JOETTA HATFIELD,

Grievant,

v. **Docket No. 99-50-129**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Joetta Hatfield (Grievant), an Itinerant, Transportation, Classroom, Special Education Aide employed by Respondent Wayne County Board of Education (WCBE), filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that her schedule was changed, during the school year, without her written consent.

The grievance was denied at Level I by Principal Barry J. Scragg, on or about February 17, 1999. (See footnote 1) The grievance was advanced to Level II, where an evidentiary hearing was conducted on March 10, 1999. Grievant was represented at this hearing by Kathleen W. Smith of the West Virginia Education Association, and WCBE was represented by Michael E. Ferguson, Director of Federal Programs for WCBE. The grievance was denied at Level II, by Director of Personnel James Ross, on March 24, 1999. There is no record of any proceedings at Level III.

The parties agreed that this grievance could be submitted at Level IV based on the record developed at the lower levels. The parties were given until May 26, 1999, to submit proposed findings of fact and conclusions of law, and this matter became mature for decision on that date.

The following Findings of Fact have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by WCBE as an Itinerant, Transportation, Classroom, Special Education Aide at Tolsia High School (THS).

2. Until December 10, 1998, Grievant reported to THS at approximately 7:45 a.m. and departed at approximately 2:55 p.m. each day.

3 Grievant's daily schedule was changed as needed during previous school years, within the confines of her 7:45 to 2:55 workday. Grievant did not contest these changes.

4. In November of 1998, T, (See footnote 2) a special education student, transferred to THS. T. required full-time assistance.

5. Grievant was assigned to assist T. and, on December 10, 1998, during the school year, her schedule was changed. Grievant was directed to report to work at the home of a bus operator, at 6:45 a.m., ride the bus with T. to THS, assist T. for most of the school day, ride with T. on the bus trip home, and end her work day at the bus operator's home at approximately 3:55 p.m.

6. Because Grievant was absent from work on medical leave, she first worked this new schedule on January 18, 1999.

7. Grievant did not agree, in writing or otherwise, to this new schedule.

8. WCBE pays Grievant two hours of overtime pay daily for her increased hours.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant alleges a violation of W. Va. Code § 18A-4-8a(7), in that her daily work schedule was changed without her written consent. W. Va. Code § 18A-4-8a(7) states: "[n]o service employee may have his or her daily work schedule changed during the school year without the employee's written consent[.]" See Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-324 (Apr. 3, 1990). She seeks to return to the schedule in effect before December 10, 1998.

WCBE responds by arguing that Grievant is doing the job for which she was hired; that she knew what she was getting into; that she is being paid overtime; that the principal of THS may require any schedule changes necessary for THS to meet state requirements regarding special education students, and that its changes to Grievant's schedule are minimal.

The record reflects that Grievants' daily work schedule was changed, during the school year, from

one of 7:45 a.m. to 2:55 p.m. each day, to one of 6:45 a.m. to 3:55 p.m. each day, an increase of two hours, to accommodate the special needs of T. Grievant was also required to begin and end her work day at the home of a bus operator, rather than at THS.

WCBE is correct that scheduling Grievant is within the statutory authority of THS'principal. Principals “shall supervise the management and operation of the school or schools to which they are assigned. . . the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which they are assigned.” W. Va. Code § 18A-2-9. See Myers/Cain v. Wetzel County Bd. of Educ., Docket No. 94-52-325 (Oct. 27, 1994); Holloway v. Ohio County Bd. of Educ., Docket No. 91-35-028 (Oct. 9, 1991).

However, this scheduling authority does not permit a principal to make substantial changes to Grievant's schedule, during the school year, without her written consent. This issue has been considered by this Grievance Board many times, most frequently in the context of bus operators who, like Grievant, are itinerant service employees. The rule of thumb that has developed on this issue is that slight modifications, particularly near the beginning of a school year, are permissible. Substantial changes, generally being the addition of significant time or distance, are not. See Conner v. Barbour County Bd. of Educ., Docket No. 93-01-543/544 (Jan. 31, 1995). These determinations are made on a fact-specific, case-by-case basis. Sipple v. Mingo County Bd. of Educ., Docket No. 95-23- 421 (Mar. 27, 1996).

Impermissible changes include the addition of one hour and 45 minutes to a bus operator's schedule, Runyon/Skeens v. Lincoln County Bd. of Educ., Docket No. 97-22- 479 (Feb. 6, 1998); the addition of 45 minutes, Id; the addition of about an hour, Bryant v. Raleigh County Bd. of Educ., Docket No. 96-41-451/452 (Dec. 2, 1997); the addition of approximately 30 minutes, Harper v. Jackson County Bd. of Educ., Docket No. 92-18-071 (June 9, 1992); and the addition of approximately 35 minutes. Froats v. Hancock County Bd. of Educ., Docket No. 89-15-164/202 (Aug. 31, 1989).

Accordingly, the undersigned administrative law judge finds that the alteration of Grievant's daily work schedule by two hours, made approximately four months into the school year, is a substantial one, and not a minimal alteration, as WCBE contends. Because WCBE produced no document purporting to be Grievant's written consent to this alteration, Grievant has met her burden of proof.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving her 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

2. Scheduling aides is within the statutory authority of a principal. Principalssupervise the management and operation of the school or schools to which they are assigned. Principals have administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which they are assigned. W. Va. Code § 18A-2-9; Myers/Cain v. Wetzel County Bd. of Educ., Docket No. 94-52-325 (Oct. 27, 1994); Holloway v. Ohio County Bd. of Educ., Docket No. 91-35-028 (Oct. 9, 1991).

3. No service employee may have his or her daily work schedule changed during the school year without the employee's written consent. W. Va. Code § 18A-4- 8a(7).

4. Grievant's daily work schedule was substantially, and not minimally, changed during the school year without her written consent.

Accordingly, this grievance is **GRANTED,** and Respondent Wayne County Board of Education is **ORDERED** to restore Grievant's pre-December 10, 1998, daily work schedule.

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

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated June 2, 1999

Footnote: 1

Due to confusion concerning the proper grievance form to use, Grievant completed several different ones, and the date of the denial of her grievance at Level I varies.

Footnote: 2 *The student involved in this matter has been identified only by an initial, consistent with this Board's practice of respecting the privacy of individuals in such circumstances. See, e.g., Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55- 379 (Mar. 10, 1999); Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998); Jones v. W. Va. Dep't of Health & Human Resources, Docket No.96-HHR-371 (Oct. 30, 1996); Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994).*