

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SCOTT ZANDERS,
Grievant,

v.

Docket No. 2016-1448-WayED

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Scott Zanders, is employed by Respondent, Wayne County Board of Education. On March 17, 2016, Grievant filed this grievance against Respondent stating, “(Agreement 1997 – Extra Duties, Sect. H.) Currently, I am required to pickup and dropoff my bus aide before and after my assigned bus runs. Other bus drivers are receiving compensation for this extra duty/driving.” For relief, Grievant stated, “I am requesting the same daily compensation (\$20.00) that other bus drivers are receiving who are employed by the Wayne County Board of Education for picking up and dropping off their bus aide before and after assigned bus runs.” In his appeal to level two Grievant changed his statement, stating, “Other bus drivers are receiving compensation for this extra duty/driving.” In his appeal to level three Grievant changed his statement, stating, “Mr. Zanders has been wrongfully and unlawfully denied compensation for picking up aides on his bus route while other bus drivers are receiving extra pay. Mr. Zanders was wrongfully and unlawfully denied uniform compensation while performing similar duties under WV Code Section 18-4-5b.” At level three Grievant requested the following relief: “Mr. Zanders requests to be made whole, including but not limited to, all backpay with interests.”

Following the April 14, 2016 level one conference, a level one decision was rendered on May 4, 2016, denying the grievance. Grievant appealed to level two on May 16, 2016. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on June 19, 2016. A level three hearing was held on November 22, 2016, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, Wes Toney, AFT-WV/AFL-CIO. Respondent was represented by counsel, David Lycan, David Lycan, LC. Following the level three hearing, Mr. Lycan retired, and Respondent's Proposed Findings of Fact and Conclusions of Law were prepared and submitted by counsel, Leslie K. Tyree. This matter became mature for decision on January 12, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Bus Operator. Grievant asserted he was not provided uniform compensation. The employees to whom Grievant compared himself were performing an extracurricular duty when they were required to take extra time to pick up Aides away from their regular bus routes. Grievant was not performing an extracurricular duty as picking up the Aide was included in his route, and did not take extra time as it was on the route. Grievant failed to prove Respondent violated the uniformity provisions as Grievant was not performing an extracurricular duty like the compared employees. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Bus Operator.
2. Grievant bid on and was assigned Route 2783. The route requires Grievant to pick up Aides at Crum Elementary School, pick up children along the old fork of Jennies Creek Road and Jennies Creek Road¹, and then unload children at Crum Middle School, Tolsia High School, and Crum Elementary School. Because of a reduction of children on the route, Grievant picks up only one Aide.
3. The trip summary attached to the bid for the route does not state that the Aides are to be picked up from the elementary school and dropped back off at the elementary school in the afternoons, but Grievant does so.
4. Respondent pays two other Bus Operators \$20 extracurricular pay per day to pick up Aides prior to beginning their regular route. The Bus Operators are paid this extra amount because they are required to take extra time to go away from their regular routes to pick up the Aides. The Bus Operators began to receive this pay when Aides, who had previously been required to meet the bus at the home of the child they were assigned, successfully grieved that they should be picked up and dropped off at a school.
5. Grievant is not required to go away from his regular route to pick up the Aide.
6. Grievant is permitted to park his bus at a safe location of his choice. Grievant parks at Copley's Market. Grievant's parking area and his route are south of Crum Elementary School, where he is required to pick up the Aide. However, there are

¹ It appears from the trip summary that the old fork of Jennies Creek Road and Jennies Creek Road are two different roads.

railroad tracks that are between Grievant's parking area and his route. There are two railroad crossings: one near Grievant's parking area, and one to the north of the school. The railroad crossing near Grievant's parking area is unsafe per Respondent's policy, so Grievant is required to use the crossing to the north of the school. Therefore, Grievant must drive past the school to and from his route.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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 asserts Respondent failed to maintain uniformity of compensation and that Respondent cannot cure the lack of uniformity by including picking up the Aide in the bid for the route. Respondent asserts Grievant failed to establish that picking up or dropping of the Aide constituted a separate job.

"[U]niformity 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." W. VA. CODE § 18A-4-5b. County boards of education are required to provide uniform benefits and compensation only to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and

actual working days.” *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. *Lockett v. Fayette County Bd. of Educ.*, Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-105 (Sept. 24, 1997).

The other Bus Operators to which Grievant compares himself are receiving extracurricular pay because they are picking up the Aides away from their regular run, which was not included in the route they bid on.

“Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.”

W. VA. CODE § 18A-4-16(1). Grievant is not performing an extracurricular duty. Picking up the Aide is included in his route and he is not required to drive away from his route in order to pick up the Aide. Grievant and the employees to which he compares himself are not performing like duties as Grievant is not performing an extracurricular duty.

Grievant argues that *Swisher et al. v. Preston County Bd. of Educ.*, Docket No. 39-87-266-2 (Apr. 29, 1988) does not permit Respondent to differentiate between the Bus Operators by including the Aide pick up and drop off in Grievant's route. *Swisher* does

not apply to this case. In *Swisher*, the grievants accepted positions that included a mid-day run in between the morning and afternoon runs. Other Bus Operators who had been hired before the grievants were receiving supplemental pay for the same type of mid-day runs. This had happened because the Respondent had been attempting to phase out paying a supplement for the mid-day runs through attrition. The *Swisher* ALJ determined this violated uniformity because the employees were doing the same work for different pay. In this case, Grievant has not proven that he is doing the same work as the Bus Operators who are required to start their runs earlier to going away from their assigned route to pick up their Aides.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. "[U]niformity 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." W. VA. CODE § 18A-4-5b. County boards of education are

required to provide uniform benefits and compensation only to similarly situated employees, meaning those who have “like classifications, ranks, assignments, duties and actual working days.” *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. *Lockett v. Fayette County Bd. of Educ.*, Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-105 (Sept. 24, 1997).

3. Extracurricular duties are defined in the West Virginia State Code as:

Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.

W. VA. CODE § 18A-4-16(1).

4. Grievant failed to prove Respondent had violated the uniformity provisions as Grievant was not performing an extracurricular duty like the compared employees.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: March 8, 2017

Billie Thacker Catlett
Chief Administrative Law Judge