MARY J. OSBORNE,

Grievant,

v. **Docket No. 04-03-056**

BOONE COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Mary J. Osborne ("Grievant") is employed by the respondent, the Boone County Board of Education ("BOE"), as a bus operator serving special needs students. Grievant seeks payment, beyond her regular salary, for an afternoon bus run she makes to accommodate a special needs student who leaves school an hour earlier than the other students. BOE has paid other bus operators an extra $11.00 per day for making this same run. Grievant claims that BOE's failure to pay her an additional $11.00 per day violates the pay equity provisions of West Virginia Code section 18A-4-5b.

Having been denied at Levels I and II, this grievance was waived to Level IV. It was brought on for a Level IV hearing on May 12, 2004, and became mature for decision on June 4, 2004, upon receipt of Grievant's proposed findings of fact and conclusions of law
BOE opted not to submit proposed findings and conclusions at Level IV.

Attorney John Everette Roush of the West Virginia School Service Personnel Association represents Grievant. Attorney Timothy R. Conaway represents BOE.

Discussion

Grievant was the successful applicant for a bus run that was identified on the job posting for the 2003-2004 school year as "Special Education Bus Run." The postingcontained an explicit caution that "[t]his run may change at any time to serve the needs of identified students." In fact, the run did

change during the school year. It was determined that a special needs student could not handle the entire day at school. The student's individual educational plan ("IEP") was amended so that B.C., the student in question, was released from school an hour earlier than the other students on Grievant's afternoon run. Before this change, B.C. had ridden on Grievant's bus in both the morning and the afternoon. After the initial change to his IEP, BOE posted an afternoon run as an "extra duty special education run" that was "contingent upon participation." However, the IEP was changed a second time to require an aide on the bus with B.C. Therefore, within less than five days, the extra duty posting was rescinded. B.C. was returned to Grievant's bus for the ride home in the afternoon. During the interim, after the first change to his IEP and before B.C. was returned to Grievant's bus, BOE paid three different regular bus operators $11.00 extra each time they made an afternoon run for B.C.

Before B.C. was returned to her bus, Grievant had one run in the morning and one run in the afternoon. Her morning run began at 7:40 a.m. and concluded at approximately 9:30 a.m. Her afternoon run began at 2:40 p.m. and concluded at approximately 4:30 p.m. The cumulative total time to complete the two runs was approximately three hours and forty minutes. When B.C. was returned to Grievant's bus, the only alteration to her schedule was the addition of a second, earlier run in the afternoon. Even with this addition, the cumulative total of time for Grievant's bus runs was approximately four hours and forty minutes.

Unlike Grievant, the bus operators who took B.C. home in the afternoons for that brief interim period were not specifically designated as bus operators for special educationstudents. With one minor exception, they did not have aides on their buses. In addition, under their regular schedules, they each had two morning runs and two afternoon runs per day. The addition of an afternoon run to take B.C. home added a fifth daily run to their respective schedules. Without the addition of the afternoon run to take B.C. home, the cumulative runs of the other bus operators generally took approximately four hours and forty-five minutes a day.

The key difference between Grievant and the three drivers with whom she compares herself lies in their respective contracts. Postings for bus operators contain a section entitled "location of position." When the posting is for a regular bus operator's position, this section describes the bus route by identifying the starting point, the terminus, and the approximate departure and arrival times. By contrast, the posting for Grievant's position identified certain general geographic areas. Any

special education students residing in those identified areas would be served by Grievant's bus.

The posting also contained the proviso that the “run may change at any time to serve the needs of identified students.” The afternoon run to take B.C. home originated and ended within the identified geographic areas and could be accomplished within Grievant's regular work hours. Thus it fell within her job duties which, as reflected in the posting, could be modified to meet the needs of a special education student, such as B.C. For the three regular bus drivers, an additional afternoon run to serve B.C. exceeded the scope of their duties in terms of traveling from one identified point to another identified point at specified times. The flexibility inherent in Grievant's job description did not extend to the other three drivers because the postings for regular bus operator positions did not contain the proviso that the duties were subject to change to accommodate student needs. Grievant's argument that, based upon the pay equity provisions of West Virginia Code section 18A-4-5b, she should receive additional compensation for the afternoon run with B.C. must fail in light of the differences between Grievant and the three bus operators with whom she compares herself. The concept of pay equity is that employees who perform similar work should receive similar compensation. “As noted in *Fowler v. Mason County Board of Education*, Docket No. 94-26-037 (Oct. 6, 1994), W. Va. Code 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay.” *Hart v. Randolph County Bd. of Educ.*, Docket No. 95-42-583 (May 30, 1996)(citing *Gleason v. Mason County Bd. of Educ*., Docket No. 94-26-282 (Dec. 22, 1994) and *Harper v. Pendleton County Bd. of Educ*., Docket No. 89-36-708 (Aug. 21, 1990)).

In light of the fact that the afternoon run with B.C. fell within Grievant's regular duties but exceeded the scope of the other three bus operators' regular duties, Grievant is unable to satisfy the “similar work” prong of the pay equity test. Consequently, she has not proven a violation of West Virginia Code section 18A-4-5b, or any other statute, policy or regulation that would entitle her to receive additional compensation for taking B.C. home in the afternoon. Therefore, this grievance must be denied.

After careful review of the underlying record, as supplemented at Level IV, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievant was employed by BOE as a bus operator to serve special needs students for the 2003-2004 school year.

2 2. As such, Grievant was a full-time employee with full salary and benefits.

3 3. Grievant had the assistance of a regularly-assigned aide.

4 4. At the beginning of the school year, Grievant began her morning run at 7:40 a.m. and concluded her morning run at 9:30 a.m.

5 5. Her afternoon run began at 2:40 p.m. and concluded at 4:30 p.m.

6 6. A student, B.C., began the school year riding on Grievant's bus.

7 7. In December a change in B.C.'s IEP required B.C. to go home an hour earlier than the other students who rode Grievant's bus in the afternoon.

8 8. Regular bus operators were paid an additional $11.00 per day for making this separate run to take B.C. home in the afternoon. Three different drivers performed this task for, at most, a total of two weeks.

9 9. During this time, BOE posted an afternoon run to take B.C. home under the heading “extra duty special education run” conditioned upon participation, presumably by the special education student.

10 10. A further amendment to his IEP called for B.C. to travel on a bus with an aide.

11 11. When B.C.'s IEP was first amended, BOE had overlooked the fact that Grievant, who had an aide on her bus, could make an afternoon run to take B.C. home without disrupting her other runs. Accordingly, Grievant was required to take B.C. home an hour before she took the other students home in the afternoon, which added less than an hour to her total workday.

12 12. With the addition of B.C., each of the three regular bus operators had five bus runs daily, whereas Grievant had three.

13 13. With the addition of B.C., the workday for each the three regular bus operators was approximately five hours and forty-five minutes, whereas Grievant's was about four hours and forty minutes.

14 14. Each of the three regular bus operators drove a full-sized bus with a capacity of over 70 students, whereas Grievant drove a short bus.

15 15. None of the three had a regularly-assigned aide on board to assist with all of the students being transported, whereas Grievant had an aide specifically assigned to her bus.

16 16. Postings for regular bus operator positions contain descriptions of beginning and ending points for the runs in question, along with approximate starting and ending times. By contrast, special education bus operator postings set forth a description of the geographic areas being served by that particular bus operator.

17 17. The posting for Grievant's job which cautioned that “[t]his run may change at any time to serve the needs of identified students” differs from postings for regular education bus runs. There is no corresponding caution for those regular bus runs, which can be altered only with the express, written consent of the employee. W. Va. Code § 18A-4-8a.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. 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).

2 2. Grievant must prove her allegations by a preponderance of the evidence. 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).

3 3. West Virginia Code section 18A-4-5b provides requires that salary schedules “be uniform throughout the county” and that “uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.”

4 4. West Virginia Code section 18A-4-5b “is directed toward employees who perform comparable work but receive dissimilar pay.” *Fowler, et al., v. Mason County Bd. of Educ*., Docket No. 94-26-037 (October 6, 1994).

5 5. The afternoon bus run at issue herein falls within the scope of Grievant's regular duties but constitutes an extra duty assignment as to regular education bus operators.

6 6. In light of the foregoing distinction, Grievant cannot satisfy the requirement under West Virginia Code section 18A-4-5b that she perform work that is comparable to the work performed by

the employees to whom she compares herself in terms of pay.

7 7. Grievant has failed to prove a violation of the pay equity provisions of West Virginia Code section 18A-4-5b.

8 8. Grievant has failed to prove that BOE's refusal to pay her an additional $11.00 a day for work that falls within her regular job duties and can be completed within her regular work hours violates any statute, regulation or policy.

9 9. Grievant has failed to support her claim of entitlement to additional compensation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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 West Virginia Code section 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:

June 24, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge