ROBIN FLEECE,

Grievant,

v. **Docket No. 99-32-090**

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Robin Fleece (Grievant) seeks “split shift pay” pursuant to the provisions of W. Va. Code § 18A-4-8, for her current duties in the multi-classified position of bus operator/truck driver, and also for her previous work in the multi-classified position of bus operator/custodian. This grievance was initiated at level one on December 14, 1998. Grievant's immediate supervisor denied the grievance as untimely on December 16, 1998. Upon appeal to level two, a hearing was held on January 6, 1999, followed by a written denial of the grievance dated January 20, 1999. Level three consideration was bypassed, and Grievant appealed to level four on February 25, 1999. After several continuances granted for good cause shown, a hearing was held in this Grievance Board's office in Morgantown, West Virginia, on June 25, 1999. Grievant was represented by counsel, John E. Roush, and Respondent was also represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 30, 1999.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant began employment with the Morgan County Board of Education (MCBOE) on November 2, 1997, as a bus operator/custodian.

2. Grievant knew shortly after she accepted the bus operator/custodian position that she would not receive split shift pay.

3. In the spring of 1998, Grievant bid upon and was awarded a position as a bus operator/truck driver. Her duties in the new position began at the commencement of the 1998-1999 school year.

She does not receive split shift pay in this position.

4. Grievant's truck driver duties entail receiving and delivering food for the school lunch program, along with checking the freezer temperature at the food warehouse and monitoring the food supply.

5. In her current position as a bus operator/truck driver, Grievant performs her truck driving duties between her morning and afternoon bus runs.

6. Grievant does not work over 40 hours per week in her current position, and her hours vary, depending on the extent of her truck driving duties each week. On some days, Grievant's truck driving responsibilities require only five minutes of her time to check the freezer temperature.

7. Roger Steiner is employed by MCBOE as a bus operator/custodian. On a daily basis, he performs custodial work at the bus garage upon arrival, interrupts the custodial work to make his morning bus run, returns to the garage and completes his custodial duties, then performs his afternoon bus run.

8. Mr. Steiner receives split shift pay, pursuant to the provisions of W. Va. Code § 18A-4-8.

Discussion

In non-disciplinary matters, Grievant has the burden of proving each element of her 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 contends that throughout the entirety of her employment with MCBOE since 1997, she has been entitled to split shift pay. She argues that in both of her multiclassified positions, she has been required to work an “interrupted schedule” as contemplated by W. Va. Code § 18A- 4-8. However, a preliminary matter which much be addressed in this grievance is Respondent's allegation that the issues raised by Grievant are untimely. W. Va. Code § 18-29-4(a)(1) provides:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Respondent contends that Grievant knew at the time of her hiring, or shortly thereafter, in each of her positions with MCBOE that she was not going to receive split shift pay. Accordingly, she did not initiate this grievance within fifteen days of the occurrence upon which it is based, i.e., November of 1997 for the bus operator/custodian position or May of 1998 for the bus operator/truck driver position.

However, Grievant argues that the pay disparity to which she has been subjectedis a “continuing violation”, which is correct. This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26- 283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996). Accordingly, Grievant's claim of pay disparity regarding her present position as a bus operator/truck driver is timely.

Grievant's allegations regarding her compensation in her previous position are, however, not timely. This Grievance Board has held that the violation or practice ceases to be continuing once the employee leaves his/her position. Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); Wylie v. W. Va. Dep't of Natural Resources, Docket No. 94-T&P-628 (Mar. 7, 1995); Gaskins v. W. Va. Dep't of Health, Docket No. 90-H-032 (Apr. 12, 1990). Since Grievant left her position as a bus operator/custodian in May of 1998, this grievance was not initiated within fifteen days of the most recent occurrence of a continuing violation. Therefore, only Grievant's arguments concerning her pay in her present position will be addressed.

Grievant contends that she is entitled to the split shift pay provided for in W. Va. Code § 18A-4-8, which states, in pertinent part:

> **Custodians, aides, maintenance, office and school lunch employees** required to work a daily work schedule that is interrupted, that is, who do not work a continuous period in one day, shall be paid additional compensation equal to at least one eighth of their total salary as provided by their state minimum salary and any county pay supplement, and payableentirely from county funds: Provided, that when engaged in duties of transporting students exclusively, aides shall not be regarded as working an interrupted schedule.

(Emphasis added.) Grievant believes she is entitled to the supplement because her bus driving duties

are “interrupted” in the middle of the day by her truck driving duties. Although neither classification of bus operator or truck driver is mentioned in the job titles which are eligible for the split shift pay, Grievant argues that, because she reports to the food service supervisor with regard to her truck driver duties, she is a “school lunch employee” entitled to the supplement. She also contends that she should be treated the same as Mr. Steiner, who does receive the supplement.

Virtually identical allegations were addressed in Gue v. Morgan County Bd. of Educ., Docket No. 93-32-288 (Apr. 8, 1994), (aff'd Morgan County Circuit Court, Feb. 24, 1995, W. Va. Sup. Ct. of Appeals appeal denied Sept. 20, 1995), and were resolved in favor of the board of education. The administrative law judge concluded that the grievant, multiclassified as a bus operator and truck driver, was not entitled to the supplemental wages provided by the statute. The reasoning was stated, in part, as follows:

> Grievant does not qualify because the sole reason he works a split schedule is to accommodate his bus operator duties and not to facilitate his alternate classification; because his alternative employment title is truck driver, an occupation not cited as a qualifying class in the statute; and, finally, because truck driver is not . . . a “school lunch” related function.

As with Mr. Gue, Grievant does not hold a classification listed in the supplemental pay statute, and she has not otherwise proven entitlement to the supplement. She also works a split schedule only by nature of her bus operator duties, and those duties are not interrupted “because” of her truck driving duties, which she performs during the breakbetween her morning and afternoon runs. Grievant has asserted that certain provisions of the Gue decision are “simply ridiculous.” However, that decision has been affirmed by a circuit court, and the appeal of that decision was rejected by the West Virginia Supreme Court of Appeals. Accordingly, the undersigned can find no legitimate reasoning for overturning its provisions.

Grievant has also alleged that MCBOE has improperly treated Mr. Steiner differently by paying him the split shift supplement. Although Grievant has not stated a specific legal basis for this contention, it is presumed that she believes that she has been subject to discrimination because of the alleged disparate treatment. 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 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, 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. Dep't 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. Dep't 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).

Clearly, Grievant is not similarly situated to Mr. Steiner. Mr. Steiner holds one of the classification titles listed in the supplemental pay statute, i.e. custodian, and his custodial duties are interrupted each day in order for him to perform his bus driving duties. See Gue, supra. Accordingly, Grievant has failed to establish a prima facie case of discrimination.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, Grievant has the burden of proving each element of her 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. Timeliness is an affirmative defense. The burden of proving the affirmative defense by a preponderance of the evidence, is upon the party asserting the grievancewas not timely filed. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

3. Salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995); See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996).

4. A continuing violation or practice ceases to be continuing once the employee leaves his/her position. Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); Wylie v. W. Va. Dep't of Natural Resources, Docket No. 94-T&P-628 (Mar. 7, 1995); Gaskins v. W. Va. Dep't of Health, Docket No. 90-H-032 (Apr, 12, 1990).

5. Grievant's allegations regarding pay disparity while she was classified as a bus operator/custodian are untimely.

6. “Custodians, aides, maintenance, office and school lunch employees required to work a daily work schedule that is interrupted, that is, who do not work a continuous period in one day, shall be paid additional compensation equal to at least one eighth of their total salary.” W. Va. Code § 18A-4-8.

7. Grievant does not hold one of the classifications eligible for split shift pay; her duties as a bus operator are not interrupted to accommodate her duties as a truck driver; and truck driver is not a “school lunch” classification; therefore, Grievant is not entitled to the supplement. See Gue v. Morgan County Bd. of Educ., Docket No. 93-32-288 (Apr. 8,1994), (aff'd Morgan County Circuit Court, Feb. 24, 1995, W. Va. Sup. Ct. of Appeals appeal denied Sept. 20, 1995).

8. 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."

9. 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 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, supra, at 15.

10. Grievant has not established a prima facie case of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Morgan 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 13, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge