THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAMELA SMITH and ROBERT HISSAM,
Grievants,

v. **Docket No. 2011-0588-CONS**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent,

and

JOANN MCCLAIN,
Intervenor.

DECISION

Grievants, Pamela Smith and Robert Hissam, filed this grievance against their employer, Hancock County Board of Education, on September 21, 2010. They allege that "Respondent has been inconsistent in application of the county policy regarding removal from the extra-duty assignment list for failure to perform an assigned extra-duty trip and that this inconsistency has worked to the disadvantage of Grievants. The policy was strictly enforced against Grievants, whereas another bus operator was returned to the extra-duty assignment list in violation of the policy. Grievants allege a violation of W. Va. Code 18A-4-5b and 6C-2-2(d), (h) & (i)." For relief they seek compensation for all lost wages with interest and uniform application of the policy related to extra-duty assignments.

A level one conference was held on September 24, 2010. The grievance was denied by decision dated September 27, 2010. Level two mediation was conducted on December 21, 2010. Grievants appealed to level three on December 29, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on April 19, 2011, at the Grievance Board's Westover office. Grievants appeared in person and

by their counsel, John Everett Roush, West Virginia School Service Personnel Association. Intervenor appeared in person and by her representative, Owens Brown, West Virginia Education Association. Respondent appeared by its counsel, William T. Fahey, Assistant Prosecuting Attorney for Hancock County.

Synopsis

Respondent has a policy that when a bus operator fails to show up for an extra-duty assignment, he or she is ineligible for extra-duty assignments until the next sign-up period. Both Grievants missed an extra-duty assignment and they were not eligible for those assignments until the next sign-up period. The Intervenor missed an extra-duty assignment because she was given the wrong report date by the transportation director. The Intervenor was not at fault when she missed her assignment, while the Grievants missed their assignments due to their own fault. Grievants failed to meet their burden of proof and demonstrate that the action of Respondent in reinstating Intervenor on the extra-duty assignment list was arbitrary and capricious; nor did Grievants prove that they were the victims of favoritism or discrimination. This grievance is denied.

The following findings of fact are based upon the record of this grievance developed at level three.

Findings of Fact

1. Pamela Smith, Robert Hissam, and JoAnn McClain are employed by the Respondent as bus operators. Ms. McClain appeared at the level three hearing of this grievance and was granted Intervenor status.

2. Grievants, Pamela Smith and Robert Hissam, challenge the application of a policy of the Respondent. The policy provides that any driver not adhering to the cancellation procedure in the policy for extra-duty assignments would be removed from the rotation for extra-duty assignments until the next sign-up period.[1]

3. The sign-up dates contained in the policy are the beginning of the school year, December 1, March 15, and the last in-service day of the school year. Depending on the missed assignment, the period of disqualification can be brief or up to three months.

4. Grievant Robert Hissam missed a scheduled extra-duty assignment on a Monday when school was not in session in January of 2009. Grievant mistakenly thought that the extra-duty assignment was scheduled for later in the week.

5. Grievant Pamela Smith missed a trip in March of 2010. Grievant was confused and thought the trip was scheduled for a Tuesday rather than a Monday. Grievant was ineligible to perform extra-duty assignments for the remainder of the school year.

6. Both Grievants acknowledged that the missed trip was entirely their own fault.

7. On September 5, 2010, Intervenor asked for an extra-duty assignment that had been assigned to a bus operator who was absent due to illness. Timothy Reinard, Coordinator of Transportation, told Intervenor that the trip was not scheduled to take place for some time and that he would deal with the matter later when he found out if the driver,

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[1]Extra-duty assignment means an irregular job that occurs 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)(1).

to whom the trip was originally assigned, would be back to work in time to perform the assignment.

8. Mr. Reinard mistakenly led the Intervenor to believe that the extra-duty run would be on Saturday when in fact the scheduled trip was for a Friday. Intervenor made the comment that she wanted to take a particular bus and that all the buses were available. This comment further confirms that Intervenor believed the trip was on a Saturday.

9. On Friday, September 10, 2010, Intervenor did not show up to perform the extra-duty assignment in question. Mr. Reinard then removed Intervenor from the eligibility list for extra-duty assignments. However, Wayne Neely, Assistant Superintendent, directed that Intervenor be reinstated to eligibility for extra-duty assignments due to the failure to communicate the correct assignment date.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

Grievants contend that Intervenor's situation related to missing an extra-duty assignment did not "really" differ from those of the Grievants.[2] In short, there has been a difference of treatment of similarly situated individuals. Grievants claim that this constitutes discrimination and/or favoritism. 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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h).

In order to establish either a discrimination or favoritism 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

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[2]Grievants' proposals, page 4.

Grievants have not met their burden of proving that they were similarly situated to the Intervenor. Grievant Robert Hissam missed an extra-duty assignment through no fault of the Respondent. In addition, Grievant Pamela Smith missed an extra-duty assignment through no fault of the Respondent. However, Intervenor JoAnn McClain, due to the miscommunication between Intervenor and Mr. Reinard related to the assignment date, missed her assignment through no fault of her own. Mr. Reinard meant to tell Intervenor the assignment was on a Friday, but did not make that clear to Intervenor. In fact, the Intervenor made the statement to Mr. Reinard that all substitute buses would be available since there were no runs on the day [Saturday] of the trip. This demonstrates responsibility on the part of Respondent for Intervenor missing the assignment date, and was the basis of the exception provided to Intervenor to be reinstated to the extra-duty assignment rotation. It also establishes that Grievants and Intervenor were not similarly situated to each other as it relates to the application of the policy.

Nothing about Respondent's decision to reinstate Intervenor to the extra-duty assignment rotation was arbitrary and capricious, or an abuse of its broad discretion. In addition, Grievants did not meet their burden of proof and establish that they were the victims of favoritism or discrimination.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 either a discrimination or favoritism 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

3. Grievants failed to demonstrate that they were the victims of discrimination or favoritism.

4. Grievants have failed to prove, by a preponderance of the evidence, that they were similarly situated to the Intervenor concerning the application of the policy related to missing extra-duty assignments. In addition, Grievants have failed to prove that the action of Respondent was arbitrary and capricious, or an abuse of discretion.

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 (eff. July 7, 2008).

Date: June 30, 2011

Ronald L. Reece
Administrative Law Judge