WENDY KESTER,

Grievant,

v. **Docket No. 02-40-133**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Wendy Kester, filed this grievance against her employer, the Putnam County Board of Education ("PBOE"), on February 25, 2002. The statement of grievance reads:

> Violation of WV Code 18-29-2 section m, discrimination and section o favoritism with regard to position of bus monitor to coordinator. Job description was changed, but duties are the same. Grievant's salary lower. Violation of WV Code 18A-4-8b with regard to non-posting of bus operator trainers. Issue of equal pay.

The stated relief sought was “compensation for years as trainer and that bus operator trainer positions be posted. Seek that all discrimination and favoritism cease.”

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. Grievant has been employed by PBOE as a bus operator for 22 years.

2. In 1993 Grievant bid on a posted bus area monitor position. PBOE had decided that area monitors would also serve as bus operator trainers. Grievant was awarded the area monitor position based upon her seniority with the county. She was paid $150 per month plus an additional $2.00 for certain bus operators in her area, for her work as an area monitor. She was not paid any additional amount for training bus operators. All area monitors were paid the same rate.

3. Sometime in 1998, Grievant began receiving additional pay in the amount of one-eighth of her daily rate of pay (See footnote 2) when she trained bus operators at night. She was also paid

when she trained bus operators during the summer. She received no additional pay for training bus operators during regular work hours.

4. At some point PBOE started referring to bus area monitors as bus area coordinators. Grievant resigned her position as area coordinator in March of 1999, after another bus operator, Tony Clark, filed a complaint about her with Cecil Dolan, who was the Director of Transportation at that time. Grievant felt forced to resign because the bus operators were continually complaining about her, and put so much stress on her, and Mr. Dolan would not correct the problem to her satisfaction. Mr. Dolan asked Grievant to continue to serve as a trainer, and she agreed to do so. She is still a bus operator trainer.

5. The area coordinator position vacated by Grievant was posted as an area coordinator, and was awarded to Mr. Clark in 1999. Grievant did not apply for the position. Mr. Clark was paid the same amount Grievant had been paid.

6. John Cunningham was hired by PBOE in late 2000 or early 2001 as Director of Transportation and Special Services. He found there was no policy in place, approvedby PBOE, for paying area coordinators. He brought this to the attention of his supervisors, and a proposed policy setting the rate of pay for area coordinators was presented to PBOE. PBOE approved the policy, which increased the pay for area coordinators, in December 2001.

7. By 2001, Grievant was the only bus operator trainer. Mr. Cunningham decided PBOE should have additional bus operator trainers. The most senior bus operators in the county were offered this opportunity, and Roger Doneff and John Hathaway agreed to become trainers. Both have several more years of seniority as bus operators than Grievant.

8. The bus operator trainers are paid one-eighth of their daily rate of pay as bus operators, exclusive of supplemental runs, for the time they spend in their training duties. Bus operator pay is dependent upon seniority in the county, and education. The rate of pay is based upon past county practice. Mr. Doneff is paid at the rate of $16.39 per hour, Mr. Hathaway is paid $18.18 per hour, and Grievant is paid $14.05 per hour.

9. In order to become a bus operator trainer, one must complete a three-day course offered by the State Department of Education, and receive a certificate.

10. The three bus operator trainers provide 30 hours of classroom instruction to potential bus operators, in the evenings, and 18 hours of hands-on training, on school buses, to each student

driver when they have time to do so, on an as needed basis. If there are no drivers to be trained during any given time period, then the bus operator trainers do not provide any training, and do not get paid. Each trainer presents a portion of the classroom instruction, although all three are on hand during the entire 30-hour training period. Each trainer provides each trainee six hours of hands-on training. When Mr. Doneff and Mr. Hathaway first began working as trainers, the hands-on portion of the training was not divided equally among the trainers, but Mr. Cunningham corrected this. 11. Mr. Cunningham approached Grievant at the bus garage and told her he needed all of her bus operator training materials. Grievant told him, “[n]o, you're not getting it.” Mr. Cunningham told her she had no choice, and she responded she did have a choice, he was not getting the materials, and she would burn them first. Sometime later Grievant asked Mr. Cunningham why he needed her training materials and he explained he needed them for a lawsuit, and that he would need a trainer to go to court. Mr. Cunningham then told her she had been insubordinate when she refused to turn over her training materials, that those materials belonged to the board, and she could be fired for insubordination.

DISCUSSION

Grievant bears the burden of proving each element 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 complained about several matters during the course of this grievance. Many of the matters about which she complained occurred several years ago, although Respondent did not raise a timeliness defense.

The first area about which Grievant complained was the increase in pay received in December 2001 by area coordinators. Grievant stated she would have bid on the area coordinator position she had vacated had she known the pay was going to increase. She believed all the area coordinator positions should have been posted when the salary was increased in December, 2001. As support for this proposition, she pointed to the fact that the job description for area coordinator was changed in July 2001, although the record does not reflect what changes were made at that time. She also felt the position was taken away from her, because other bus operators were always questioning her actions, and being mean to her, and Mr. Dolin did not make them stop.

Grievant also claimed discrimination and favoritism in the amount of pay she received as an area

coordinator, although she stated at the Level II hearing that she wasnot seeking any back pay for her work as an area coordinator from 1993 through 1999, and such relief was not stated on the grievance form. She stated she thought the area coordinators were being paid too much.

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.

W. Va. Code § 18-29-2(o) defines favoritism as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

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

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
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> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v.

Burdine, 450 U.S. 248 (1981); Frank's Shoe Storev. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant resigned her position as area coordinator in March of 1999. Although Grievant claims she was referred to as an area monitor at that time, her resignation letter says she is resigning as area coordinator. Her former position was posted as an area coordinator position, and Mr. Clark was placed in the position in 1999. Mr. Clark was paid the same rate of pay as Grievant had received, as were all the other area coordinators at the time. In December 2001, over two and a half years later, PBOE increased the rate of pay for area coordinators. All area coordinators now receive this higher rate of pay. The fact that Grievant did not receive this higher rate of pay when she was an area coordinator several years ago is neither discrimination or favoritism. While PBOE apparently had not adopted a policy approving the rate of pay for area coordinators prior to December 2001, this does not mean Grievant should have been paid at this new approved rate over two and a half years earlier.

Grievant did not cite any support for the proposition that the bus area coordinator positions should have been posted when the salary was increased, and the undersigned has found no such requirement. A change in salary does not create a new position or change the position in such a way that posting is required. It is clear from the record that the position was not changed from bus area monitor to bus area coordinator in December 2001, as is noted in the statement of grievance. That change in title had already occurred by the time Grievant resigned.

It is unfortunate that some of the bus operators did not get along with Grievant when she was an area coordinator, were mean to her, made her cry, and complained so much about her that she felt compelled to resign. The undersigned is not sure what Grievant thought Mr. Dolin should have done to help her. However, if Grievant would have bid on the position she vacated had she known the salary was going to increase as she stated,she likewise would have never resigned had she known the salary was going to increase, which brings into question her claim that she was forced to resign. Apparently, she was willing to put up with some grief from the other bus operators if the price was right. The undersigned cannot conclude from the evidence presented that it would be appropriate to let Grievant have her job back three and a half years after she resigned, now that PBOE is paying area coordinators more money.

The second area which will be addressed is Grievant's argument that the bus operator trainers

should all be paid the same amount of money, rather than being paid one-eighth of their daily rate, which results in the other two trainers being paid more than Grievant due to their seniority and education. Grievant cited no support for the proposition that the trainers should all be paid the same. Grievant argued the trainer positions should be posted, because if the positions were posted, all the trainers would be paid the same amount per hour.

The arguments of the parties lend no guidance to the undersigned on this issue. Grievant has not demonstrated a violation of any law, policy, rule, or regulation with regard to the method used by PBOE for paying trainers. As this Grievance Board has previously pointed out, “bus operator trainer” is not a position defined by W. Va. Code § 18A-4-8, nor is it an extracurricular assignment.

> In this case, it is clear that the bus operator trainer assignment in question is not a classified service position. Neither is the trainer position an extracurricular assignment pursuant to Code §18A-4-16, since a trainer works "as needed" and the trainer's duties do not "occur on a regularly scheduled basis," such as those defined by the statute. Under Code §18A- 4-16, an extracurricular assignment must have a clearly defined number of hours per school year. Thus, Grievant had no entitlement to the trainer's job under the seniority-based statutes she cited, or under any other statute relative to the employment of school service personnel.

Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1108 (July 18, 1996)(footnotes omitted). See also, Byrd v. Cabell County Bd. of Educ., Docket No. 97-16-071 (July 10, 1997). The assignment likewise is not an extra-duty assignment. Accordingly, the statutes governing how PBOE is to pay service personnel are not applicable to a bus operator trainer. PBOE has chosen to pay the trainers at an hourly rate, and that rate is based upon their daily rate as bus operators; which varies from bus operator to bus operator, depending upon seniority and education. This is the same rate PBOE has been paying trainers since 1998. Grievant argued she should be paid based upon her seniority as a trainer, however, she cited no authority for this proposition. PBOE pointed out that both Mr. Cole and Mr. Hathaway have provided hands-on training to many drivers over the years, even though they were not the official “trainers,” and Mr. Hathaway has some expertise in teaching, having received a degree in education and a Masters Degree in Education Administration, and in addition to his experience teaching school for several years. The undersigned cannot find anything illegal, unreasonable, or discriminatory in the method of compensation.

The next area is Grievant's claim for back pay to 1993 for training bus operators. It is clear that Grievant agreed to perform this service for PBOE without any promise of or expectation that she

would be paid anything above and beyond the amount she received as an area coordinator. Grievant has not demonstrated she was entitled to receive additional compensation.

Finally, Grievant complained that she was threatened by Mr. Cunningham. The nature of Grievant's complaint that she was threatened by Mr. Cunningham when she had refused to turn over her bus operator training materials is not clear. Grievant was concerned that Mr. Doneff was trying to take her training job, and felt Mr. Cunningham should have explained to her why he needed the materials when he asked her for them, although Grievant did not ask him at that time why he needed them. Mr. Cunningham, as a supervisor, told Grievant he needed her training materials; a simple, reasonable request. Grievant responded to Mr. Cunningham in a hostile manner, which Mr. Cunningham did not deserve, for reasons Mr. Cunningham could not understand unless he was a mindreader, and she flat out refused to provide the materials, for no good reason. Showing considerable restraint, Mr. Cunningham did not escalate the situation at that time, and did not discipline Grievant for her refusal. He did make it clear to her later that her behavior was inappropriate, and noted the potential repercussions of such behavior, although he did not document this as a verbal counseling. This was not a threat. It was a supervisor explaining the facts to a subordinate. If anyone has a right to complain about the treatment received, it is Mr. Cunningham, not Grievant.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element 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. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
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> (c) that the difference in treatment has caused a substantial inequity to [him], and that

there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant received the same pay as other bus area monitors or coordinators from 1993 until the time she resigned in 1999. Accordingly, there was no discrimination or favoritism in the amount of her pay as a bus area monitor or coordinator. 4. "Bus operator trainer" is not a position defined by W. Va. Code § 18A-4-8, nor is it an extracurricular assignment.

> In this case, it is clear that the bus operator trainer assignment in question is not a classified service position. Neither is the trainer position an extracurricular assignment pursuant to Code §18A-4-16, since a trainer works "as needed" and the trainer's duties do not "occur on a regularly scheduled basis," such as those defined by the statute. Under Code §18A- 4-16, an extracurricular assignment must have a clearly defined number of hours per school year. Thus, Grievant had no entitlement to the trainer's job under the seniority-based statutes she cited, or under any other statute relative to the employment of school service personnel.

Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1108 (July 18, 1996)(footnotes omitted). See also, Byrd v. Cabell County Bd. of Educ., Docket No. 97-16-071 (July 10, 1997). Likewise, "bus operator trainer" does not fit within the definition of an extra-duty assignment.

5. The statutes governing how PBOE is to pay service personnel are not applicable to a bus operator trainer. PBOE has chosen to pay the trainers at an hourly rate, and that rate is based upon their daily rate as bus operators; which varies from bus operator to bus operator, depending upon seniority and education. This is the same rate PBOE has been paying trainers since 1998. The undersigned cannot find anything illegal, unreasonable, or discriminatory in the method of compensation.

6. Grievant agreed to train bus operators from 1993 to 1998, as part of her duties as a bus area monitor or coordinator, and did so without any promise or expectation of additional compensation. She is not entitled to be paid any additional amount for her training work for this time period.

7. Grievant was not threatened by Mr. Cunningham.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Putnam 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: November 19, 2002

Footnote: 1

The grievance was denied at Level I on March 15, 2002. Grievant appealed to Level II, where a hearing was held on April 9, 2002. A Level II decision denying the grievance was issued on May 8, 2002. Grievant bypassed Level III, appealing to Level IV on May 13, 2002. A Level IV hearing was held on September 23, 2002. Grievant was represented by Susan Hubbard, and Respondent was represented by John A. Grafton, Esquire. This grievance became mature for decision on October 18, 2002, upon receipt of the last of the parties' written arguments.

Footnote: 2

Although Grievant testified she was paid one-seventh of her daily rate, PBOE's records showed she was paid one-eighth of her daily rate.