PHYLLIS SIMPSON,

Grievant,

v. **DOCKET NO. 99-23-022**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Phyllis Simpson against the Logan County Board of Education, Respondent ("LBOE"), on or about December 4, 1998. Her amended statement of grievance reads:

> Violation of WV Code 18-29-2(m) discrimination. (See footnote 1) Grievant is being paid less for performing like job responsibilities as two other bus operators.

As relief she seeks, "[a]dequate compensation for bus run and discriminatory practices to stop plus back pay to beginning of school year." (See footnote 2) As a preliminary matter, after the Level IV hearing, the parties agreed to submit as a joint exhibit the two-page affidavit of Aaron Mitchem, and a statement dated March 15, 1999, and signed by Aaron Mitchem, that he would agree to an alteration of his contract. Those three pages have been marked as Joint Exhibit E, and are **ORDERED ADMITTED INTO EVIDENCE**.

The following findings of fact have been properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant is employed by LBOE as a bus operator.

2. On August 3, 1998, LBOE posted a mid-day vocational run for the Man area, "as needed," at the rate of $30 per day. This run was awarded to Aaron Mitchem.

3. LBOE intended when it posted this position, that, in the mornings, the bus operator would transport senior students from the Ralph R. Willis Vocational School to Man High School. He would

then load junior students at Man High School and transport them to the vocational school. In the afternoon he would transport thejuniors from the vocational school back to Man High School. It was because of the first trip from the vocational school to Man High School in the morning, that the bus operator was to be paid $30.00 per day, rather than $22.50 per day.

4. The standard rate of pay for LBOE bus operators making vocational runs is $22.50 per day. Approximately four drivers are paid $30.00 per day for making vocational runs, because they make (or it was initially intended that they would make) more than two trips between the vocational school and the base school. One bus operator who transports special needs students from the vocational school to Chapmanville, is paid $11.25 per day.

5. Grievant has more seniority than Mr. Mitchem, but she did not apply for the position he was awarded, because she did not want to take on the extra duties for which he was to be paid the additional $7.50 per day.

6. Two problems arose which had not been anticipated by LBOE. First, in mid-August 1998, LBOE discovered there were more junior students to be transported to the vocational school than Mr. Mitchem could safely transport on his bus. Second, LBOE personnel determined that the schedule they had devised was disruptive to the lunch schedule for the students attending the vocational school. The extra run from the vocational school to Man High School, for which Mr. Mitchem was to be paid the additional $7.50 per day, was removed from Mr. Mitchem's schedule at or near the beginning of the school year, and no additional duties were added.

7. On August 19, 1998, LBOE posted a second mid-day vocational run for the Man area, at the rate of $22.50 per day, in order to take care of the junioroverload. Grievant applied for this position and was selected, and entered into a contract on September 16, 1998, to be paid the standard $22.50 per day for making this bus run.

8. On September 14, 1998, (See footnote 3) LBOE posted a third mid-day run from the vocational school to Man High School, "as needed," at the rate of $22.50 per day, to solve the lunch problem. Grievant applied for this position, but was not the most senior applicant. This position was awarded to Linda Gibson.

9. Grievant and Mr. Mitchem make the same vocational runs, for different rates of pay, except that Grievant also picks up a security guard at Man High School and takes him to the vocational school in the afternoon, which takes her an additional 15 to 20 minutes each day.

10. A driver in the Chapmanville area is also being paid $30.00 per day for making vocational runs, even though he is making only the standard number of runs, because unanticipated student enrollment resulted in his schedule being reduced.

Discussion

Grievant bears the burden of proving her allegations by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

Grievant argued she was discriminated against. 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. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant has not been discriminated against. The reason for the difference between her salary and Mr. Mitchem's is related to anticipated actual job responsibilities, which did not materialize. Mr. Mitchem had already been selected for the position at a higher rate of pay before it was realized he could not transport all the students as planned. LBOE argued it could not reduce his pay after he had been awarded the position, due to the provisions of W. Va. Code § 18A-2-8 (which relates to the suspension or dismissal of an employee), unless Mr. Mitchem agreed to this. While W. Va. Code §§

18A-2-6 and 18A-2-7 seem more applicable to LBOE's argument, it is certainly correct that the statutes in place protect employees of county boards of education from having their contracts of employment affected until the end of a school year. Grievant did not dispute this, and she did not argue his pay should be reduced. She thought she should also get $30.00 per day.

Ms. Gibson is being paid the same amount of money as Grievant for less work, and LBOE knew this would be the case when it posted the position. While LBOE possibly should have posted this single run at a lesser rate, (See footnote 4) Grievant did not seek as relief that Ms. Gibson's salary be reduced, but believed again, that she should be paid more. Grievant is similarly situated to all other bus operators in Logan County who make the standard number of trips to a vocational school and are paid $22.50 per day, and that is what she agreed to when she signed on for this job. She has not demonstrated she is entitled to more.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving her allegations by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. 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.

3. 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).

4. Grievant was not a victim of discrimination, as the difference in salary was related to actual anticipated job responsibilities which did not materialize due to unforeseen circumstances.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 11, 1999

Footnote: 1

Grievant's counsel pointed out at the beginning of the Level IV hearing that Grievant was proceeding under a discrimination theory, rather than a statutory uniformity of pay theory, although he did not see much difference, and asked that any references he inadvertently made to uniformity be considered references to discrimination. Accordingly, Grievant's counsel's argument in his post-hearing written submission that W. Va. Code § 18A-4-5b's uniformity provisions were violated will not be addressed.

Footnote: 2

Grievant did not explain why she waited three months to file her grievance. Thegrievance was denied at Level I on December 4, 1998, and Grievant appealed to Level II. A Level II hearing was held on December 8, 1998, and a decision denying the grievance at Level II was issued on December 28, 1998. Level III was waived by Grievant, who appealed to Level IV on January 19, 1999. A Level IV hearing was held on March 4, 1999. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by Brian R. Abraham, Esquire. This case became mature for decision on April 14, 1999, upon receipt of the last of the parties' post-hearing written arguments.

Footnote: 3

Substitutes were performing this run from sometime near the beginning of the school year until the position was filled.

Footnote: 4

Certainly, it will not be possible for LBOE to distribute bus runs so that every bus operator is going to travel the same distance and work the same amount of time.