

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ROSEANNA FINNEY,
Grievant,**

v.

DOCKET NO. 2017-1523-HanED

**HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Roseanna Finney, filed this grievance against her employer, the Hancock County Board of Education, on January 20, 2017. The statement of grievance reads: “[v]iolation of WV Code 6c-2-2(d)(l) current and past practice, uniformity of pay. Grievant was assigned an extracurricular trip¹ by respondent’s representative. Trip was canceled but the school/athletes attended and participated in the event. Current and past practice of the BOE is to compensate the driver in situations such as this.” As relief Grievant seeks “[c]ompensation for the time of the scheduled trip of 17.25 hours at holiday week pay plus interest.”

A hearing was held at level one on February 21, 2017, and a level one decision denying the grievance was issued on February 27, 2017. Grievant appealed to level two on March 9, 2017, and a mediation session was held on April 25, 2017. Grievant appealed to level three on May 1, 2017, and a level three hearing was held before the undersigned Administrative Law Judge at the Grievance Board’s Westover office on September 13,

¹ It is clear from the record that this was an extra-duty trip, as defined in WEST VIRGINIA CODE § 18A-4-8b, not an extracurricular trip, as defined in WEST VIRGINIA CODE § 18A-4-16.

2017. Grievant was represented by Jeremy Radabaugh, West Virginia Education Association, and Respondent was represented by David F. Cross, Esquire. This matter became mature for decision on October 16, 2017, the deadline for submission of written Proposed Findings of Fact and Conclusions of Law. Both parties submitted written argument by the agreed deadline.

Synopsis

Grievant was assigned an extra-duty trip scheduled for December 28, 2016, transporting a private high school wrestling team to a wrestling match. Grievant was told the same day she accepted this trip that the trip had been canceled. Respondent followed its standard practice and did not pay Grievant for this trip. Grievant did not demonstrate that she was treated differently from any other similarly-situated employee.

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

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education (“HBOE”) as a bus operator for four years.

2. HBOE bus operators who wish to make extra-duty trips put their names on the applicable list for extra-duty trips, and are called out to work extra-duty trips on a rotating basis, beginning with the most senior bus operator on the list. There are four extra-duty lists in the county, two for bus operators in the Weirton area, and two for the Oak Glen area. The lists are divided into trips which occur during the school day, and trips that occur after hours.

3. Each week HBOE's Transportation Department prepares "trip sheets" listing the extra-duty trips for the following week. On Thursday of each week, the trip sheet is posted for the bus operators to view. The Secretary for the Transportation Department assigns a driver to each trip for the following week from the bus operator rotation list.

4. On Monday, December 19, 2016, Grievant was assigned to a trip scheduled for December 28, 2016, transporting the Weirton Madonna High School wrestling team to WesBanco Arena. The trip had originally been assigned to bus operator Jamie Jenkins, who later declined the trip.

5. Weirton Madonna High School is a private Catholic school in Hancock County. HBOE, however, provides transportation to the students who attend this school.

6. The trip sheet listed the departure time for the WesBanco Arena as 5:45 a.m., and the return time as 10:00 p.m. With pre-trip and post-trip inspections, this would be 17.25 hours of work.

7. Later on the same day she was offered and accepted this trip, December 19, 2016, Grievant was notified that the trip had been canceled. The Weirton Madonna High School wrestling team traveled to the event at the WesBanco Arena on December 28, 2016, using personal vehicles. Grievant was not paid for this trip.

8. A bus was also scheduled to transport the Weirton Madonna High School wrestling team to the WesBanco Area on December 29, 2016. This was a separate extra-duty trip, and was assigned to a driver other than Grievant. This bus was needed for this trip, and the assigned bus operator made the trip and was paid for the trip.

9. It is HBOE's practice to pay bus operators who have agreed to make an extra-duty trip when the trip is canceled because a decision was made to use a charter bus

instead, and the trip was not canceled in a timely manner. The drivers are paid the entire amount they would have been paid if they had made the trip.

10. Bus operators Trish Barr, Pam Smith, and Bob Stewart were paid as though they had made extra-duty trips when the trips were canceled, but not canceled in a timely manner, because a decision was made to use a charter bus to transport students. The bill for the driver time for Ms. Barr and Mr. Stewart was sent to the Oak Glen Boosters Club, and this expense was paid by the Boosters Club.

11. HBOE does not have in place a written policy which states that bus operators will be paid for canceled trips in particular circumstances. It is HBOE's practice to pay bus operators for two hours' work when a trip is canceled so late in the process that the bus operator has already arrived at work to make the trip before he or she can be notified of the cancellation, or when the trip is placed on the trip sheet by mistake.

12. HBOE bus operator Jeff Plimpton accepted an extra-duty trip in 2009 transporting a baseball team to a game. Mr. Plimpton was notified at noon on the day of the trip that the trip had been canceled. The game was not canceled, and the students used their personal vehicles to travel to the game. Mr. Plimpton was paid for the number of hours it took to play the baseball game, but not for any estimated transportation time. Mr. Plimpton acknowledged, however, that it is the practice of HBOE not to pay a bus operator when the extra-duty trip to which he or she has been assigned is canceled in a timely manner, and that there is not a general practice of paying bus operators when the students drive themselves to an event if the trip is canceled in a timely manner.

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 argued that other employees were paid when trips were canceled but the scheduled event took place and the students were transported to the event by other means, which, she alleged, constitutes discrimination. Respondent acknowledged that it has certain practices in place for paying bus operators in limited circumstances when an extra-duty trip is canceled, but that Grievant's situation did not fall within any of these practices, and she was not discriminated against. Respondent also asserted that Grievant had acted in extreme bad faith in pursuing this grievance, and that costs should be awarded to Respondent.

Extra-duty trips are trips which are "irregular jobs that occur 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). That CODE Section describes how extra-duty assignments are to be made, stating:

(A) A service person with the greatest length of service time in a particular category of employment shall be given priority in accepting extra[-]duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated.

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

The statute does not address the cancellation of a trip after it has been accepted by an employee.

Grievant pointed to the fact that other bus operators have been paid for trips when the trip was canceled, but the students went to the event anyway, but by other means of transportation. Grievant asserted she had been discriminated against. 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,

(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, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The situations in which bus operators were paid by HBOE for canceled trips are not the same as Grievant's situation. While Respondent has paid bus operators on a few occasions when a charter bus was used, the testimony was that in these instances the trip was not canceled in a timely manner, and that the tab for the bus operator's time was picked up by the Boosters Club, not the county. Grievant did not argue that her trip was not canceled in a timely manner, and indeed, nine days in advance would seem to be timely cancellation. Also, there was no Booster Club here which could be billed by Respondent for Grievant's services. The only instance when a bus operator was paid when the students drove themselves to an event occurred many years ago in 2009, and in that case, the bus operator was notified just a few hours before he was to make the trip. Grievant did not demonstrate that she was treated differently from any other employee.

As to Respondent's assertion that this grievance was pursued in extreme bad faith, this argument lacks merit. WEST VIRGINIA CODE § 6C-2.4(c)(6) states that "[t]he administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." Respondent did not indicate that the issue presented had already been decided, but rather simply argued that Grievant had clearly not been discriminated against. Grievant put forth into evidence situations in which bus operators had in fact been paid when a trip was canceled, but the students traveled to the event, which she argued were similar to her situation. This is not bad faith, and clearly is not extreme bad faith, but a difference of point of view. Respondent's Motion for an award of costs is **DENIED**.

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). "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. Service personnel with the greatest amount of seniority "shall be given priority in accepting extra[-]duty assignments" on a rotating basis. W. VA. CODE § 18A-4-8b(f)(A). This statute does not address the cancellation of assignments after they have been accepted by the employee.

3. 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant did not demonstrate that any similarly-situated employee had been treated differently from her.

5. If an administrative law judge finds that a party has acted in bad faith, and the action is extreme, the cost of the hearing may be allocated to the party found to be acting in bad faith, but is to be based on the relative ability of the party to pay the costs. W. VA. CODE § 6C-2.4(c)(6). Respondent did not demonstrate that this grievance was pursued in bad faith.

Accordingly, this grievance is **DENIED**, and Respondent's Motion for an award of costs 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).

Date: November 28, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge