ROBERT TAYLOR,

Grievant,

v v.

DOCKET NO. 05-40-332

PUTNAM COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

Grievant Robert Taylor filed a grievance on May 23, 2005, claiming a violation of West Virginia Code §18A-4-5b with regard to disparity in salary. He requested that he be paid $20 per supplemental run, the same amount as the new hire.

At Level I, Respondent issued a letter granting relief to Grievant by changing the rate of pay for all similarly situated service personnel, making such change retroactive from the time of the new hire. Although the requested relief was granted, Grievant still appealed to Level II. A Level II hearing was held on August 10, 2005, and at that time Grievant requested compensation from September 2004, to the end of school year, or alternatively requested he receive payment for the eight additional days a substitute drove that route. The grievance was denied by order of September 9, 2005. A Level III hearing was waived, and a Level IV hearing was held in the Grievance Board's Charleston office on October 26, 2005. (See footnote 1) Grievant was represented by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by counsel, Gregory W. Bailey of Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision on November 28, 2005, the deadline for submission of the parties fact/law proposals.

Issues and Arguments

Grievant argues that he was discriminated against and should receive compensation for the entire school year, or in the alternative for the eight days that a substitute bus driver provided transportation

for the children.

Respondent asserts that there was no discrimination, and that it supplied the appropriate relief at Level I by making the pay uniform for all bus operators and aides. Respondent goes on to argue that the requested relief is a change in remedy and was not agreed to by the parties. While Respondent concedes that the administrative law judge does have discretion to allow a change in remedy, it argues the purpose of the grievance procedure is to provide relief at the lowest possible administrative level, and that is what has occurred in this case.

Procedural History

Given that this case is unique, a brief statement about the procedural history is needed. Grievant is a bus operator working for the Putnam County Board of Education. On April 4, 2005, Grievant filed a separate grievance alleging violations of various statutes as a result of transporting two out-of-area students on his pre-K run, which increased the time of his bus run. He requested that the students be placed on the proper pre-K bus and he receive compensation for the extended runs he performed. This grievance was denied at all levels. Taylor v. Putnam County Bd. of Educ., Docket No. 05-40-225, (Dec. 22, 2005).

Respondent attempted to remedy Grievant's concern by placing these children on an additional bus route. However, because Respondent could not find anyone willing to transport these children at the $10 being paid all other drivers, the pay was increased to $20. For eight days a substitute driver transported these children at the $20 rate. Then, on May 3, 2005, a bus operator and aide were hired on a full time basis and paid $20. Grievant initiated this grievance alleging disparity in pay on May 23, 2005.

The following material facts have been proven by a preponderance of the credible evidence of the record.

Findings of Fact

1. Grievant has been employed by the Putnam County Board of Education as a bus operator for nine years and as a substitute for three years.

2. Grievant originally requested “compensation in a uniform manner at $20 per one way supplemental run.”

3. That relief was granted on June 2, 2005, increasing the pay for all bus operators and aides to $20, making it retroactive to the date a permanent bus operator and aide were

hired. 4. Grievant accepted the relief offered by Respondent.

5. Later Grievant was informed that a substitute drove that route for eight days and was paid $20.

6. Grievant then appealed to Level II and changed his requested relief to $20 for each supplemental run from September 2004, to the end of the school year, or in the alternative $20 for the eight days the route was driven by a substitute driver.

7. The additional bus route was created as a result of Grievant's unwillingness to transport these two children.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 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). See W. Va. Code § 18-29-6. "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Both Grievant's claim to be compensated for each day of his supplemental run since September 2004, and his request to be compensated for days for which he was unaware an inequity existed amounts to a change in the relief sought. West Virginia Code §18-29- 3(k) requires all parties consent to any change in the relief sought at lower levels. At LevelIV, this decision is within the discretion of the administrative law judge. West Virginia Code §18-29-6(b) allows the hearing examiner to “provide relief found fair and equitable.”

At the lower levels, Grievant asserted he was discriminated against, and therefore should be compensated from September 2004, to the end of the school year, or in the alternative, should receive payment equal to the substitute who drove that route for eight days. Discrimination is defined in W. Va. Code § 18-29-2(m), 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." In The Board of Education of the County of Tyler v. White, 216 W.Va. 242, 605 S.E.2d 814 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 2)

(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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). Grievant has not met his burden and established the elements of the above stated test. With respect to the eight additional days that a substitute was paid $20 per run, that information was unknown to Grievant at the time of the original filing. Respondent did not conceal information or do anything to hinder Grievant in investigating or determining what appropriate relief to request. Respondent acted in a manner consistent with the purpose of the grievance procedure by attempting to resolve Grievant's claim at the lowest administrative level in a manner that was fair to Grievant as well as other similarly situated employees. Grievant received the appropriate remedy at Level I and should not be allowed to amend his requested relief.

The following Conclusions of Law support the decision:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 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). See W. Va. Code § 18-29-6. "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons performing like assignments and duties. Weimer-Godwin v. Bd. of Educ., 369 S.E.2d 726(W. Va. 1988); Mersing v. Preston County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89-43-74 (Aug. 31, 1989).

3. W. Va. Code §18A-4-5b requires boards of education to provide uniform compensation and benefits to similarly-situated service employees, that is, to employees with like classifications, ranks, assignments, duties and actual working hours. Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Mersing, Supra; Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990); Hardbarger, supra.

4. Grievant failed to prove by a preponderance of the evidence any violation, misapplication, or misinterpretation of W. Va. Code §18A-4-5b that would entitle him to additional compensation above and beyond that originally requested and awarded at Level I.

5. Requesting payment from September 2004, until the end of the school year, or alternatively, compensation for the eight days the substitute driver took that route is a change in relief sought by the grievant.

6. West Virginia Code §18-2-3(k) requires all parties to consent to any change in relief. However, the change may be granted at Level IV in the discretion of the administrative law judge.

7. West Virginia Code §18-29-6(b) provides that administrative law judges may provide relief found to be fair and equitable. 8. The remedy provided at Level I, increasing the pay for supplemental runs for all bus drivers and bus aides from $10 to $20 and making such increase retroactive from May 3, 2005, is fair and equitable.

9. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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."

10. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> (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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

11. Grievant failed to meet his burden to establish a discrimination.

12. The remedy granted at Level I is the appropriate given the circumstances.

Accordingly, the 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 suchappeal, 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: March 3, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

This case was originally assigned to ALJ Reynolds, but due to administrative reasons was reassigned to the undersigned.

Footnote: 2

In this case, the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).