KAREN RICHARDSON,

Grievant,

v. Docket No. 98-40-133

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Karen Richardson against Respondent Putnam County Board of Education, on or about February 23, 1998. Grievant alleges a violation of W. Va. Code § 18-29-2(m) occurred when, on February 10, 1998, Transportation Director Cecil Dolan,

> informed Phyllis Bays (Hurricane Bus co-ordinator) that 10 min[ute]s will be added to the arrival times of the drivers. Feb. 11, 1998 Mr. Dolin informed Mrs. Bays that the added 10 minutes would only apply to Karen Richardson's arrival time. With this decision, Mrs. Richardson is unable to take 4:00 extracurricular trips that she previously had taken. This decision is unethical, unconstitutional and discriminating to Mrs. Richardson.

The grievance form also alleged a violation of the state transportation regulations, but this claim was withdrawn at Level II. Grievant had been able to accept extra-curricular bus runs which were scheduled to begin at 4:00 p.m., or later, but now is able to accept extra-curricular bus runs whichbegin at 4:15 p.m., or later. As relief, Grievant sought compensation for extra-curricular trips she had lost due to this Mr. Dolin's action, plus interest, and that his directive be reversed. (See footnote 1)

The following Findings of Fact necessary to the decision reached, are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Putnam County Board of Education ("PBOE") as a regular bus operator, assigned to the Hurricane area.

2. The policy applied by the area bus coordinator for the Hurricane area, Phyllis Bays, is that each bus operator determines what time he or she is available to make extra-curricular bus runs, using his or her own watch, and reports this to Ms. Bays. Ms. Bays assigns extra-curricular runs to bus operators who complete their afternoon bus runs close to the scheduled departure time for the extra-curricular run.

3. Robert Taylor, a bus operator for PBOE, and four other bus operators filed a grievance complaining that Grievant had incorrectly reported the time she was available for extra- curricular runs as 4:00 p.m.

4. As a result of that complaint, between January 28 and March 6, 1998, Transportation Director Cecil Dolan rode Grievant's bus three times, and recorded her return to the bus parking garage behind Hurricane High School after her afternoon run as being after 4:00 p.m., by his watch. Mr. Dolin advised Ms. Bays that Grievant was not available to make afternoon extra-curricular bus runs until 4:15 p.m. He also advised Ms. Bays that Grievant needed ten minutes to relax between her afternoon run and extra-curricular runs.

5. No other PBOE bus operator is required to take ten minutes to relax between his or her afternoon run and extra-curricular runs.

6. Grievant arrives at the bus parking garage behind Hurricane High School each day at 4:00 p.m., or a couple of minutes after, by her watch. Grievant arrives in time to make 4:00 p.m. extra-curricular runs, based upon how Ms. Bays assigns them to all bus operators.

7. Other bus operators have used Grievant's bus to make extra-curricular bus runs which are scheduled for 4:00 p.m.

8. Robert Taylor reported to Ms. Bays that he is available for 4:15 p.m. extra-curricular runs, but he does not arrive at the bus parking garage behind Hurricane High School until 4:17 p.m., or later. Mr. Dolan has observed this, but his arrival time has not been changed by Mr. Dolan or anyone else, because a grievance has not been filed regarding Mr. Taylor. Mr. Taylor is allowed to make extra-curricular bus runs which are scheduled for 4:15 p.m.

9. Grievant was available to make two extra-curricular runs which began at 4:00 p.m., after Mr. Dolin changed her availability to 4:15 p.m., but was not allowed to make these runs. On both occasions the substitute who made the run arrived at Hurricane High School after Grievant returned from her afternoon run. One of the trips was on February 12, 1998, from Hurricane Middle School to

Point Pleasant, which departed at 4:10 p.m. She lost 13 3/4 hours of wages. (See footnote 2)

Discussion

The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant charges she is being discriminated against. Respondent argued that the issue was whether Grievant was available to make extra-curricular runs at 4:00 p.m. While Mr. Dolin's suggestion that bus operators have some down time between the end of their afternoon runs and extra-curricular runs seems reasonable, and may not be contrary to law, that is not the issue in this grievance. The issue is whether this new practice has been applied in a discriminatory manner.

W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

In order to establish a prima facie case of discrimination, a grievant must prove:

> (a) that she is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment been treated by her employer in a manner that the other employee(s) has/have not in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext." Id.

It is clear from the evidence that the policy PBOE has in place for all drivers in the Hurricane area,

except Grievant, is that applied by Ms. Bays. Her policy is that drivers use their own watches to determine what time they finish their afternoon runs, they report that time to her, and as long as they finish their afternoon runs close to the time the extra-curricular run is to depart, even if that is a few minutes after the scheduled departure time, they are considered available to take the extra-curricular run. Grievant, however, is required to report her time according to Mr. Dolin's watch, and then add ten minutes down time. Grievant has proven her claim of discrimination.

PBOE's only excuse for this discriminatory treatment is that someone filed a grievance about Grievant taking 4:00 p.m. extra-curricular runs, and no one had filed a grievance about any other bus operator taking extra-curricular runs. Respondent asserted that Mr. Dolin would investigate any such complaint made by any driver. No evidence was presented that this action was taken to settle a grievance. If it were a settlement, however,

> "The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation; it is the policy of the law to uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy." McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (W. Va. 1994).

Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). A settlement which discriminated against Grievant in this manner without her consent would not be fairly made, and would be in contravention of W. Va. Code § 18-29-2(m). See Dawson v. Cabell County Bd. of Educ., Docket No. 97-06-272 (Oct. 14, 1997). Respondent's policy is to change its policy regarding who can make extra-curricular runs on a case-by-case complaint only basis. If no one complains, then a bus operator may continue to accept extra-curricular runs at a particular time, even though he completes his afternoon run at or shortly after the scheduled extra-curricular departure time, so long as no one complains about it, but Grievant is precluded from this practice. This practice is discriminatory.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure,

as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

3. A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that she is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant established a prima facie case of discrimination by establishing that she was not allowed to make extra-curricular bus runs at 4:00 p.m., because she completed her afternoon run at 4:00 p.m., or a few minutes after, while other bus operators were allowed to make extra-curricular runs when they completed their afternoon runs at or shortly after the scheduled departure time for extra-curricular runs.

5. Once a prima facie case of discrimination has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Steele, supra.

6. Respondent failed to present a "legitimate, nondiscriminatory reason" for discriminating against Grievant.

Accordingly, this grievance is **GRANTED**. Respondent Putnam County Board of Education is **ORDERED** to allow Grievant to report her own ending time for her afternoon bus run using her own clock, just as every other bus operator is allowed to do, and to accept extra-curricular runs which begin at or shortly before the ending time for her afternoon run, consistent with Ms. Bays' policy for

all bus operators, and to compensate her for 13 3/4 hours for the two extra-curricular runs she lost, plus interest.

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.

_____

BRENDA L. GOULD

Administrative Law Judge

Dated: July 30, 1998

Footnote: 1

The record does not reflect what occurred at Level I. Grievant appealed to Level II on February 23, 1998. A Level II hearing was held on March 25, 1998, and the grievance was denied at Level II on April 22, 1998. Grievant bypassed Level III, appealing to Level IV on April 24, 1998. A Level IV hearing was held before the undersigned Administrative Law Judge on June 15, 1998. Grievant was represented by Susan Hubbard, and Respondent was represented by James Withrow, Esquire. This matter became mature for decision at the conclusion of the Level IV hearing.

Footnote: 2

Grievant alleged she had been denied the opportunity to make other extra-curricular runs, but did not identify how many, or their duration.