ROBERT RUSSELL,

Grievant,

v. **DOCKET NO. 03-26-028**

MASON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Robert Russell, Grievant filed two separate grievances against Mason County Board of Education, Respondent, on April 29, 2002 and on October 22, 2002, alleging he had improperly been denied opportunities to take extra duty assignments. His first grievance, identified as Grievance 02-09 states: "I was denied two day time trips due to the fact that I have an hour supplemental run, even though it was my turn in rotation," and alleges a violation of W. Va. Code § 18A-4-8b(5)(f). His second grievance, identified as number 03- 01, states, "I have been denied 3 trips so far, due to the fact that I can not get back in time from my regular route. These are 4:00 trips and I do not return off my route until 4:15. The trip policy states that back ups will be given to drivers that time does not allow the driver to make the trips. Also see State Law 18A-4-8b." As relief, he requests for Grievance 02-09, "Want to be able to take day time change of assignment and paid for the two trips that were denied me." For Grievance 03-01, he states as his relief sought, "Want same rights as everyone else, and paid for all trips that were denied me." Having been denied at all lower levels, a level four hearing was scheduled for May 8, 2003. Grievant was represented by John Roush, Esq., and Respondent was represented by Gregory W. Bailey, Esq. Prior to convening the hearing, the parties agreed to submit the matter for decision based on the lower-level record. This matter became mature for decision on May 15, 2003, the deadline for the filing of the proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is a bus operator regularly employed by Respondent, with 27 years of seniority.

2. Grievant's regular assignment for both the 2001-2002 school year and the 2002-2003 school year was a morning route that started at 6:45 a.m. and was finished by 8:00 a.m., and an evening route starting at 2:45 p.m. and finishing at about 4:15 p.m. (See footnote 2)

3. For the 2001-2002 school year, Grievant had an extra-duty assignment each day that started at 12:05 p.m. and was finished at 1:35 p.m.

4. For the 2002-2003 school year, Grievant has two extra-duty assignments. The first starts at 11:50 a.m. and is finished by 1:40 p.m., Monday through Friday. The second starts at 5:00 p.m. and is finished by 6:30 p.m., Monday through Thursday. 5. In accordance with the provisions of W. Va. Code § 18A-4-8b, the employees within the Bus Operator classification in Mason County approved an alternate procedure for making extra-duty assignments.

6. Mason County Board of Education Policy 1216 is the alternate procedure approved by the Bus Operators in 1987 and amended in 2002 by a vote of 47 to 3. (See footnote 3) This policy states in part:

> 7. Back-ups will be given for the following reasons with no exceptions: (1) trip cancellations; (b) if time does not allow driver to take trip; (c) mechanical breakdowns on route; (d) if already on a trip; (e) approved professional leave; (f) jury duty; (g) on military duty or (h) death in the immediate family.
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> 8. Drivers on supplemental contracts will not receive back-up when daily trips are scheduled during their regularly scheduled work day. Supplemental contracted drivers will not be eligible for Change of Assignment trips that interfere with their supplemental work day.

7. A "back up" is like a placeholder in the rotation list for extra duty or extracurricular assignments. If a driver is next on the list for an available extra trip, but the driver's regular assignment ends after the extra trip is scheduled to start, he gets a back up, which entitles him to retain his place on the rotation list, so he would then be offered the next available extra assignment.

8. A driver is not entitled to a back up if he already has a supplemental assignment, even if the back up is for a trip that only interferes with his regular assignment and does not interfere with his supplemental assignment.

9. A "change of assignment" occurs when a driver accepts an extra assignment that interferes completely with his regular assignment. That driver is required to usepersonal leave or take leave without pay to miss his regular assignment, he drives the extra assignment, and a substitute is called in to cover his regular run.

10. If no regular employee wants the change of assignment trip, it is given to a substitute.

11. As used in the policy, "supplemental contract" means any extracurricular contract.

12. Four bus operators have contracts for mid-day supplemental runs: Grievant, Mr. Matheny, Mr. McCarty and Ms. Worley. Four drivers have evening supplemental runs: Grievant, Mr. McCarty, Ms. Simpkins and Ms. Worley.

13. Grievant identified six trips he claims he could have taken if he were allowed to take a change of assignment from his mid-day supplemental run: February 6, 2002, March 26, 2002, May 17, 2002, May 23, 2002, May 29, 2002, and June 3, 2002. 14. Grievant identified five trips he claims he was denied because they started at 4:00 p.m.: September 10 and 17, 2002, October 3 and 22, 2002 and November 12, 2002.

15. All other drivers with supplemental assignments are denied back-ups and changes of assignment in the same situations as Grievant.

DISCUSSION

Grievant argues he should be able to get a back up if his regular assignment concludes after the available extra assignment is scheduled to begin. He also wants to be able to take a change of assignment only if it affects his regular assignment. He is not asking for any back up or change of assignment trip if his current supplemental runs are affected. Grievant claims that he was denied trips and back ups that he should havegotten. Since this is a non-disciplinary grievance, 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.

Grievant's claim that he has been denied the same rights as everyone else amounts to a claim of 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.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 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).

Grievant's representative claims it is discriminatory to treat employees with supplemental contracts differently than those without, on par with refusing a back up or change of assignment because an employee is Hispanic. As Grievant's attorney suggests,such a policy would be improper even if a majority of employees approved it. However, the two concepts are not comparable. As it is, Grievant has not proven he is similarly situated to any employees who have been treated differently. Respondent has applied Policy 1216 to all employees with supplemental contracts consistently and uniformly. Grievant is not similarly situated to employees who do not have supplemental contracts. Policy 1216 recognizes these differences and accounts for them.

The Grievance Board has consistently held that,"[i]mplicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee

making application must be available to assume the duties of a position at the times designated by the Board. *See* Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." McClintock v. Morgan County Bd. of Educ., Docket No. 02-32-378 (April 18, 2003). When Grievant has supplemental assignments that interfere with other available assignments, he is not "available to assume the duties of the position." Grievant was not eligible for back-ups for trips occurring after his evening run because he was not available -- he already had a supplemental run starting shortly after his evening run.

Likewise, Grievant was not entitled to a change of assignment from his supplemental runs, as that case is clearly contemplated by Section 8 of Policy 1216. All the other similarly-situated drivers are also denied changes of assignment from their supplemental runs.

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 standardgenerally 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. "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.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 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).

4. Grievant did not establish a *prima facie* case of discrimination, by failing to prove he was treated differently than any similarly-situated employees.

5. "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. *See* Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." McClintock v. Morgan County Bd. of Educ., Docket No. 02-32-378 (April 18,2003); Skeens v. Lincoln County Bd. of Educ., Docket No. 02-22-070 (June 19, 2002); White v. Monongalia County Bd. of Educ., Docket No. 00-30-279 (Jan. 2, 2001); Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996); O'Neal v. Kanawha County Bd. of Educ., Docket No. 20-86-239 (May 13, 1987).

6. Grievant has failed to meet his burden of proving he was entitled to back-ups or changes of assignments for the trips he identified.

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 Mason 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: June 3, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent relied on the brief it filed at level two.

Footnote: 2

Drivers are permitted to select their own ending times, based on how much time they need to check the bus, get coffee, go to the restroom, or whatever. Grievant is actually parked back at the garage by 4:00, but chose to select 4:15 as his ending time.

Footnote: 3

The policy was amended in August, 2002 to add 7(e) and 7(h), but otherwise was unchanged.