THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

HARRY MIDCAP,
Grievant,

v. **Docket No. 2009-0028-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Harry Midcap filed this grievance against his employer, Respondent Marshall County Board of Education, on July 17, 2008. His Statement of Grievance reads as follows:

> Grievant contends that on or about July 3, 2008, he was directed to discontinue driving the vehicle assigned to him to and from his home. Other employees in the maintenance department continue to drive their vehicles to and from home. Grievant contends that the action of the board of education violates West Virginia Code § 18A-4-5b & constitutes discrimination/favoritism as defined in West Virginia Code § 6C-2-2(g)(1).[1]
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> Relief Sought: Grievant seeks restoration of his permission to drive the vehicle assigned to him to and from home.

This grievance was denied at level one following a conference held on September 16, 2008. A level two mediation conducted on February 4, 2009 was unsuccessful. Grievant appealed to level three on February 19, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on April 17, 2009. Grievant appeared in person and by his counsel, John Everett Roush, WVSSPA. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice McDavid Graff & Love LLP.

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[1]Grievant did not argue favoritism at level three, and focused on a claim of discrimination based upon the assertions addressed in the discussion of this grievance. Accordingly, the initial claim of favoritism will not be addressed by the undersigned.

This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 20, 2009.

Synopsis

Grievant conceded at level three that Respondent is not required to provide transportation to the maintenance employees to and from home. However, having committed to doing so for some employees, Respondent is obligated to extend the same privileges to all similarly situated employees. Grievant contended that he is similarly situated to the employees who are permitted to take a county owned vehicle home. Respondent countered that Grievant is not similarly situated to the other employees with whom he compares himself. In particular, Grievant was not assigned cross-county responsibilities, does not work in the same classification as other maintenance employees, and was not called out for emergencies. Grievant failed to establish by a preponderance of the evidence a case of discrimination.

Grievant also claimed he should be permitted to use a county vehicle to and from home based upon a statutory violation. Grievant failed to establish that Respondent had violated any statute, rule, regulation, or policy. Respondent's decision on how it assigned its vehicles was within its discretion, pursuant to statute, and was a management determination. This grievance is DENIED.

The undersigned makes the following Findings of Fact based upon the record developed at level three:

Findings of Fact

1. Grievant is employed by Marshall County Schools as a Heating and Air Conditioning Mechanic II/General Maintenance/Groundsman at John Marshall High School on a 260-day contract.

2. Grievant first assumed his current position on or about September 29, 2003. Near the beginning of the 2005-2006 school year, Grievant was permitted to start using a van owned by Respondent to commute to and from home.

3. The posting for Grievant's current position states the location as county/itinerant/John Marshall High School. Grievant does not report to any work station other than John Marshall High School.

4. On or about July 7, 2008 Grievant was directed to cease utilizing the van owned by Respondent for the commute to and from home. Grievant retained the use of the van for job related purposes during his regular work hours. At the same time, Grievant was notified that his supervisor was the principal at John Marshall High School.

5. Marshall County Schools employs approximately ten maintenance persons, none of whom share the same class title as Grievant.

6. Mike Slonaker is employed as a Groundsman/General Maintenance/Custodian III by Respondent at the Robert's Sports Complex. He is assigned to this one location and does not have the use of a van owned by Respondent for commuting purposes.

7. Grievant is not called away from his assigned building, John Marshall High School, to assist with other maintenance assignments.

8. With the exception of Grievant and Mike Slonaker, other maintenance employees have no permanent work station, and are daily assigned to buildings throughout Marshall County. These other maintenance employees may be called to work at odd hours in order to address emergency maintenance situations. These other maintenance employees have requested to and have performed much overtime work.

9. Each of the other maintenance employees is assigned a vehicle that is outfitted with both basic tools and special tools for performing specific maintenance tasks, as well as supplies for each particular type of job. These other maintenance employees make use of their specially outfitted vehicles to perform much of the overtime work.

10. John Marshall High School is the largest school building in Marshall County in terms of square footage, faculty and staff, and student population. The annual maintenance needs of John Marshall High School are considerable and often require the assistance of many of the Respondent's other maintenance employees.

11. The administration recently reconsidered its past practice of having maintenance employees take these specially outfitted vehicles home each evening at the end of their work day. As of July 1, 2009, a new policy went into effect requiring all Respondent owned vehicles to be parked at a Respondent-owned facility at the end of each work day.

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant claims discrimination because some maintenance employees are allowed to take their assigned board owned vehicles to and from home, while he is not.[2] He argued that he is similarly situated to these employees because they are all defined as maintenance employees under the same statutory provision. In addition, by the terms of Grievant's contract of employment, Respondent has retained the right to assign Grievant to any location in the county school system. Consequently, Grievant really is in the same position as the other countywide maintenance employees. Respondent counters that Grievant has no cross-county responsibilities. Grievant is and has always been assigned to a single work site, John Marshall High School, since bidding into his current position. Respondent also argued that Grievant is not in the same classification as any of the employees to whom he compares himself, and therefore, he has not been discriminated against.

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[2]It should be noted that similar issues presented in this grievance have been addressed by this Board in *Nottingham v. Kanawha County Board of Education*, Docket No. 02-20-062/077 (Sept. 11, 2002) and *Kuhn v. Kanawha County Board of Education*, Docket No. 02-20-336 (Jan. 31, 2003).

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did not demonstrate that he was similarly situated to any other maintenance employee in Marshall County who is allowed to drive a board-owned vehicle to and from home. Grievant does not travel to other work sites, as do the other maintenance employees with whom he compares himself. Grievant is assigned to a single work site, John Marshall High School. In fact, Grievant has repeatedly requested and received assistance at John Marshall High School from these other maintenance employees. Those employees identified as being allowed to drive a board-owned vehicle to and from home are not in Grievant's classification, and the reason they are allowed to drive their vehicle home is related to their job responsibilities, which are different from Grievant's.

Grievant's job requires him to report to John Marshall High School each day. Other maintenance employees have no permanent work station, and are daily assigned to buildings throughout Marshall County. These other maintenance employees may be called to work at odd hours in order to address emergency maintenance situations. Grievant failed to establish by a preponderance of the evidence that he is similarly situated to the other employees with whom he is comparing himself.

Grievant also seems to assert using a board-owned vehicle to and from home is a benefit and, as such, is subject to W. VA. CODE § 18A-4-5b which states:

> The county board of education may establish salary schedules which shall be in excess of state minimums fixed by this article.
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> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, 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: Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.
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> Counties may provide, in uniform manner, benefits for service personnel which require an appropriation from local funds including, but not limited to, dental, optical, health and income protection insurance, vacation time and retirement plans excluding the State Teachers Retirement System. Nothing herein shall prohibit the maintenance nor result in the reduction of any benefits in effect on the first day of January, one thousand nine hundred eighty-four, by any county board of education.
> (Emphasis added as contained in Grievant's proposals).

The advantage of driving a board-owned vehicle to and from home is not a benefit within the meaning of W. VA. CODE § 18A-4-5b. *See Kuhn v. Kanawha County Bd. of*

Educ., Docket No. 02-20-336 (Jan. 31, 2003). A benefit, pursuant to the above-cited section, must be uniformly provided to all employees without discretion. That is not the case here. W. VA. CODE § 18-5-13(o) places the authority to designate the employees who will receive vehicles with boards of education.[3] Since the designation as to which employee is to receive a vehicle is within the discretion of a board of education, the standard of review for this decision is the arbitrary and capricious standard. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

The undersigned does not find Respondent's decision to be arbitrary and capricious. Marshall County Schools did not abuse its discretion in assigning county vehicles to certain maintenance employees in its maintenance department who are not assigned to any one specific building, but rather report daily to various work sites as needed, and may be called out at odd hours to deal with emergency maintenance matters. In addition, there is no

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[3]W. VA. CODE § 18-5-13(o) provides that the authority of a board includes to "[a]llow designated employees to use publicly provided carriage to travel from their residences to their workplace and return. The use: (1) Is subject to the supervision of the county board; and (2) Shall be directly connected with, required by and essential to the performance of the employee's duties and responsibilities."

work-related reason for Grievant, who works at only one work site, to be assigned a board-owned vehicle to drive to and from home.

The following Conclusions of Law support the conclusion reached:

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant failed to establish by a preponderance of the evidence that he is similarly situated to the other maintenance employees with whom he is comparing himself as he is not employed within the same classification category, and he does not work at the same work stations as these other maintenance employees.

4. The designation of which employees may drive board of education vehicles is controlled by W. VA. CODE § 18-5-13(o). *Kuhn v. Kanawha County Bd. of Educ.*, Docket No. 02-20-336 (Jan. 31, 2003).

5. When a board of education has the discretion to act pursuant to statute, the standard of review of these actions is whether these decisions were arbitrary and capricious.

6. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

7. Marshall County Schools did not abuse its discretion in assigning county vehicles to certain maintenance employees in its maintenance department who are not assigned to any one specific building, but rather report daily to various work sites as needed, and may be called out at odd hours to deal with emergency maintenance matters.

8. Grievant has not established a violation of any policy or statute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 5, 2009

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Ronald L. Reece
Administrative Law Judge