MICHAEL R. BENNETT,

Grievant,

v. **Docket No. 03-42-148**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Michael Bennett ("Grievant") initiated this grievance on January 24, 2003, alleging that his employer, the Randolph County Board of Education ("RCBOE") illegally "attached" an extracurricular run to his regular bus runs. He seeks back pay at the extracurricular rate of pay for the additional run, and that he be given the option of resigning only the extra portion of the run while retaining his regular morning and evening bus runs. The grievance was denied at level one on January 30, 2003. Respondent attempted to conduct a level two hearing on March 3, 2003, at which time Grievant asserted a default had occurred. Grievant's default claim was denied by this Grievance Board by Order dated May 12, 2003 (Bennett v. Randolph County Bd. of Educ., Docket No. 03-42-071D). Upon remand to level two, a hearing was held on May 16, 2003, and the grievance was denied on May 23, 2003. Level three consideration was bypassed, and Grievant appealed to level four on May 28, 2003. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on July 14, 2003. Grievant was represented by counsel, Eric M. Gordon, and RCBOE was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 30, 2003.

The following findings of fact are made based upon a preponderance of the credibleevidence of record.

Findings of Fact

1. On January 8, 2003, RCBOE posted a vacancy for a bus operator position for the Harman

area, which included a Vo-Tech run.

2. Grievant bid upon and was the successful applicant for the Harman run. However, on his bid sheet, Grievant stated that he “did not agree that Vo-Tech can be posted with a regular bus run” and that he accepted the Vo-Tech run “under protest.”

3. Grievant's daily schedule is as follows:

6:20 a.m.
Arrive at bus garage and do pre-trip inspection, pick up students and transport them to school

7:45 a.m. Conclude transportation of students to Harman School

11:00 a.m.
Return to Harman School to pick up students and transport them to Vo-Tech

12:00 p.m. Return to bus garage

1:50 p.m.
Pick up students at Vo-Tech and return them to Harman School

3:10 p.m. Begin transportation of students home

4:35 p.m. Conclude afternoon run

4. Grievant is allowed a total of one hour to do pre- and post-trip inspections of his bus during his work day.

5. Grievant is released from work and is on his “own time” between the hours of 7:45 a.m. and approximately 10:45 a.m., and also from 12:00 p.m. to approximately 1:30 p.m.

6. Grievant's morning and afternoon runs begin and end at the Harman garage, where he parks his personal vehicle. The Vo-Tech center is in Elkins, and it would be impractical for Grievant to return to the Harman garage between his Vo-Tech runs. Therefore, he waits at the Elkins bus garage between the Vo-Tech runs. 7. Because Grievant lives 45 minutes from Elkins, he does not have time to return home between his two Vo-Tech runs in the afternoon.

8. There are currently two other Vo-Tech runs in Randolph County, and they are combined with regular bus runs.

9. Grievant and the other drivers who have a Vo-Tech run in addition to their regular runs are compensated an extra $15 per day, because they work more hours than other bus drivers.

10. Grievant does not have a separate extracurricular contract for his Vo-Tech run, because it is included in the Harman bus operator position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

Grievant contends that his Vo-Tech run should be considered an extracurricular assignment, which must be mutually agreed to by the Board and employee. He argues that he should not have been required to accept the additional run as part of his full-time position, and he is entitled to the extracurricular rate of pay for all the time he has spent performing the Vo-Tech run. Respondent counters that, pursuant to prior Grievance Board decisions, a board of education is entitled to add to a regular bus run, and that the instant situation does not constitute an extracurricular assignment.

W. Va. Code § 18A-4-16 defines extracurricular assignments as “any activities thatoccur 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.” Further, the statute provides that such assignments “shall be made only by mutual agreement of the employee and the superintendent” and the agreement must be contained in a contract separate from the employee's regular employment contract.

Both parties rely heavily upon the decision in Dillon/Vance v. Cabell County Board of Education, Docket No. 97-06-570 (May 29, 1998), in support of their respective positions. That case involved the “supplementation” of existing regular bus runs with “shuttle runs” to the Vo-Tech center. Grievants contended that discrimination resulted when the additions to their own runs were not considered extracurricular, while other drivers who had mid-day Vo-Tech runs received separate contracts and

compensation. However, the distinction in Dillon, supra, was that Grievants' Vo-Tech runs occurred *in conjunction with* their morning and afternoon regular runs, while the drivers with extracurricular runs were "compensated separately because they have agreed *to return to duty in the middle of the day* after being released from their duties until time to begin their afternoon bus run." (Emphasis added.) This reasoning was based, in part, upon a prior decision which determined that a board of education "has discretion to combine shuttle runs between schools with home-to-school, or school-to-home, runs in order to create a regular, full-time service personnel Bus Operator position. " Id. (citing Conner v. Barbour County Bd. of Educ., Docket No. 92-01-191 (Feb. 26, 1993). Likewise, it was recognized in Roush v. Jackson County Board of Education, Docket No. 95-18-020 (May 25, 1995), that an addition to either an operator's usual morning or afternoon run is different from amid-day vocational school shuttle run.

Although Respondent contends that the above-cited cases support its prerogative to "combine" Grievant's Vo-Tech run with his other runs, the undersigned must disagree. The evidence clearly established that Grievant concludes his morning run, is on his own time for approximately three hours, then returns to work to perform the first part of his Vo- Tech run. This is exactly the type of situation discussed in Dillon, supra, where a bus operator returns to work in the middle of the day, during what would otherwise be his own time, to perform bus driving duties, constituting extracurricular work. Because other bus drivers who do not have Vo-Tech runs do not work during the mid-day hours, Grievant's Vo-Tech run occurs at a time "other than regularly scheduled working hours", as defined in W. Va. Code § 18A-4-16. If Grievant's Vo-Tech run occurred immediately or shortly after his regular morning run, the situation would be quite different and more analogous to that discussed in Conner, supra.

Grievant contends that he was entitled to the one-seventh of regular salary rate set forth in W. Va. Code § 18A-4-8a for his extracurricular duties. Unfortunately, that provision applies only to "extra duty" assignments, which are irregular occurrences such as field trips, sporting events, and other similar events. See W. Va. Code § 18A-4-8b. Rather, Grievant would be entitled to the current rate of pay which Respondent pays for similar extracurricular bus runs. In addition, since Grievant performed the extracurricular portion of his contract this past school year, he must retain the option of continuing it in the current school year. See W. Va. Code 18A-4-16(6). If so, Grievant and Respondent must enter into a separate contract regarding his Vo-Tech run and compensation for it.

Grievant is correct in his contention that he should not have been required to acceptan extracurricular assignment in conjunction with his regular contract. W. Va. Code § 18A- 4-16 provides that not only must an employee's regular contract be separate from his extracurricular contract, but that the regular contract “shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment.” That is exactly what occurred in this case, so Grievant must be provided the option of resigning the extracurricular portion of his duties while retaining his regular contract of employment.

Finally, Grievant contends that his extracurricular duties have resulted in his working over eight hours per day since the beginning of his assignment, entitling him to overtime pay. However, Grievant is attempting to include his morning “free time” as working hours. Grievant's total driving time, plus one hour for pre-trip and post-trip inspections, totals less than six hours. Even if his “captive time” spent at the Elkins bus garage between his Vo- Tech runs is included, he still is not working over eight hours during any work day, so he is not entitled to overtime pay.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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-4-16 defines extracurricular assignments as “any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring forthe needs of students, and which occur on a regularly scheduled basis.”

3. When a bus operator must return to work in the middle of the day to perform a shuttle run to a vocational technical center, during hours when drivers do not normally work, these duties are extracurricular. See Dillon/Vance v. Cabell County Board of Education, Docket No. 97-06-570 (May 29, 1998).

4. Grievant's vocational technical run was an extracurricular assignment and should have been

contained in a separate contract, pursuant to mutual agreement of Grievant and the Board. W. Va. Code § 18A-4-16.

5. Grievant was not entitled to the compensation set forth in W. Va. Code § 18A-4-8a for extra duty assignments.

6. Grievant has not been required to work in excess of eight hours per day or 40 hours per week, so he is not entitled to overtime pay.

Accordingly, this grievance is **GRANTED IN PART** and Respondent is **ORDERED** to compensate Grievant at the applicable rate of pay for extracurricular bus runs, if it has one, retroactive to the date he began performing the assignment. In addition, Grievant must be allowed the option to resign only the extracurricular portion of his assignment. If Grievant wishes to retain the assignment, Respondent must enter into a contract with Grievant for those duties, setting forth the terms and conditions of the assignment and salary. All other relief is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to theCircuit Court of Randolph 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 25, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge