JAMES CHANEY and

ROBERT THOMPSON,

Grievants,

v.

Docket No. 05-40-075

PUTNAM COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievants, James Chaney ("Chaney") and Robert Thompson (See footnote 1) ("Thompson"), (jointly "Grievants") challenge the actions of their employer, the respondent Putnam County Board of Education ("BOE"), in applying a policy for distributing extra-duty assignments among bus operators. The statement of grievance reads as follows:

> Violations of WV Code 18-29-2 sections "a" and "o" with regard to half-time drivers taking extra trips during the day. Violations of Putnam County Policy T.3.8 with regard to applying policy in an [sic] uniform manner. Relief sought is to be allowed to take trips and compensation for trips missed.

This grievance was denied at the lower levels, and proceedings at Level III were waived. (See footnote 2) The appeal to Level IV was filed on March 3, 2005. A Level IV hearing was held on April 8, 2005, at the offices of the West Virginia Education and State Employees Grievance Board ("the Grievance Board") in Charleston. At the Level IV hearing, Grievants were represented by Susan

E. Hubbard of the West Virginia Education Association, while BOE was represented by attorney Gregory W. Bailey. The parties submitted proposed findings of fact and conclusions of law by May 9, 2005, at which time this grievance matured for decision.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievants are employed by BOE as regular, part-time bus operators. They are each assigned to afternoon runs that commence at approximately 1:35 p.m. and end at approximately 4:30 or 5:00 p.m. Tr.15, 20.

2 2. Putnam County school buses operate in four geographic regions, which include Winfield, Buffalo, Poca, and Hurricane. Tr.27. Grievants both drive in the Hurricane region. Tr.15, 20.

3 3. West Virginia Code section 18A-4-8b(f), defines extra-duty assignments “as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.”

4 4. On August 23, 1996, a two-thirds majority of the bus drivers in Putnam County voted to adopt an alternative procedure (“alternative procedure”) for assigning extra-duty trips, in accordance with the applicable provisions of West Virginia Code section 18A-4-8b.

5 5. On September 9, 1996, BOE voted to adopt this alternative procedure for assigning extra-duty bus trips. (See footnote 3) Both this vote and the alternative procedure are memorialized in BOE's minutes. Gr.Exh.1 at Level II.

6 6. The alternative procedure for making extra-duty bus trip assignments was added to section T.3.8 (“Policy T.3.8”) of BOE's “Transportation and Other Support Services” policy. Gr.Exh.1 at Level II.

7 7. Pursuant to Policy T.3.8, each geographical area maintains a “posting board” in the bus lounge for that area. Two bus operators in each area use the posting board to keep track of the extra-duty assignments for their geographic area. If a bus operator takes an extra-duty assignment, the hours required for the trip are reported on the posting board. The bus operator is said to be “charged” with those hours. Gr.Exh.1 at Level II.

8 8. New extra-duty assignments are given to the bus operator with the lowest number of

hours on the posting board for the geographical region in question. Gr.Exh.1 at Level II. A bus operator is “charged” hours not only for any extra-duty trip taken, but also for any extra-duty trip that is refused for other than a limited number of reasons identified in Policy T.3.8. For instance, bus operators are not “charged” with refusing an extra-duty assignment if it would interfere with a regular run or if it would fall during a holiday break. Gr.Exh.1 at Level II.

9 9. Policy T.3.8 expressly provides that “[p]art-time drivers cannot accept and are not charged for trips after a morning run or before an afternoon run.” Gr.Exh.1 at Level II. As a result, Grievants cannot take extra-duty runs prior to completion of their regular afternoon runs. Tr.29-30.

10 10. During the beginning of the 2003-2004 school year, Grievants were permitted to make some extra-duty bus runs prior to the beginning of their respective afternoon runs. This practice was halted after it came to the attention of the Coordinator of Transportation. Tr.28-29. Grievants were informed that it was contrary to “policy.” Tr. 21-22, 29.

11 11. Subsequent to learning that taking such extra-duty runs was contrary to policy, there was an occasion on which Grievant Thompson was called upon to make a day run on an emergency basis. Tr.22-23.

12 12. Grievants claim they are “half-day” drivers, as opposed to “part-time.” Tr.23.

Discussion

This is not a disciplinary grievance. Therefore, Grievants bear the burden of proving the elements of this grievance by a preponderance of evidence. W. VA. CODE ST. R. § 156- 1-4.21(2004); *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). “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

Misapplication or Misinterpretation of Policy T.3.8

Grievants allege a violation of West Virginia Code section 18-29-2(a). This is the statutory provision that explains what constitutes a claim giving rise to a grievance. Grievants rely upon it in connection with their allegations of a misapplication or misinterpretation of the provisions of Policy T.3.8 relating to how extra-duty bus trips are assigned. Tr.6. More specifically, Grievants assert that those provisions of Policy T.3.8, which were adopted by BOE on September 9, 1996, do not

accurately state the alternative procedure that was approved by a two-thirds majority of the bus operators.

A familiarity with the provisions of West Virginia Code section 18A-4-8b(f) is necessary to an understanding of the significance of this allegation. This statute sets forth the method by which extra-duty assignments are awarded to service personnel. It also contains the following proviso:

> 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.

W. Va. Code § 18A-4-8b(f).

In other words, "[a]n alternative method of making extra-duty assignments may be utilized if the procedure is approved by both the county board of education and two-thirds of the employees within the affected classification of employment." *Stafford v. Hancock County Bd. of Educ*., Docket No. 89-15-385 (Jan. 31, 1990)(decided under an earlier version of this statute)(citing *Mayle v. Barbour County Bd. of Educ*., Docket No. 01-89-039 (Dec. 21, 1989) and *Terek v. Ohio County Bd. of Educ*., Docket No. 35-87-276-3 (Apr. 4,1988)). In this case, the employees in the affected classification are the bus operators. On August 23, 1996, pursuant to the above-quoted proviso from West Virginia Code section 18A-4-8b(f), the bus operators in the Putnam County school system adopted an alternative procedure for making extra-duty bus trip assignments. Thereafter, on September 9, 1996, BOE voted to approve this alternative procedure, which was then incorporated into Policy T.3.8.

The minutes of the September 9, 1996, BOE meeting reflect that the alternative procedure was adopted without amendment. Some confusion may have resulted from the fact that the adoption of the alternative procedure had the effect of amending the existing Policy T.3.8, into which it was incorporated. Although there have been subsequent attempts by bus operators to amend the alternative procedure, these efforts have been unsuccessful because they have not been adopted by BOE. *Richardson v. Putnam County Bd. of Educ*., Docket No. 05-40-033 (July 28, 2005). The alternative procedure that was approved by the bus operators on August 23, 1996, is the policy that is still in effect.

At Level II of the grievance process, Grievants introduced, as Grievants' Exhibit 3, a fugitive document that may also account for some of the confusion about the alternative procedure. Gr.Exh.6

at Level IV. This document is titled “Putnam County Schools Curricular/Extra Curricular Trip Regulations Approved 8/23/96 and 9/26/96.” During the Level IV hearing, Grievants elicited testimony from veteran bus operator Winona Pearl Kester that this document contained the alternative procedure approved by the bus operators. The fact that it contains the date of “9/26/96” controverts this testimony because, by September 26, BOE had already adopted the version of the alternative procedure that had been approved by the bus operators on August 23, 1996. According to Ms. Kester, the bus operators held a meeting on September 26, 1996, at which they attempted to amend the alternative procedure. Any amendments they may have proposed or discussed are of no moment because BOE had already adopted the alternative procedure on September 9, 1996, and there have not been any subsequent changes approved by BOE. Nothing on its face suggests that this fugitive document has any official status. There is no legal significance to this document. It does not support Grievants' assertion that the alternative procedure adopted by BOE varies from the alternative procedure approved by the bus operators on August 23, 1996.

On at least one occasion, a different alternative procedure was distributed to bus operators. However, this was distributed in error because it was never adopted by BOE. To be valid, the alternative procedure requires BOE approval in addition to the two-thirds majority vote of the bus operators. Therefore, only the August 23, 1996, version of the alternative procedure is legally valid. Grievants' argument that Policy T.3.8 does not accurately reflect the alternative procedure approved by a two-thirds majority of the bus operator is defeated by the BOE minutes of September 9, 1996, which constitute the official record for purposes of determining what alternative procedure was adopted.

Favoritism

Grievants also allege a violation of West Virginia Code section 18-29-2(o), wherein favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” As with a claim of discrimination, an employee who makes a claim of favoritism must demonstrate that he is similarly situated to another employee. *Finley v. Dep't of Transp*., Docket No. 05-DOH- 031 (April 15, 2005). Grievants have failed to identify any similarly situated employee whowas treated differently with respect to the application of Policy T.3.8. Therefore, Grievants are unable to support their claim that Policy T.3.8 has not been applied uniformly. Tr.7.

BOE concedes that Grievant Chaney was permitted to take extra-duty runs before his regular afternoon run on four or five occasions. Tr.16. Similar circumstances may have applied to Grievant Thompson. This was, however, a mistake. Once this mistake came to light, the practice stopped. Tr.16. Grievants are allowed to take extra-duty runs after their regular afternoon runs and on weekends. Tr.17. They just cannot take extra-duty runs before their afternoon runs.

Grievants have not pointed to any other part-time bus operators who have been permitted to violate the prohibitions contained in Policy T.3.8 by taking runs after the morning runs or before the afternoon runs. It is well-established that a board of education must abide by its own policies. *Trimboli v. Bd. of Educ*., 163 W. Va. 1, 254 S.E.2d 561 (1979). There is, however, nothing to establish that BOE failed to abide by the alternative procedure for assigning extra-duty bus runs.

Part-time Bus Operators

Grievants also argue that they are half-day, rather than part-time, bus operators. In this way they attempt to avoid the prohibition that "[p]art-time drivers cannot accept and are not charged for trips after a morning run or before an afternoon run."

BOE does not recognize any category such as "half-day" or "half-time" bus operators. There are statutory provisions for paying part-time employees half of the regular monthly salary of full-time employees. "[T]he minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shallbe at least one-half the amount indicated in the 'state minimum pay scale pay grade II' set forth in this section." W. Va. Code § 18A-4-8a(1).

With respect to extra-duty assignments, the term "half-day" is used in connection with salary. Specifically, West Virginia Code section 18A-4-8a(9) provides that "[w]hen performing extra duty assignments, employees who are regularly employed on a one-half day salary basis shall receive the same hourly extra duty assignment pay computed as though the employee were employed on a full-day salary basis." This may be where the confusion over the term "half-day" arose. Nonetheless, semantics aside, Grievants are part-time bus operators and, as such, are subject to the foregoing prohibition.

Summary

Grievants have failed to prove their allegation that the alternative procedure approved by the bus operators varies from the alternative procedure approved by BOE and incorporated into Policy T.3.8. The records of the September 9, 1996, BOE meeting rebut such assertion.

Grievants have failed to prove that the alternative procedure, as set forth in Policy T.3.8, has not been applied uniformly. As soon as it was discovered that a mistake had been made in applying the policy in the Hurricane area, where Grievants drive, the administration hastened to correct the mistake, thereby ensuring that the alternative procedure was being applied uniformly throughout Putnam County. Grievants have also failed to establish that the provisions of the alternative procedure relating to part-time drivers does not apply to them.

In sum, Grievants have failed to prove any of the allegations upon which this grievance is premised. Accordingly, it must be denied. 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. Grievants bear the burden of proving the elements of this non-disciplinary grievance by a preponderance of evidence. W. VA. CODE ST. R. § 156-1-4.21(2004); *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. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. Grievants have failed to prove that the alternative procedure approved by a two-thirds majority of the bus operators on August 23, 1996, differs from the version that was incorporated into Policy T.3.8 when it was approved by BOE on September 9, 1996.

4 4. Grievants have failed to prove any misapplication or misinterpretation of the alternative procedure approved by a two-thirds majority of the bus operators on August 23, 1996, and adopted by BOE on September 9, 1996.

5 5. To prove a claim of favoritism, Grievants would have to establish that they were similarly situated to another employee who was treated more favorably. *Finley v. Dep't of Transp.*, Docket No. 05-DOH-031 (April 15, 2005). Grievants have failed to identify any such similarly situated employee or employees, and thus cannot establish a claim of favoritism.

6 6. Except for a short-lived mistake that was corrected when it was discovered, the

alternative procedure for assigning extra-duty bus runs has been applied uniformly throughout the geographic regions in Putnam County. Therefore, Grievants have failed to prove that there has been favoritism or lack of uniformity in the application of the policy.

7 7. The foregoing conclusion is not undermined by the existence of one emergency exception to the alternative procedure for assigning extra-duty bus runs.

8 8. As part-time bus operators, Grievants are subject to the prohibition in Policy T.3.8 that bars them from accepting extra-duty trips before their regular afternoon runs.

Accordingly, this grievance is **DENIED**.

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

Date:

August 16, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Robert Thompson joined this grievance at Level II. Level II transcript at 5. Hereafter, references to pages in the Level II transcript shall appear as "Tr.__."

Footnote: 2

The lower level record, including the transcript of the January 6, 2005 Level II hearing, was incorporated into the Level IV record.

Footnote: 3

At Level IV, there was some confusion about the proper term for these trips. This confusion was addressed in an earlier decision, wherein the Grievance Board "noted that the terms 'supplemental' and 'extracurricular' are frequently used interchangeably, but that, technically, there are no 'supplemental' assignments, only 'extracurricular' and 'extra-duty' assignments. 'Extracurricular' assignments are governed by W. Va. Code 18A-4-16, while 'extra-duty' assignments are governed by W. Va. Code 18A-4-8b." Smith v. Wood County Bd. of Educ., Docket No. 96-54-271 at n.3 (Oct. 31, 1996).