DANNY MARSHALL,

Grievant,

v. **DOCKET NO. 98-17-262**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Danny Marshall, alleges that an alteration to his 1997-1998 bus driving schedule entitles him to additional pay. The record does not reflect the date of the initial filing at level one. The grievance was denied by Grievant's immediate supervisor on January 9, 1998. Grievant appealed to level two, where a hearing was held before William Ashcraft, Assistant Superintendent, on May 20, 1998. (See footnote 1) Mr. Ashcraft denied the grievance in a written decision dated June 5, 1998. Consideration at level three was waived, and Grievant appealed to level four on July 21, 1998. The grievance was transferred to the undersigned administrative law judge for administrative reasons on July 29, 1998. The parties agreed to submit this matter based upon the record developed below, and it became mature for consideration on October 29, 1998, upon receipt of the parties' written submissions. Grievant represented himself, and Respondent was represented by counsel, Basil R. Legg.

The following findings of fact are made from a preponderance of the evidence of record, including the level two transcript, and Joint Exhibit 1 (See footnote 2) submitted by the parties atlevel four.

Findings of Fact

1. Grievant is employed as a bus operator for the Harrison County Board of Education ("HCBOE"), and he is contracted to work six hours per day.

2. At the beginning of the 1997-1998 school year, changes in various bus schedules were implemented in order to accommodate students who attended the United Technical Center. (See

footnote 3)

3. As a result of the changes described above, Grievant's daily bus route was slightly altered, adding approximately one quarter of a mile in distance and less than five minutes in driving time.

4. Some bus operators employed by HCBOE have contracts for an eight-hour work day.

5. Grievant is not requesting an eight-hour contract, but believes he should be compensated for an additional one hour of work per day.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6. Grievant complains that he is not being compensated for the 1997-1998 addition to his bus run, and argues that he should receive one hour of additional pay. Grievant does not appear to contend that the schedule change itself was improper. (See footnote 4) Rather, he contends that the other bus operators who were affected by the changes had eight-hour contracts, while he held only a six-hour contract. Grievant believes that he is performing the same work as these eight-hour bus drivers, so he should receive additional compensation. He argues he is not receiving “like pay for like work.” (See footnote 5) However, he wants only an additional hour of compensation, not an eight-hour contract.

W. Va. Code § 18A-4-5b states that “uniformity 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.” In order to prevail in a claim of pay non-uniformity, a grievant must demonstrate that he is actually “performing like assignments and duties” to those with whom he has compared himself. See Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Robb v. Hancock County Bd. of Educ., Docket No. 91-15-356 (Mar. 31, 1992); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990) (rev'd on other grounds, Harrison CountyBd. of Educ. v. Allman, Circuit Court of Harrison County, Civil Action No. 90-P-86-2, Apr. 15, 1992). Even employees holding the exact same classification have been determined to have been properly granted different contract terms, based upon different work sites and duties. See Robb,

supra. In non-uniformity cases in which employees have prevailed, the grievants and those to whom they compared themselves worked in the same location or office, had the same schedule, performed the same duties, and worked the same hours and number of days. Flint v. Harrison County Bd. of Educ., Docket No. 97-17-348 (Jan. 22, 1998); Allman, supra.

The record in this case is completely devoid of any evidence regarding Grievant's daily duties or work hours, nor is there any evidence regarding the duties or hours of the drivers who have eight-hour work days. Accordingly, the undersigned is unable to conclude that HCBOE has violated the uniformity statute with regard to Grievant's contract term or his salary. Moreover, there is no indication in the record that Grievant is actually working more than the six-hour day for which he is contracted.

Although not specifically articulated, it appears that Grievant is claiming that HCBOE's failure to provide him with additional compensation, while other drivers have eight-hour contracts, is discriminatory. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more otheremployee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket

Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Grievant has failed to establish a prima facie case of discrimination. Without any information in the record regarding the particulars of Grievant's duties and those of the other bus operators, it is impossible to conclude that Grievant is "similarly situated" to those employees or that any differences in compensation are "unrelated to actual responsibilities." Accordingly, Grievant has not met his burden of proof in this regard.

The evidence does not indicate that Grievant is being improperly compensated in his position as a bus operator. The following conclusions of law support this decision.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. "Uniformity 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.

3. In order to prevail in a claim of pay non-uniformity, a grievant must demonstrate that he is actually "performing like assignments and duties" to those with whom he has compared himself. See Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Robb v. Hancock County Bd. of Educ., Docket No. 91-15-356 (Mar. 31, 1992); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990) (rev'd on other grounds, Harrison County Bd. of Educ. v. Allman, Circuit Court of Harrison County, Civil Action No. 90-P-86-2, Apr. 15, 1992).

4. Grievant has not established any violations of W. Va. Code §18A-4-5b with regard to his salary as a bus operator for HCBOE.

5. W. Va. Code §18-29-2(m) defines "discrimination" to mean "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."

6. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989) at 15.

7. Grievant has failed to establish a prima facie case of discrimination with regard to his compensation as a bus operator for HCBOE.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison 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.

Date: November 18, 1998 _____

DENISE MANNING SPATAFORE

Administrative Law Judge

Footnote: 1

The record does not explain the long delay between the level one denial and the level two hearing.

Footnote: 2

Joint Exhibit I was the memorandum dated August 7, 1997, providing notice of the alterations in bus schedules for the 1997-1998 school year.

Footnote: 3

The record does not explain the nature of the "United Technical Center School," but it is assumed that it is a HCBOE facility.

Footnote: 4

This Grievance Board has issued numerous decisions concluding that minor changes in a bus operator's schedule are not contrary to any of the statutes applicable to school service personnel. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Sipple v. Mingo County Bd. of Educ., Docket No. 95-23-421 (Mar. 27, 1996). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989). Clearly, an addition of a quarter mile and less than five minutes of driving time is an extremely slight variation in schedule and is permissible.

Footnote: 5

It appears the Grievant contends that, with the addition of a few more minutes to his driving time, he and all the other bus drivers are working the same amount of time.