SHIRLEY A. WILLIAMS,

Grievant,

v. DOCKET NO. 98-20-323

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Shirley A. Williams on or about June 26, 1998, against Respondent Kanawha County Board of Education ("KBOE"), alleging she was the most senior applicant for a summer Bus Monitor Aide position, but was not selected because her husband was the Bus Operator. As relief she requested that she be paid "any and all benefits that are due me from being denied the position in question."

The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II hearing. (See footnote 1)

Findings of Fact

1. Grievant is employed by KBOE as an Aide III. She has been employed by KBOE for 26 years.

2. KBOE posted a vacancy for a Bus Monitor Aide at the South Charleston Bus Garage, for the 1998 extended summer school program.

3. Grievant timely applied for the posted position. She was the most senior applicant, and had good evaluations.

4. An applicant with less seniority than Grievant was selected for the position.

5. Grievant's husband was the Bus Operator assigned to the bus on which this Bus Monitor Aide would serve.

6. On April 23, 1998, KBOE adopted a nepotism policy, which provides that, for the purposes of the policy, a bus operator is regarded as a supervisor of aides who ride his bus. The policy does not allow an employee to be placed in a position where he or she will be supervised by his or her

spouse.

7. There are two buses in Kanawha County on which the Aide assigned to the bus is married to the Bus Operator. Both of these situations were in place prior to the passage of the nepotism policy. The nepotism policy does not require that an employee already in this situation be transferred, and has not been retroactively applied by KBOE to remove employees from positions when they are being supervised by their spouses.

Discussion

Grievant bears the burden of proving the allegations of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). W. Va. Code § 18A-4-8b provides:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
>
> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies.

There is no question in this case that, absent the nepotism policy, Grievant should have been selected for the subject aide position. The Supreme Court of Appeals of West Virginia has determined that a county board of education has the discretion to establish a nepotism policy which would preclude an otherwise qualified professional employee from being placed in a position.

> A board of education policy that prohibits one spouse from supervising the other spouse within a county school system is a reasonable exercise of the board's supervisory authority to prevent favoritism, conflicts of interest or the appearance of either.

Syl. Pt. 2, Townshend v. Bd. of Educ. of the County of Grant, 183 W. Va. 418, 396 S.E.2d 185 (1990). The Court further stated in regard to the grievant's argument that the board of education had violated W. Va. Code § 18A-4-8b [1988] (See footnote 2) :

> the Board of Education has identified an additional requirement or "qualification" - namely, no immediate family members in a supervisor/supervisee relationship. Given that the Board's policy is designed to avoid a potential conflict of interest or favoritism, we find the "qualification" of not being closely related to the supervisor to be

reasonable.

Id. at 189. Grievant has presented no argument as to why a different rule should apply to the selection of service personnel. KBOE's nepotism policy provides, in pertinent part, as follows:

9.01 Definitions

a) Immediate Family - Means spouse; parent; sibling; child; the spouse of a parent, sibling or child; or, an individual with whom an employee has a relationship that would be recognized as a common law relationship.

b) Supervision - Means the authority to direct, recommend scheduling, or formally evaluate daily work activities. . . . Also, for [the] purpose of this policy, classroom teachers and bus operators shall be regarded as supervisors of aides who are assigned to attend to students within such teacher's classroom or who ride on such bus operator's bus.

9.02 **Supervision of Immediate Family Prohibited.** No person, either by new hire, transfer, reassignment, or assignment as a substitute, shall be placed in any position in which he or she is supervised by or supervises an immediate family member.

It is clear that these provisions of the nepotism policy precluded KBOE from placing Grievant in the posted position.

Grievant placed into evidence the job description for bus operators, which states that a bus operator, "[r]eceives instruction from the supervisor. Supervises no other employees." Grievant's Level II Exhibit Number 1. She also placed into evidence the job description for the Supervisor of Transportation, which states that this position is responsible for supervising bus aides. Grievant's Level II Exhibit Number 2. Grievant referenced the statutory definition of bus operator, which states, "personnel employed to operate school buses and other school transportation vehicles as provided by the state board of education." W. Va. Code § 18A-4-8. From this, Grievant concluded that a bus operator does not supervise the aide assigned to his bus, and that the nepotism policy conflicts with the job description and statutory definition, adds supervisory duties to busoperators, and is arbitrary and capricious, because the interpretation of "supervise" is overly broad.

George Beckett, Administrative Assistant for Pupil Transportation, testified that, while the bus operator does not evaluate the aide on his bus, he may offer his views of her performance to his supervisor, and that the state transportation regulations provide that the bus operator is in charge of the bus and all its passengers. The regulations state:

> The school bus operator shall be in charge of the bus, pupils and other passengers.

See KSC Exhibit Number 1 from Level II, at page numbered 7.

Grievant also elicited testimony from Mr. Beckett that the two husband and wife bus operator/aide teams were accomplishing the goals of the transportation department and doing a good job.

The nepotism policy does nothing to change the duties of a bus operator by stating that for the purposes of the policy, bus operators will be regarded as supervisors of aides on their buses. Likewise, this statement does not conflict with any statutory definitions or job descriptions. The policy merely recognizes that bus operators are responsible for their passengers, including aides. When a situation arises, such as an accident, it is the bus operator who is responsible and in charge, not the aide, and the bus operator may have to assign duties to the aide or direct her to take a particular course of action.

The Supreme Court of Appeals of West Virginia went on to note in Townshend, supra, that:

> Most courts that have restricted or struck down anti-nepotism policies did so in contexts where the policies were unreasonably over-broad and prohibited employment of any other family members by the company or governmentalagency, regardless of whether there was or would appear to be a conflict of interest.

Id. at 190. The Grievance Board has upheld a nepotism policy that precluded more than one family member from working in the same correctional facility, when the policy was based upon security concerns (Gillespie and Gillespie v. W. Va. Regional Jail and Correctional Facility Auth., Docket No. 96-RJA-425 (Mar. 28, 1997)), and a nepotism policy which precluded a board of education from hiring a relative of a board member (Tuggle v. Monroe County Bd. of Educ., Docket No. 92-31-487 (Jan. 29, 1993)).

The Grievance Board found that Kanawha County's nepotism policy did not violate W. Va. Code § 18A-4-7a, when a teacher challenged the policy after her application for a teaching vacancy was rejected because her mother was the aide assigned to the teaching vacancy. Pierson v. Kanawha County Bd. of Educ., Docket No. 93-20-484 (Mar. 17, 1994). (See footnote 3) The decision states that, at that time, the nepotism policy provided that "[n]o service personnel will be placed under the direct

supervision of a member of his immediate family by hire," and there was a parallel provision for professional personnel. The grievant argued she would not directly supervise her mother, because W. Va. Code § 18A-2-9 provides that the school principal is the supervisor of all personnel assigned to his school. The job description for aide, however, provided that an aide is also under the teacher's supervision. The Administrative Law Judge concluded that the aide's day-to-day activities are directed by the teacher, and that Kanawha County's interpretation of its policy wasreasonable. Grievant has not proven that KBOE's application of the nepotism policy to bus operators and aides is overly broad or unreasonable.

Although evidence was presented at Level II regarding KBOE allowing two other employees to serve as aides on their spouses buses, Grievant explicitly alleged for the first time in her written submission at Level IV that Respondent had discriminated against her by refusing to employ her as an aide on her husband's bus. Respondent did not object to this change in the grievance. In the interests of judicial economy, and under the facts of this case, this issue will be disposed of here, rather than allowing Grievant to start this process over, pursuant to W. Va. Code § 18-29-3(j).

W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (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 job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant is not similarly situated to those aides who are married to the bus operator on whose bus they serve, as those situations were in existence at the time the nepotism policy which precludes this arrangement was adopted. Grievant did not demonstrate that it was unreasonable to make the policy prospective.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (March 28, 1996).

2. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. "A board of education policy that prohibits one spouse from supervising the other spouse within a county school system is a reasonable exercise of the board's supervisory authority to prevent favoritism, conflicts of interest or the appearance of either." Syl. Pt. 2, Townshend v. Bd. of Educ. of the County of Grant, 183 W. Va. 418, 396 S.E.2d 185 (1990). 4. KBOE's nepotism policy precluded it from placing Grievant in the subject vacancy.

5. The Kanawha County Board of Education did not abuse its broad discretion or act in an arbitrary and capricious manner in adopting its prospective nepotism policy, which precludes an aide from being placed in a position on a bus driven by her spouse, and applying it to Grievant.

6. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, 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.

7. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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 job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Grievant was not similarly situated to other employees who were allowed to remain in aide positions serving on buses operated by their spouses, as those situations existed before adoption of the provision of the nepotism policy which precludes this arrangement.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: October 19, 1998

Footnote: 1

Grievant's immediate supervisor advised Grievant on June 30, 1998, that she had no authority to resolve the issue. Grievant appealed to Level II, where a hearing was held on July 23, 1998. The grievance was denied at Level II on August 6, 1998. KBOE waived participation at Level III, and Grievant appealed to Level IV on August 26, 1998. The parties agreed to submit this matter for decision based upon the Level II record. Grievant was represented by Rosemary Jenkins, and Respondent was represented by its counsel, Gregory W. Bailey. This grievance became mature for decision on October 2, 1998, upon receipt of Grievant's written arguments. Respondent declined to submit written argument.

Footnote: 2

That Code Section provided that "a county board of education shall make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications."

Footnote: 3

The record does not reflect whether this policy was rescinded and a new policy adopted in April 1998, or was simply amended in April 1998 to add the new language which is at issue here.