WANDA WORKMAN,

Grievant,

v. **DOCKET NO. 95-08-170**

CLAY COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Wanda Workman, filed this grievance on March 10, 1995, requesting compensation for "coming in early to get students off the bus (7:40). Employees at high school are being compensated." Following adverse decisions at the lower levels, Grievant advanced an appeal to Level IV on April 14, 1995. Hearing was held on June 6, 1995, at which time this case became mature for decision.

Findings of Fact

The material facts in this case are not in dispute. Grievant is a special education aide at Respondent's Clay Elementary School. During the 1994-1995 school year, Grievant was responsible for a special education student who required assistance getting off the school bus in the morning. Employees of Respondent are paid for an 8-hour workday, normally from 8:00 a.m. to 3:30 p.m. To facilitate the student, Grievant had to be at school at 7:40 a.m. when the bus

arrived. During the 1993-94 school year, Grievant requested extra compensation for arriving at school 30 minutes earlier than other employees. She had been denied this compensation because the 30 minutes still fell within the 8-hour workday. Grievant does not deny that the 30 minutes fell within her 8-hour workday. However, in Spring 1995, Grievant learned that special education aides at Clay County High School were receiving "compensatory time" for arriving early to assist students off the buses, and subsequently filed this grievance.[1] Clay Elementary School, where Grievant works, has an arrangement where employees are permitted to take off up to 1-1/2 hours early, up to 15 days a year, without reporting the time as sick leave. LIV, Krauklis.[2] Indeed, Grievant has benefitted personally from this arrangement. LIV, Workman.

Discussion

Grievant does not deny that assisting the special education student off the bus is included in her job duties, nor does she deny that those duties fall within her 8-hour work day. Rather, Grievant alleges she is being discriminated against because she was refused any type of compensation for arriving at school early, when the high school aides receive "compensatory time."

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[1] Grievant originally requested as relief that she be given compensatory time, also. However, because the grievance had not been resolved by the end of the school year, Grievant changed her relief and now requests that she be compensated in an equivalent dollar amount.

[2] References to testimony at the Level IV hearing will be "LIV, (Witness).

"Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o).

The test to determine whether Grievant has established a prima facie case of discrimination or favoritism requires Grievant to establish by a preponderance of the evidence:

> (a) that she is similarly situated in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
>
> (c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince.

Although the undersigned questions whether Grievant is "similarly situated" in this particular instance to employees in another, separate school (See Hays v. W. Va. Div. of Employment

Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992)), the undersigned finds that, even if she is similarly situated, Grievant has not proven that she has been discriminated against in this case.

Grievant was aware at the beginning of the 1994-95 school year that she would have to arrive 15-20 minutes early to assist her special education student. LIV, Workman. James Dawson, Superintendent, explained that a special education aide at Clay County High School, also responsible for assisting students off the bus, had her working conditions changed during the school year. At some time after the beginning of the school year, a special education student moved farther away from school, which required that the aide come in early and stay later to assist the student off the bus. Because the change occurred during the school year, the Principal at Clay County High School told the aide, and others similarly situated, that he would provide them with "comp time", which meant that if they had to take off early or take a day off, he would not report it as sick leave. This agreement was acceptable to the employees. LIV, Dawson.

Jeff Krauklis, Assistant Superintendent and Director of Special Education, testified that Clay Elementary School, where Grievant works, has a similar arrangement where employees are permitted to take off up to 1-1/2 hours early, up to 15 days a year, without reporting the time as sick leave. LIV, Krauklis. Indeed, Grievant has benefitted personally from this arrangement. LIV, Workman. Mr. Krauklis explained "every school" offers some

form of additional compensation or "perk" outside the framework of the Board of Education, and that the Board does not wish to interfere with these types of arrangements in an effort to give principals "leeway" in accommodating the individual needs of their employees. LIV, Krauklis.

Thus, while it appears that the arrangement at Clay County High School may be euphemistically termed "comp time", it does not appear to be any different than the arrangement at Clay Elementary allowing its employees to take off time up to 15 days a year without reporting it as sick leave. Further, it appears that the arrangement at Clay County High School was entered into because a service employee's work schedule was changed during the school year, whereas Grievant's work schedule was determined at the beginning of the 1994-95 school year. While the undersigned is uncertain that the change which occurred at Clay County High School demanded any action to further "compensate" the employee, it is certainly within the authority of the Principal to make an effort to accommodate his employees in such a situation. See W. Va. Code § 18A-4-8a. Grievant, on the other hand, already enjoyed the benefit of the sick leave arrangement at Clay Elementary, despite her work schedule.

Conclusions of Law

1. In order to prevail, Grievant must establish the truth of her allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. Grievant has failed to prove that she has been discriminated against in any way in not receiving additional compensation in the form of "compensatory time" or salary, for arriving at school 20 minutes early, but well within her 8-hour work day, to assist a special education student off the bus.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Clay County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ
Administrative Law Judge

Dated: July 14, 1995