SHEILA K. HIXENBAUGH,

Grievant,

v. **Docket No. 02-30-260**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sheila K. Hixenbaugh, employed by the Monongalia County Board of Education (MCBE) as a bus operator, filed a level one grievance on May 9, 2002, in which she alleged that extra duty assignments were made in violation of W. Va. Code §§ 18A-4- 8b and 18-29-2 (m). For relief, Grievant seeks compensation for lost wages and cessation of discrimination. The record does not include a level one decision. Following a level two hearing, Assistant Superintendent Sharon Harsh granted the grievance in part and denied it in part. Finding that there were no procedures or criteria to justify the variation in the number of assignments awarded to the drivers, the Transportation Department was ordered to implement procedures to document and verify that the assignments are awarded according to the 1993 alternate procedure approved by the MCBE bus operators. Ms. Harsh found the evidence regarding compensatory payment for any unassigned short trips to be inconclusive.

Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and filed a level four appeal on August 26, 2002. A level four hearing was conducted on October 7, 2002, at which time Grievant was represented by John E. Roush, Esq., of WVSSPA, and MCBE was represented by Kelly J. Kimble, Esq. of Kay Casto & Chaney, at which time additional documentation was submitted for the purpose of establishing Grievant's claim of lost compensation. The matter became mature fordecision upon receipt of proposed findings of fact and conclusions of law on November 18, 2002.

The evidence of record supports the following findings of fact.

Findings of Fact

1. Grievant has been employed by MCBE since 1989, and has held the classification of Bus Operator since 1990.

2. In 1993 MCBE bus operators approved an alternate plan for approving extra- duty trips. The plan provided that extra-duty assignments of less than three hours, referred to as “short trips”:

shall be assigned from the school bus operator's list by the supervisor according to [the] driver's work schedule. Notification of a trip shall be made the day preceding the trip. The supervisor will make an effort to see that all drivers have an opportunity to accept such assignment(s).

Emergency situations involving last minute bookings or a driver's cancellation shall be handled by the supervisor.

3. During the 2001-2002 school year, the short trips were assigned by Transportation Supervisor Duane Prickett according to the drivers' seniority, and their availability, based on the start and end times of their regular morning and afternoon runs. Mr. Prickett also attempted to equalize the number of assignments awarded to each driver by the end of the school year.

4. Grievant's morning run begins at 6:15 a. m., and concludes at 8:40 a. m. Her afternoon run begins at 2:30 p. m., and is completed by 4:15 p.m. During the 2001-2002 school year Grievant additionally held an extracurricular assignment four days per week from 11:30 a. m. until 1:00 p.m. 5. Some bus operators completed only a few short trips during the 2001-2002 school year, while others completed twenty-one such assignments. (See footnote 1)

6. Grievant completed seventeen short trips for which she was compensated forty-four and one-fourth hours.

Discussion

Grievant asserts that the short trips were improperly assigned in violation of W. Va. Code § 18A-4-8b, and as a result of discrimination. MCBE argues that the assignments were made in compliance with an alternative policy adopted by the bus operators. 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 §4.21 (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.

W. Va. Code § 18A-4-8b provides in pertinent part:

(f) Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority inaccepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: **Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.** For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

(Emphasis added).

MCBE has adopted an alternative policy approved by the bus operators for the assignment of short trips. The evidence of record does not establish that the short trips were assigned inconsistently with the policy, i.e., in no specific order, but rather, according to the driver's work schedule.

Neither has Grievant proven her claim of discrimination. 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 demonstrate the following:

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

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

The evidence in this case falls short of establishing a prima facie case of discrimination. More than fifty bus operators completed short trips during 2001-2002. No driver received more than twenty-one assignments, or more than fifty and one quarter hours of work. Grievant completed seventeen short trips for at least forty-four and one quarter hours of work, placing her near the top of the list for the number/hours of short trips completed. Grievant failed to prove any specific harm by identifying short trips she believes she should have received, the amount of compensation she was entitled for lost wages, or that MCBE has treated her in a manner which was detrimental. Furthermore, the relief granted at the lower level may help insure the policy is administered fairly and consistently.

In addition to the foregoing it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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 ofthe 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.

2. Grievant failed to prove that MCBE had made short trip extra-duty assignments contrary to the alternative procedure provided for in W. Va. Code § 18A-4-8b.

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

(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 other

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

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant failed to establish a prima facie case of discrimination by proving that she was treated differently than other bus operator regarding the assignment of short trip, extra-duty runs.

Accordingly, the grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: November 25, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Both parties submitted an Appendix indicating the bus operators and number of short trips they completed during the 2001-2002 school year. The number of assignments attributed to individual operators were frequently not in agreement; however, it would be impractical to ascertain all the variables which ultimately determined the number of short trips an operator completed. It is sufficient to note that more than twenty bus operators completed between fifteen and twenty-one short trips. It is also noted that the assignments varied in length so that a driver could have fewer trips, but actually work more hours than another driver.