THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELIZABETH A. BROWN,
Grievant,

v. **DOCKET NO. 2010-1686-HamED**

HAMPSHIRE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on March 3, 2010, by Grievant, Elizabeth A. Brown, against her employer, the Hampshire County Board of Education. The statement of grievance reads:

> Grievant's supervisor required Grievant to perform her full bus schedule on February 16, 2010, a day when students did not attend school. Other bus operators were permitted to make an abridged version of their routes and one did not run any of his route on that day. Grievant contends that this action constitutes favoritism and discrimination according to W. Va. Code 6C-2-2.

The relief sought by Grievant is "appropriate relief for the act of discrimination/favoritism, i.e., compensation for time worked over and above that worked by the other bus operators on February 16, 2010, cessation of discrimination/favoritism, and appropriate disciplinary measures taken against her supervisor to ensure equal treatment of Grievant in the future."

A hearing was held at level one on June 28, 2010, and the grievance was denied at that level on August 26, 2010. Grievant appealed to level two on September 2, 2010, and a mediation session was held on December 2, 2010. Grievant appealed to level three on December 16, 2010, and a level three hearing was held before the undersigned

Administrative Law Judge, in the Grievance Board's Westover office on September 9, 2011. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on October 17, 2011, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

In February 2010, severe weather caused schools in Hampshire County to be closed for two weeks. The Superintendent decided to have the bus operators in the county drive their routes using the buses on a "dry run," to determine what stops and turnaround areas needed to be plowed before students could return to school. Grievant claimed her supervisor showed favoritism and discriminated against her when the supervisor told some bus operators they did not have to drive their buses over Route 50 to check the road conditions on the dry run, while Grievant was required to take her bus over Route 50. Grievant's supervisor already knew that Route 50 was clear, but she needed Grievant to make this part of her run because she needed to be sure that the fueling area where Grievant turned her 90-passenger bus around had been cleared enough for the larger bus to get through. Grievant did not run her entire route either during the "dry run," because she felt that one of the side roads was too dangerous. All the bus operators were paid for the entire day, including Grievant. Grievant did not demonstrate that her supervisor engaged in discrimination or favoritism.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Hampshire County Board of Education ("HBOE") as a Bus Operator.

2. During February 2010, heavy snowfall in Hampshire County caused roads to be unpassable, and schools were closed for two weeks. The National Guard was called in to clear roads, and in anticipation of this, HBOE Superintendent Robin Lewis told the Transportation Director, Peggy Whitacre, to have the bus operators run their routes empty, so they could report on whether their routes were passable, and on what areas where they turned, pulled over, or picked up students needed to be plowed.

3. On February 16, 2010, Ms. Whitacre sent a message out to all HBOE bus operators via the automated calling system, telling them to run their bus routes on a two-hour delay on February 17, 2010, empty; that is, they were not to pick up students.

4. Grievant had driven her four-wheel drive on a part of her route earlier on February 16, 2010, and did not believe it was safe for her to take her bus down that road. Grievant told Ms. Whitacre she was not going to take her bus down Jason Haines Road. She also questioned whether she needed to run that part of her bus route which took her on Route 50, since that main road was clear. Ms. Whitacre told Grievant she needed her to complete her route by taking Route 50, so that she could make sure Grievant could get her 90-passenger bus around the pumps and through the lanes where she turned.

5. HBOE has only two 90-passenger buses, and Ms. Whitacre was concerned that these larger buses might face issues that the other buses would not because of the difference in the turning radius and the tail swing.

6. Grievant ran her bus route on February 17, 2010, empty, on a two-hour delay, and was paid for a full day of work. She did not run all of her route, as she did not make the loop off Route 29 onto Jason Haines Road.

7. Grievant was not verbally reprimanded for not completing her entire route on February 17, 2010, or for refusing to take her bus down Jason Haines Road.[1]

8. None of the buses were running on their usual schedule on February 17, 2010, because the bus operators were not stopping to pick up students, and some of the bus operators did not run exactly on a two-hour delay.

9. HBOE Bus Operator Ronnie Riggleman started his run on February 17, 2010, about 15 minutes later than he normally would have started on a two-hour delay. He put the chains on his bus and drove his assigned route, stopping at Capon Bridge Elementary and Middle Schools to remove his chains. While he was preparing to remove the chains from his bus so he could complete his route via Route 50 to Hampshire High School, he was told by one of the other Bus Operators that they did not need to go down Route 50. Mr. Riggleman called Ms. Whitacre and asked her what she wanted him to do, and she told him he did not need to go to Hampshire High School, as she was aware of the road conditions on Route 50. Mr. Riggleman does not drive a 90-passenger bus.

10. Ms. Whitacre told three bus operators that they did not need to complete their runs by taking their buses down Route 50 to Hampshire High School. Her decision was based on several factors. These drivers had driven this same area in their personal

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[1] The undersigned would point out, however, that Grievant's own testimony about the manner in which she questioned her supervisor's directive to drive Route 50, probably would support a charge of insubordination.

vehicles already, and knew the road was clear, and two of the three had no stops on Route 50 that they needed to check for snow. Further, Ms. Whitacre did not see any reason to expend the fuel and wear and tear on the buses when it was not necessary. One of these three drivers took his bus down Route 50 anyway to make sure he could pull the bus off the road in the area where he was scheduled to do so.

11. Grievant reported to Ms. Whitacre that the road needed plowed at the Hanging Rock turn on Route 50, as she had to take the bus into the other lane at the point.

12. All the bus operators employed by HBOE drove at least some portion of their route on February 17, 2010, and all were paid for a full day of work. Most of the bus operators drove their entire route that day.

13. Ms. Whitacre is no longer employed by HBOE.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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 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 claimed discrimination and favoritism. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). 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 favoritism or 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 asserted that Mr. Riggleman did not run any part of his route on February 17, 2010. Her assertion was based entirely on speculation. She assumed that because Mr. Riggleman's bus, and other buses, should have already left Capon Bridge Elementary and Middle Schools by the time she arrived under a normal schedule, but were still there when she arrived on February 17, that Mr. Riggleman did not make his run. Mr. Riggleman explained, however, that he was running late. Grievant also did not take into consideration that the road conditions and the fact that no one was stopping to pick up students would

also impact the timing of every bus on that day. Grievant also asserted that Mr. Riggleman could not have been operating his bus because the hood was cold when she touched it. Mr. Riggleman was somewhat stunned by this assertion, so he did a test. After he heard the rumor being circulated about him not making his run because the hood of the bus was cold, he touched the hood of the bus on a cold day after February 17, after he had run the bus for a while, and it was indeed cold.

Mr. Riggleman and some of the other Bus Operators were told not to complete their routes taking Route 50, while Grievant was told she had to complete her route using Route 50. The difference, as explained by Ms. Whitacre, was that Grievant drove a larger bus, and Ms. Whitacre needed to be sure that Grievant's bus was not going to have any turning problems. Any difference in treatment was related to actual job responsibilities. The undersigned would also point out, as did Respondent, that Grievant herself did not complete her entire route. All the HBOE Bus Operators were paid their regular rate for the day, regardless of how much time they put in. They were all treated the same in this regard.

Finally, Ms. Whitacre is no longer employed by HBOE, so Grievant's requested relief as relates to Ms. Whitacre is now moot.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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 favoritism or 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 demonstrate that she was the victim of discrimination or favoritism.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: November 16, 2011