WALTER MILLER,

Grievant,

v.

DOCKET NO. 98-40-233

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Walter Miller, filed this grievance against his employer, the Putnam County Board of Education ("Board") on December 12, 1997, alleging:

> Violations of WV Code 18A-4-8b in regard to the assigning of extra-duty bus runs per county policy. The grievant was given hours for which he didn't make trips resulting in unfair treatment.
>
> Relief sought: The grievant seeks relief by being compensated for los[s] of runs and for unfair treatment to cease.

The grievance was denied at level one, and a level two hearing was conducted on May 21, 1998. A level two decision denying the grievance was issued by Assistant Superintendent Harold Hatfield on June 29, 1998, and Grievant appealed to level four on July 2, 1998. Hearing was held on July 27, 1998, at which time this case became mature for decision. Grievant was represented by Susan E. Hubbard, West Virginia Education Association, and the Board was represented by James W. Withrow, Esq.

SUMMARY OF EVIDENCE

Level Two Joint Exhibit

Ex. 1 -

Trip Board

Level Two Grievant's Exhibit

Ex. 1 -

Handwritten note from Susan Miller.

Level Four Grievant's Exhibit

Ex. 1 -

Affidavit of Susan L. Miller, dated July 23, 1998.

Level Four Board Exhibit

Ex. 1 -

Putnam County Schools Curricular/Extra Curricular Trip Regulations Approved 8/23/96 and 9/26/96.

Testimony

Grievant testified in his own behalf, and presented the testimony of Wendy Kester, Phyllis Bays, and Deborah Scott. The Board presented the testimony of Cecil Dolan.

FINDINGS OF FACT

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

1. Grievant is currently employed by the Board as a bus operator in the Hurricane area. At the time this grievance arose, Grievant drove in the Winfield area of Putnam County.

2. In August and/or September 1996, a two-thirds majority of the bus drivers in Putnam County voted to adopt an alternative method for assigning extra-duty trips, in accordance with the applicable provisions of W. Va. Code § 18A-4-8b. R. Ex. 1.

3. A provision of that policy specifies that, except for certain circumstances, drivers who refuse extra-duty trips offered to them will be charged for the hours of the trip. All hours are recorded and

maintained for each area by an elected board monitor on a trip board. LII Jt. Ex. 1.

4. On October 9, 1997, Grievant was charged with 5-1/2 hours for refusing an extra-duty trip which would have interfered with his regular run.

5. On Friday, October 17, 1997, the Winfield area board monitor, Deborah Scott, called Grievant's home and spoke to his daughter, Susan. Grievant had gone to bed and instructed Susan not to interrupt him for any reason. Grievant often volunteers to drive with the Hurricane band to football games, and had planned on doing that on Saturday, October 18, 1997. Susan told Ms. Scott that Grievant probably would not be able to make the Saturday extra-duty trip because he had other plans with the Hurricane band.

6. Ms. Scott charged Grievant with 6-1/2 hours for the October 18, 1997, bus run as if he had refused the run.

7. These additional 12 charged hours resulted in Grievant missing a time and one-half trip over the Christmas holidays in 1997, which was given to Wendy Kester.

8. Ms. Kester and Grievant spoke to Cecil Dolan, Transportation Director, on or about October 10, 1997, regarding the error in the hours charged. Mr. Dolan told them he would look into it.

9. Ms. Kester filed a grievance over hours she alleged were wrongfully charged her. As part of this claim, Ms. Kester explained to Mr. Dolan that she had been given a trip which should have gone to Grievant, except that his hours were calculated wrong, also.

10. Ms. Kester's grievance was settled in January, 1998, and she had the challenged hours removed from her total hours off the trip board. However, some of thehours that were taken from Ms. Kester should have been taken from Grievant. Ms. Kester again brought this up to the board monitor, but the matter was still not corrected.

DISCUSSION

W. Va. Code § 18A-4-8b provides the method by which extra-duty assignments shall be assigned to service personnel, including bus operators. Specifically, it states:

> 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.

The bus operators in Putnam County approved and affirmed by two-thirds vote an alternative procedure for assigning extra-duty trips. That policy provides that bus operators called for extra-duty trips, but refuse the assignment, will be charged the hours for those trips. This alternative procedure was adopted with the intent of equalizing the number of extra-duty trips each bus operator is assigned. The procedure provides that trips will be assigned to the “first available driver with the lowest hours”. In addition, it provides that an operator will not be charged hours because of the following exceptions: (1) Interference with the regular run; (2) Off work; (3) doctor's appointment; and (4) Thanksgiving, Christmas and Spring Break only. R. Ex. 1. Grievant alleges he was wrongfully charged hours for trips not taken in two separate circumstances. First, he alleges he was charged hours for a trip he could not take because it interfered with his regular bus run. The Board's only defense to this claim is that this trip was never brought to its attention at the lower levels of this grievance. The Board did not object to this issue being raised at level four, only noting that it had not had the opportunity to correct this error before because it did not know about it. It is evident that Grievant was wrongfully charged for a run which he could not take because it interfered with his regular bus run.

Grievant's second allegation is that he was charged hours for a run which he did not refuse. It is undisputed that on the evening of Friday, October 17, 1997, Grievant went to bed and instructed his daughter, Susan, not to interrupt him for any reason. It is also undisputed that Grievant had a band trip run for Hurricane High School the next day, Saturday, October 18, 1997. When Ms. Scott called Grievant's home late Friday evening, she explained to Grievant's daughter that Grievant was up for an extra-duty trip to Charleston for a volleyball game on Saturday. Grievant's daughter, obeying his instructions, did not wake Grievant up to take the phone call. She told Ms. Scott that Grievant already had a run scheduled for Saturday for Hurricane High School.

The only factual dispute is that, Ms. Scott testified she told Grievant's daughter to tell him to call her by 9:00 a.m. on Saturday if he wanted the extra-duty trip. Ms. Miller testified, by affidavit, that she

understood that Ms. Scott would call Grievant by 9:00 a.m. on Saturday to see if he wanted the trip. Grievant did not call Ms. Scott by 9:00 a.m. on Saturday, and she counted this as a refusal to take the run. The issue to be decided is whether this incident should have been treated as a refusal on Grievant's part to take an extra-duty trip which was offered to him. Ms. Phyllis Bays, the board monitor for the Hurricane area, does not charge operators for trips if she does not actually speak to them. She does not leave messages with family members, except to say that the driver must call her back within 30 minutes if he or she wants the trip. Ms. Scott, the board monitor for the Winfield area, did not testify directly to that scenario, but merely testified that all drivers who refuse trips are charged for the trip.

The American Heritage Dictionary (2d ed.), defines “refusal” as: “1. The act of refusing. 2. The opportunity or right to refuse or accept.” It defines “refuse” as: “1. To decline to do, accept, give, or allow. . . “. Both of these terms imply a positive act of negation or denial in some variation. In this case, Grievant did not act to refuse the Saturday, October 18, 1997 bus run. Rather, he simply was unavailable.

Giving Grievant the benefit of the doubt, it does appear there was some element of miscommunication between Ms. Scott and Ms. Miller regarding whether Grievant should return Ms. Scott's phone call or not. This problem is probably why Ms. Bays does not leave messages with family members. This seems like the more reasonable course of action.

Ms. Scott testified there were problems with the policy as it exists, because there “are so many loopholes”. This situation is one of them. There is nothing in the policy which instructs how to deal with bus operators who simply are not home when called. In this instance, Ms. Scott determined that Grievant had actively refused the run because he deliberately made himself unavailable. In all fairness, I cannot agree with Ms. Scott. According to the definition of “refuse” and “refusal”, Grievant would have had to have been given the opportunity to accept or deny the extra-duty trip before he could have beencharged for that trip. Grievant did not have that opportunity. I believe Ms. Bays' method of handling these situations is the better reasoned one in the absence of any other instructions or guidelines in the policy.

Finally, Grievant claims that if these errors had not occurred, he would been the next available driver with the least amount of hours for the holiday extra-duty trip that was assigned to Ms. Kester. Ms. Kester confirmed she should not have been offered that trip, and that Grievant should have been.

Further, Ms. Kester confirmed that she and Grievant spoke to the Transportation Director about this problem when it happened, but it was never corrected.

CONCLUSIONS OF LAW

1. 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. Grievant has proven by a preponderance of the evidence that he was wrongfully charged with 5-1/2 hours for an extra-duty trip he could not take because it interfered with his regular bus run.

3. Grievant has proven by a preponderance of the evidence that he did not "refuse" the Saturday, October 18, 1997, extra-duty bus run to Charleston, when he did not directly speak to Ms. Scott on the telephone about that trip. Accordingly, this grievance is **GRANTED**, and the Board is hereby **ORDERED** to compensate Grievant for the 5-1/2 hour holiday trip he was not offered in December 1997, for which he would have received time and one-half. (See footnote 1)

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 2, 1998

Footnote: 1

Grievant no longer drives in the Winfield area, and drivers do not carry their hours with them when they switch areas. Therefore, Grievant requests only that he receive compensation for the trip he missed which was given to Ms.

Kester.