998, the deadline for the parties' proposed findings of fact andconclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. (See footnote 1) The Board was represented by David Lycan, Esq.

SUMMARY OF EVIDENCE

Level Two

Ex. A -

Grievance documents.

Ex. B. -

Agreement between Wayne County, West Virginia, Board of Education and West Virginia Education Support Personnel, West Virginia Education Association, West Virginia School Service Personnel Association, effective June 23, 1997.

Level Four

G. Ex. 1 -

Night Run Schedule, 1997-98 School Year.

G. Ex. 2 -

Extra Duty Assignment Payroll Report School Year 97/98.

Testimony

Grievant testified in his own behalf, and presented the testimony of King Queen. The Board presented the testimony of Rebecca Phillips, Ronald Fannin, James Dyer, and Mike Damron.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following material facts.

1. Grievant is currently employed as a regular bus operator for the Board, driving in the Wayne attendance area.

2. A two-thirds majority of the bus operators in Wayne County have voted in the past to adopt an Agreement amending the procedure for assigning extra-duty runs in accordance with W. Va. Code § 18A-4-8b. 3. The most recent amendment and ratification to the Agreement reached between the bus operators' associations and the Board has an effective date of June 23, 1997. LII Ex. B.

4. The procedure for assigning extra-duty trips is seniority-based within each driving area of Wayne County, with assignments being made on a rotating basis.

5. When a driver assigned to an extra-duty trip cannot make that trip, and gives less than 24 hours notice, it is considered an emergency. The Agreement provides that, in the case of an emergency, "the next unscheduled driver up on list/roster will be called and continued in rotation until at least two (2) drivers have been contacted. Should both drivers refuse, the appropriate supervisor will have the liberty to get any driver available within their proper area/district." (Emphasis in original). LII Ex. B.

6. Approximately five years ago, when instituting the emergency call-out procedure, a driver named Ray Scott was next up in line on the rotation list and was called to drive the emergency trip. Mr. Scott drove the emergency trip, which was counted as his regular extra-duty run, and he was passed by on the rotation for the next regular extra-duty trip.

7. Mr. Scott filed a level one grievance, and the parties in that grievance agreed at that level that it was unfair to penalize the next driver up on the regular rotation list for helping out in an emergency. Therefore, the practice was changed so that if, in an emergency situation, the next driver up on the rotation list agreed to drive the emergency trip, he or she would not lose their place in rotation, and would be available for the next regular extra-duty trip, as well. 8. That practice has been ongoing in Wayne County since that time, although it has never been memorialized in writing, or specifically incorporated into the Agreement.

9. On February 23, 1998, Howard Medding was scheduled to make an extra- duty trip. Mr. Medding reported he was sick that day and could not make that trip. LIV G. Ex. 1.

10. The next driver on the rotation list was Billy Adkins. Mr. Adkins was asked to take the emergency trip on February 23, 1998, and he agreed. LIV G. Exs. 1, 2.

11. On March 2, 1998, an extra-duty trip was assigned to Billy Adkins, who was the next in line on the rotation list. LIV G. Exs. 1, 2.

12. Grievant was the next most senior person on the rotation list after Billy Adkins. LIV G. Ex. 1.

13. Grievant filed this grievance on March 9, 1998, alleging that he should have been assigned the March 2, 1998 extra-duty trip, rather than Billy Adkins.

DISCUSSION

West Virginia Code § 18A-4-8b provides, in pertinent part:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

As noted in Findings of Fact Numbers 2 and 3, a two-thirds majority of the bus operators in Wayne County voted to alter the procedure for making extra-duty assignments, which is set forth in the Agreement entered into between the Board and the bus operators' associations, the most recent one becoming effective on June 23, 1997. LII Ex. B.

Grievant alleges that the Board is violating the Agreement and/or W. Va. Code § 18A-4-8b in utilizing its current practice of allowing a driver in regular rotation who agrees to take an emergency extra-duty trip to remain in his or her place on the regular rotation roster for the next regular extra-duty assignment. The Board argues that it is continuing a practice which was agreed to in settlement of a grievance approximately five years ago, to which the drivers have acquiesced over the years. Alternatively, the Board agrees that, if the Agreement is unclear and ambiguous as to what to do in an emergency situation, the provisions of Code § 18A-4-8b should apply.

There is no dispute that the provisions in the Agreement dealing with the assignment of emergency extra-duty trips do not adequately explain what happens to the driver who agrees to take the emergency trip with regard to his or her place on the regular rotation roster. The Board initially decided that when a driver accepted an emergency trip, that would be counted as his or her regular extra-duty trip on the rotation roster. When Mr. Scott grieved over that practice, the Board changed the practice to allow the driver who accepts the emergency trip to remain in his or her place on the regular rotation roster. Often times, the emergency trip was a short trip of a few hours, while the next regular extra-duty trip would be a full-day, 10 or 12 hour trip. The Board agreed with Mr. Scott that it was unfair to penalize the driver who helped out in an emergency situation by removinghim from the

rotation roster, and thereby risking the loss of a better regular extra-duty trip. That practice has now been in effect for approximately five years.

It is interesting to note that the most recent Agreement was ratified and signed on June 23, 1997, yet nothing was added to the procedure described for assigning extra-duty trips to memorialize the practice which had been ongoing in Wayne County. Whether this was an oversight, or intentional, the result is the same: the emergency trip provision does not give any guidance on how to treat the driver on regular rotation who agrees to help out in an emergency situation. While individual boards of education are free to adopt alternative procedures for making extra-duty assignments, the procedure must be approved by both the board and two-thirds of the employees within the affected classification. See Williamson v. Lincoln County Bd. of Educ., Docket No. 90-22-322 (Oct. 31, 1990).

In the absence of any specific amendment or alteration in the Agreement, the Board and the drivers are required to make assignments in accordance with the pertinent provisions of W. Va. Code § 18A-4-8b. Those provisions dictate that extra-duty runs are to be assigned on a seniority basis, in rotation order. Once a driver has had a trip, or refused a trip, he or she is moved to the end of the rotation roster. In this instance, once a driver accepts an emergency trip, that is counted as his extra-duty trip, and he should be moved to the end of the rotation roster. Had that occurred in this instance, Grievant would have been next in line for the March 2, 1998 extra-duty trip which was assigned to Billy Adkins. This is not to say that the Board and the bus operators cannot agree at some later date to further amend the Agreement to reflect another way of handling emergencysituations. That opportunity is provided for in the Agreement, and either party may notify the other of its desire to make changes for the succeeding years. See LII G. B, p. 11.

CONCLUSIONS OF LAW

1. While individual boards of education are free to adopt alternative procedures for making extra-duty assignments, the procedure must be approved by both the board and two-thirds of the employees within the affected classification. See Williamson v. Lincoln County Bd. of Educ., Docket No. 90-22-322 (Oct. 31, 1990).

2. There is no evidence of official action on the part of the Board or an affirmative vote of two-thirds of the Board's bus operators to approve the practice of allowing bus operators to remain in their place on the regular extra-duty rotation roster once they have accepted and made an emergency trip.

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to compensate Grievant the amount he would have been paid for the March 2, 1998 extra- duty bus trip, with interest.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 29, 1998

Footnote: 1

Grievant, as well as Mr. Roush, filed an appeal of this matter to level four. Grievant's appeal was entered on the Grievance Board docket as Docket No. 98-50-271. The matters were consolidated at level four under Docket No. 98-50-252, the number assigned to the appeal received from Mr. Roush.