DOROTHY PERSINGER,

Grievant,

v. **DOCKET NO. 03-34-065**

NICHOLAS COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

In a grievance filed against Respondent Nicholas County Board of Education on September 25, 2002, Grievant Dorothy Persinger stated: "Agreement was not honored in route change. Seniority was not considered in route change. State Law was violated on at least three times. Favoritism was a big factor in route change. Grievant has been harassed to do a job that is impossible to do." Grievant's stated relief requested is: "Pat Bostic pickup and deliver all of his Glade Creek, SJHA and NCHS students. This will enable me to begin my run at 7AM at the turnaround spot on Irish Corner, deliver [Summersville] Grade School kids, then go to Old Route 19 and pickup those students for delivery to the appropriate school. And monetary relief for the additional time."

After being denied at the lower levels, a level four hearing was scheduled for May 13, 2003 at the Grievance Board's Beckley Office. (See footnote 1) The parties agreed instead to submit the matter for decision at level four based on the foregoing record. Grievant was represented by W. Va. School Service Personnel Association Attorney John E. Roush, Esq., andRespondent was represented by its counsel, Howard E. Seufer, Jr., Esq. of Bowles, Rice, McDavid, Graff & Love, PLLC. The parties agreed to submit their proposed findings of fact and conclusions of law by May 27, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a bus operator, with approximately 24

years seniority.

2. For the 2001-2002 school year, Grievant started her pre-trip inspection of the bus at 6:35 a.m., left the garage at about 6:40 a.m. to pick up students on Muddlety Valley Road, then at 7:00 a.m. met another bus driven by Pat Bostic at the end of the road, where they transferred some students from each bus to the other.

3. On August 16, 2002, David Baber, Nicholas County Director of Transportation, notified Grievant by letter that there would be changes to her morning bus run beginning with the 2002-2003 school term. These changes were listed as: "(1) extend bus to the end of the blacktop in Muddlety Valley Road to pick-up two kindergarten students, (2) transport SJHS and NCHS students along with the SES students from the Irish Corner area. After dropping off at SES, remaining students will be transported to SJHS and NCHS accordingly." Level two Joint Exhibit No. 1.

4. The first change came about because two new students were enrolled who lived further out the road on which Grievant already picked up students. The change adds about 2 miles total to that part of Grievant's run, and requires approximately an additional ten minutes. However, Grievant still must meet Mr. Bostic's bus at 7:00 a.m. to transfer students, so she must leave earlier. 5. The second change was caused by decreased enrollment, in that there are fewer students living at Irish Corner now than in previous years. Previously, the number of students on Irish Corner required two buses in that area, whereas only one is needed now.

6. In the spring of 2002, Grievant was not put on transfer for the 2002-2003 school year.

7. In October 2002, in response to complaints from parents that Grievant was not getting the students to school on time, the second change was rescinded, and the only change to Grievant's schedule remained the addition of two kindergarten students and an extra two miles to her run.

8. On one occasion, Mr. Baber and Superintendent Gus Penix rode Grievant's bus to observe the route and how it was driven, and on two or three other occasions they either followed Grievant as she drove parts of her route, or waited at checkpoints along the route to time when she came through.

9. Grievant is not the only bus operator whom Mr. Baber has followed or ridden with in order to check on problems with the route.

10. In a meeting Grievant had with Mr. Baber, former Transportation Director Bernard Lindsey sat in. When Grievant suggested only one bus was needed for part of the run, Mr. Lindsey opined

they could do away with Grievant's run altogether. Grievant told Mr. Lindsey he was no longer her boss.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant's argument is that she has a better idea how to route her run and Mr. Bostic's run than does Mr. Baber. She also argues that Mr. Baber's and Mr. Penix's actions of checking her route and riding her bus constitute harassment. Respondent's position is that the bus runs have been set up in the best way possible given the circumstances, and that Grievant was not harassed.

Grievant's argument that Respondent should use her version of the route schedule, but instead it implemented a change in her schedule without her consent, is an allegation that Respondent violated W. Va. Code § 18A-4-8a(8), which provides in part, "No service employee may have his or her daily work schedule changed during the school year without the employee's written consent. . . ." However, "[n]otwithstanding the language in W. Va. Code § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of her contract, some of which cannot reasonably be effected until shortly after school starts." Stover v. Raleigh County Bd. of Educ., Docket No. 02-41-179 (Sept. 19, 2002). Adding ten minutes to the start of Grievant's schedule to accommodate two students on Grievant's existing run was not an unreasonable change to her schedule, nor was the second change to her schedule (now removed) unreasonable.

Grievant also contends that favoritism played a part in her route change. Favoritism is "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o); Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000). She claims a less senior employee should have had his or her schedule changed to accommodate different transportation needs for the year. This claim has no merit. 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 establish the following:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and

(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.

Flint v. Bd. of Educ. of the County of Harrison 207 W. Va. 251, 531 S.E.2d 76 (1999). *See* Martin, v. Randolph County Bd. of Educ. 195 W. Va. 297, 465 S.E.2d 399 (1995). Grievant failed to establish a *prima facie* favoritism claim, because she failed to prove the minor change to her schedule was a substantial detriment to her, or that it was without justification. Grievant is a bus operator tasked with picking up students and getting them to and from school, and that is all she was directed to do.

Her harassment claim is similarly without merit. West Virginia Code § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Grievant claims Mr. Baber's and Mr. Penix's monitoring of her run was harassment. In fact, this was simply her supervisors performing their jobs. She was not disciplined, counseled or otherwise taken to task after these events. Mr. Baber and Mr. Penix simply gathered information needed in order to study the issues Grievant herself raised. “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See* Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997).” Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22- 495 (Jan. 29, 1999).

Nor did Mr. Lindsey's comments to Grievant amount to harassment. In the first place, he had no power over Grievant's job at the time, and it only happened once. A singleincident does not constitute harassment. *Id.*; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Grievant did not meet her burden of proving harassment.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. "Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, which limits changes in a school service employees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis. Stover v. Raleigh County Brd. of Educ., Docket No. 02-41-179 (Sept. 19, 2002); Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996). *See* Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Roberts v. Lincoln County Bd. of Educ., Docket No. 92- 22-131 (Aug. 31, 1992)." Napier v. Mingo Co. Bd. of Educ., Docket No. 00-29-086 (July 13, 2000).

3. "Notwithstanding the language in W. Va. Code § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of her contract, some of which cannot reasonably be effected until shortly afterschool starts. Stover, *supra*; Sipple, *supra* . *See* Conner, *supra* ; [Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989)]. *Accord*, Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1100 (Aug. 2, 1995)." Napier, *supra* .

4. The change in Grievant's work schedule was not unreasonable.

5. Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

6. 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 establish the following:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and

(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.

Flint v. Bd. of Educ. of the County of Harrison, 207 W. Va. 251, 531 S.E.2d 76 (1999). *See* Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

7. Grievant did not establish a *prima facie* favoritism claim.

8. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

9. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See* Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. LincolnCounty Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

10. Grievant was not harassed.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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.

Date: July 1, 2003

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Although Grievant did not appear, her attorney did.