DONA GASTON,

Grievant,

v. **Docket No. 98-15-366**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Dona Gaston (Grievant) initiated this grievance on May 4, 1998, alleging that the discipline she received for an incident which occurred in May of 1997 was discriminatory, because another employee, under similar circumstances in May of 1998, did not receive any discipline at all. As relief, she seeks reimbursement of the three days of pay she lost during the suspension. After a timely response was not received at level one, Grievant appealed to level two on June 12, 1998. A level two hearing was held on July 24, 1998, followed by a decision denying the grievance dated August 31, 1998. Level three consideration was waived, and Grievant appealed to level four on September 21, 1998. After several continuances granted for good cause shown, a level four hearing was held on March 1, 1999, in the Grievance Board's office in Wheeling, West Virginia. Grievant was represented by counsel, John Roush, and Respondent was represented by counsel, William Fahey. This matter became mature for consideration on April 1, 1999, upon receipt of the parties' fact/law proposals.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence of record.

Findings of Fact

1. Grievant is employed by the Hancock County Board of Education (HCBOE) as a bus operator.

2. On May 27, 1997, Grievant was suspended for three days without pay, because she refused to transport a handicapped student assigned to her bus, about whom Grievant had complained to the transportation supervisor. (See footnote 1)

3. On the day in question, the handicapped child was present at the school in the designated area to be picked up. The principal was with the child and directed Grievant to transport the child home, which she refused to do.

4. Grievant did not file a grievance regarding her suspension in 1997.

5. On April 24, 1998, bus operator Tom Falter arrived at school at the designated afternoon time to transport students home. He left the school at the same time all the other buses did, and several students failed to get on his bus. (See footnote 2)

6. After Mr. Falter had left the school, the school principal called HCBOE's central office to request that Mr. Falter return to pick up the students.

7. Upon his return to the garage, Mr. Falter was informed by the head mechanic that a secretary from the central office had relayed a message that the principal wanted the students picked up.

8. Mr. Falter did not return to the school to retrieve the students. 9. No one in a position of authority over Mr. Falter ordered him to return to the school for the students.

10. It is HCBOE policy that, while on school grounds, a school principal has the authority to give orders or directives to bus operators.

11. Mr. Falter was orally counseled by his supervisors regarding the incident, but he was not suspended.

Discussion

Because Grievant is only alleging that her punishment became discriminatory after Mr. Falter's incident occurred, this is not a disciplinary action. In a non-disciplinary matter, a grievant must prove the allegations of her complaint 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. HCBOE contends that there was no discrimination, because the two situations were different, one involving the direct refusal to transport a student and the other involving tardy students who were not at the designated area at the proper time.

A preliminary issue raised by Respondent is timeliness. It contends that Grievant had fifteen days

from the imposition of her suspension to file a grievance, and after not doing so, she was prohibited from grieving it approximately one year later. Grievant argues that the suspension did not become discriminatory until the incident involving Mr. Falter occurred and no discipline resulted. Timeliness is an affirmative defense. The burden of proving the affirmative defense by a preponderance of the evidence, is upon the partyasserting the grievance was not timely filed. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

W. Va. Code § 18-29-4(a)(1) provides that a grievance must be initiated at level one “within fifteen days following the occurrence of the event upon which the grievance is based.” In the instant case, the dispute is what was the “event” which gave rise to the grievance. While Respondent contends that it is Grievant's suspension she is attempting to grieve, Grievant argues that it is the alleged discriminatory treatment given to Mr. Falter, which caused her to file this grievance.

The remedy Grievant is requesting is that her suspension be removed from her record and that she be reimbursed for the three days of pay she lost. Accordingly, she is grieving her suspension, which was implemented on May 27, 1997. The filing of this grievance almost one year later was clearly untimely. At the time the discipline was instituted, Grievant had the opportunity to file a grievance, which she chose not to do. (See footnote 3)

Although this grievance may be denied on the issue of untimeliness alone, Grievant has also failed to prove her claim on the merits. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to inwriting by the employees." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his 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 responsibilities of the grievant and/or

other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Grievant has not demonstrated a prima facie case of discrimination, because she and Mr. Falter were not involved in similar situations. Grievant refused to transport astudent who was at the designated area at the proper time, waiting to be picked up, after she was told do so by the principal. Grievant testified that the child was, indeed, assigned to her bus, although she had requested that he be reassigned. (See footnote 4)

Conversely, although Grievant argues to the contrary, Mr. Falter did not refuse an order to transport students assigned to his bus. He was at the school at the appropriate time, and he did not leave until the other buses did, which was actually delayed by several minutes that day, due to a problem on another bus. Therefore, the students in question had more than ample opportunity to board the bus. In addition, Mr. Falter was never directed to go back to pick up the students. He was merely given a message which came from a secretary, stating that the principal had requested that Mr. Falter return. Dr. Chandler, HCBOE Superintendent, testified that it was within Mr. Falter's authority to refuse such a request, which did not come from anyone in a supervisory position with supervisory authority over him.

Accordingly, Grievant has not established a prima facie case of discrimination. Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations of her complaint 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. A grievance must be filed within fifteen days of the occurrence of the event upon which it is based. W. Va. Code § 18-29-4(a)(1).

3. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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."

4. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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 responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), at15.

5. Grievant did not establish a prima facie case of discrimination, because she was not similarly situated to Mr. Falter under the circumstances presented in this case.

6. Respondent has proven by a preponderance of the evidence that this grievance was not timely filed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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: April 19, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently this child had a problem related to soiling himself, and others on the bus complained about the odor. The child was also unable to communicate.

Footnote: 2

The testimony was conflicting as to why the students did not board the bus. One witness stated that they were at the boarding area, but, because they were fighting, they did not get on the bus. Another stated that they were not at the boarding area at all.

Footnote: 3

Obviously, Grievant has not attempted to seek discipline against Mr. Falter as a remedy, because of this Grievance Board's prior holdings that we do not have the authority to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

Footnote: 4

Grievant is prohibited from placing the merits of her own disciplinary situation in issue, because she did not grieve it. Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997); Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96- HHR-371 (Oct. 30, 1996).