JEANETTA LAMBERT/

ROSEMARY HARVEY,

Grievants,

v. **Docket No. 05-23-426**

LOGAN COUNTY BOARD

of EDUCATION,

Respondent.

DECISION

Grievants, Jeanetta Lambert, bus operator, and Rosemary Harvey, special needs aide, filed their grievance on September 1, 2005, alleging:

The Logan County Board of Education violated West Virginia Code § 18-29- 2(m) and West Virginia Code § 18A-4-5b by failing to provide us compensation for doing assignments like those for which other employees are compensated.

Grievants seek appropriate compensation and back pay.

Grievants were denied at Levels I and II, bypassed Level III, and appealed to Level IV. A Level IV hearing was held at the Grievance Board's Charleston office on April 3, 2006. Grievants were represented by Gary Archer of the West Virginia Education Association, and Respondent was represented by Leslie Tyree, Personnel Director and General Counsel. (See footnote 1) This case became mature for decision on April 3, 2006, as the parties agreed to waive filing proposed findings of facts and conclusions of law.

Issues and Arguments

Grievants assert they are being discriminated against because they are required to go to the Ralph R. Willis Career Technical Center ("Vocational Center") to drop off and pickup a student, but receive no extra pay. They argue that every other bus operator who is required to travel to the Vocational Center gets paid a supplemental rate.

Respondent argues Grievants' stop at the Vocational Center is not supplemental, but instead is part of their bus run. The following material facts have been proven by a preponderance of the credible evidence of the record.

Findings of Fact

1. Grievants are employed by Respondents. Ms. Lambert is a special needs bus operator, and Ms. Harvey is a special needs bus aide.

2. When Ms. Lambert bid on the special needs bus, runs to the Vocational Center were not included as part of that run. (See footnote 2)

3. During the 2005-2006 school year, Grievants were instructed to pick up a special needs child at Central City and take him to the Vocational Center in the morning. In the afternoon, they were told to pick this child up from the Vocational Center and take him back to his home in Central City.

4. Respondent considered this an addition to their run, not a supplemental run. Therefore, this stop was never bid on by bus operators and aides, and Grievants were not paid supplemental money for this addition.

5. Adding this child to Grievants' bus route required them to pick him up from the Vocational Center and take him to Central City in the afternoon before being at the special needs school in Crooked Creek to pick up the rest of the students for theirafternoon run. This addition took them away from their final destination and increased their bus run by at least an hour.

6. Other special needs Vocational Center runs were bid on by bus operators, and the successful applicants were paid a supplemental rate of $22.50 a day. A requirement to bid on the supplemental runs was that bus operator and the aide be able to incorporate the run into their regular run without deviation.

7. Grievants have been going out of their way to pick up the student from Central City and take him to the Vocational Center and back to Central City with no additional compensation.

Discussion

This grievance does not challenge a disciplinary action, so 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 Res.*, 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.* Grievants claim they are being discriminated against because they are not being compensated for performing what they contend to be a supplemental bus run. 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 he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants have met their burden in this case. At the Level IV hearing, Grievants presented evidence that they were being treated differently than one or more similarly situated employee(s). Specifically, Grievants presented evidence that there were special needs buses going to the Vocational Center, and the drivers and aides were being compensated $22.50 a day.

Grievants also proved that the treatment was not related to actual job responsibilities. The evidence presented was that other special needs buses were going to the Vocational Center and being paid a supplemental rate, but Grievants were going out of their way to make the Vocational Center stop and were not being compensated. Respondent presented no evidence as to explain why all other special needs Vocational Center stops were bid out, but required Grievants' to accept the Vocational Center stop as part of their normal run. The undersigned understands that had this run been posted as a supplemental run, Grievants would not have been eligible to bid on it as it was not on their regular run. However, Grievants had no choice. For whatever reason, this particular Vocational Center stop was not posted as a supplemental run, and because Grievants were required to accept this additional bus run, compensation is warranted. Clearly, this difference was not agreed to in writing by Grievants who immediately filed a grievance on this issue. Grievants have met their burden in this case. Therefore, they are entitled to appropriate compensation and back pay for the extra duty.

The following conclusions of law support this Decision.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so 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 Res.*, 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. 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 he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,
(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004). 3. Grievants have proven that other special needs bus operators and aides are getting paid a supplemental rate of $22.50 a day for performing stops at the Vocational Center. Yet, Grievants are going out of their way to transport a child to and from the Vocational Center and are not being compensated. The difference is not related to job duties, and Grievants did not agree in writing to this additional run.

Accordingly this grievance is **GRANTED.** It is hereby **ORDERED** that Respondent pay Grievants' back pay in the amount of $22.50 plus interest from the date they began the run to the Vocational Center. It is also **ORDERED** that Grievants be paid $22.50 a day for each run to the Vocational Center until the end of the 2005-2006 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any such appeal must be filed within thirty 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: May 16, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Ms. Tyree was also the Level II hearing examiner in this case.

Footnote: 2

It was not clear exactly when Ms. Lambert bid on this run.