HAROLD W. SCOTT,

Grievant,

v. DOCKET NO. 00-33-157

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Harold W. Scott (Grievant), is employed by Respondent, McDowell County Board of Education (MCBE), as a bus operator. Grievant alleges that MCBE improperly transferred him. On April 27, 2000, this grievance was jointly waived to Level II, where it was denied on May 24, 2000, by MCBE Superintendent J. Kenneth Roberts (Roberts). The record does not reflect any proceeding at Level III.

A Level IV hearing was held on July 28, 2000, (See footnote 1) and January 26, 2001, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by John Roush, Esq., and MCBE was represented by Danny W. Barie, Esq. The parties were given until February 28, 2001, a date later extended to March 5,2001, by agreement of the parties, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date.

FINDINGS OF FACT

1. Grievant is employed by MCBE as a bus operator.
2. A report for the 2000 - 2001 school year showed that MCBE had 21.356 extra service personnel.
3. As part of an effort to reduce service personnel, MCBE decided to reduce three bus runs in Grievant's area to two, by eliminating his run.
4. By letter of March 2, 2000, MCBE placed Grievant on its transfer and subsequent

assignment list.

5. One of the two bus operators retained by MCBE to drive the two remaining bus runs had less seniority than Grievant.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. 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, DocketNo. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant contends that he was subjected to discrimination and retaliation when MCBE eliminated his bus run. (See footnote 2) MCBE responds that it had to cut service personnel positions; that Grievant's run was somewhat redundant and was the logical run to cut in his area; and denies that Grievant was subjected to discrimination.

W. Va. Code § 18-29-2(m) defines discrimination 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 he is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and
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> (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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Id.

Grievant has failed to establish a prima facie case of discrimination. He was similarly situated, in a pertinent way, to other MCBE bus operators subject to transfer in order to reduce MCBE's excess number of service employees, and was, to his detriment, treated by MCBE in a manner that the other employees were not, by being placed on MCBE's transfer and subsequent assignment list. However, MCBE established, by a preponderance of the evidence, that his different treatment was related to his actual job responsibilities.

The credible testimony of Roberts established that MCBE had to cut service personnel positions; that MCBE has authority to determine which service personnel to cut; that Grievant's run was somewhat redundant and was the logical run to cut in his area because the two runs that were not cut can pick up all of his students, and that the reverse is not true; that cutting Grievant's run was the least disruptive action MCBE could take in the situation; and that transfers such as Grievant's are not controlled by seniority.

MCBE is correct that transfers such as Grievant's are not controlled by seniority. Transfers of school service personnel are governed by W. Va. Code § 18A-2-7, which provides, in pertinent part: “[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . . . “ The power to transfer employees must be exercised reasonably and in the bests interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. TylerCounty Bd. of Educ., 166 W.Va. 363, 275 S.E.2d 908 (1980). Nothing in Code § 18A-2-7, nor anywhere else in that chapter, speaks to the use of seniority as a basis in determining which employees shall be transferred. Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997).

Grievant argued that one of the two bus operators not transferred by MCBE was a more suitable candidate for transfer than Grievant because that driver “deadheads,” or drives without passengers, a

much greater distance each day than Grievant does. However, the evidence showed that Grievant deadheads less than the other driver because he parks his bus at his home, as a courtesy of MCBE, and so does not have to drive his bus between the Welch bus garage and his first and last stop each day. Grievant's deadheading argument failed to establish that MCBE acted arbitrarily or capriciously in selecting him for transfer. State ex rel. Hawkins, supra.

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

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. 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. W. Va. Code § 18-29-2(m) defines discrimination 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 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) 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Id.

4. Grievant failed to establish a prima facie case of discrimination because his different treatment was related to his actual job responsibilities.

5. Transfers of school service personnel are governed by W. Va. Code § 18A-2-7, which provides, in pertinent part: "[t]he superintendent, subject only to approvalof the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . . . " 6. The power to transfer employees must be exercised reasonably and in the bests interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W.Va. 363, 275 S.E.2d 908 (1980). 7. W. Va. Code § 18A-2-7 does not require the use of seniority as a basis in determining which employees shall be transferred. Eckenrode v. Kanawha County Bd' of Educ., Docket No. 96-20-302 (Jan. 22, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell County. Any 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: March 7, 2001

Footnote: 1

The parties announced a tentative settlement of this grievance at this hearing. That agreement later collapsed.

Footnote: 2

One of the two grievance forms completed by Grievant alleged that he was the victim of retaliation for a previous grievance against MCBE, Scott v. McDowell County Bd. Of Educ., Docket No. 99-33-112 (July 19, 1999). Grievant did not pursue his retaliation claim at Level IV, and it is deemed abandoned.