SHIRLEY BLAND,

Grievant,

v v.

Docket No. 00-31-042

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Shirley Bland (Grievant) is an Early Childhood Aide/Bus Aide employed by Respondent Monroe County Board of Education (MCBE). Grievant filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that her schedule subjects her to discrimination and a lack of pay uniformity.

A Level II hearing in this grievance was held on January 13, 2000. Grievant was represented at this hearing by John Roush, Esq., and MCBE was represented by its Business Operations Manager, Robert W. Phillips. This grievance was denied, at Level II, on January 20, 2000, by MCBE Superintendent Lyn Guy. Level III was bypassed as authorized by W. Va. Code § 18-29-4(c).

A Level IV hearing was held at this Grievance Board's Beckley office on March 14, 2000. Grievant was again represented by John Roush, Esq., and MCBE was represented by Greg Bailey, Esq. The parties were given until May 1, 2000, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision on thatdate. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is an Early Childhood Aide/Bus Aide currently employed by MCBE at Mountain View Elementary School. She has been employed by MCBE for approximately 18 years.

2. On or about October 5, 1999, Grievant began riding the bus with J. H. (See footnote 1) , a disabled student. Grievant assists J. H. from 7:40 a.m. to 4:00 p.m., or eight hours and twenty

minutes per day.

3. Grievant's previous work day was seven hours and ten minutes long.

4. Grievant's work week is 41 hours and 40 minutes long.

5. MCBE posts all of its Aide positions as being Bus Aide positions as well, and all of its Aides assist students on buses as needed.

6. MCBE's Aides' schedules vary according to the needs of the students they assist.

7. Grievant is paid overtime for her work in excess of 40 hours per week.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burdenof proving 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant alleges that her assignment to assist J. H. subjects her to discrimination and a lack of pay uniformity, and that MCBE should assign another aide, Margorie Booth, to assist J. H. She requests as relief the removal of transportation duties from her schedule, as well as prospective and retrospective payment of wages and benefits, plus interest.

County boards of education must maintain uniformity of salaries and rates of pay for all school service personnel who perform like assignments and duties. W. Va. Code § 18A-4-5b.

W. Va. Code § 18-29-2(m) defines discrimination 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." In order to establish a prima facie case of discrimination, a grievant must prove:

(a) that she is similarly situated, in a pertinent way, to one or more other

employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was mere pretext. Id.

Grievant has failed to establish a prima facie case of discrimination. Assuming, for the purpose of argument, that she is similarly situated to her fellow Aides, Grievant has failed to establish that she has, to her detriment, been treated by her employer in a manner that the other employee(s) have not, because all of MCBE's Aides/Bus Aides are paid for a 40 hour week unless they work longer, in which case they are paid overtime, and all of MCBE's Aides/Bus Aides' schedules vary according to the needs of the students they assist. J. H.'s Individual Education Plan is such that she needs assistance from 7:40 a.m. to 4:00 p.m. Other students with special needs require assistance from other Aides according to other schedules. The evidence shows a legitimate reason for the difference in the way MCBE's Aides are scheduled and paid. Accordingly, Grievant has failed to show that the treatment afforded her by MCBE, a schedule of 7:40 a.m. to 4:00 p.m., was unrelated to her actual job responsibilities. Grievant argues that she should be paid overtime for one hour and ten minutes per day, because her schedule changed from her previous work day of seven hours and ten minutes to her current one of eight hours and twenty minutes, an increase of one hour and ten minutes. It is undisputed that Grievant is paid overtime, at time and one-half, for her hours over 40 hours per week. She is, in effect, asking to be paid overtime before she reaches the threshold of 40 hours per week. Grievant has cited no legal authority for this, and the undersigned is aware of none. Grievant is being properly paid for a 40 hour week, plus one hour and ten minutes overtime, at time

and one-half, for her 41 hour and 40 minute work week. Accordingly, Grievant has failed to establish a violation of the pay uniformity provisions of W. Va. Code § 18A-4-5b.

With respect to Grievant's argument that MCBE should assign another Aide, Margorie Booth, to assist J. H., MCBE established that Ms. Booth is not a logical choice for Grievant's position, because she is already overworked by adapting 7th grade materials for a severely brain damaged and ill student, assisting this student with computer use, taking work home, and giving this student health, toileting, and physical therapy assistance.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion in personnel matters must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). In this grievance, Grievant is contesting a management prerogative, and this grievance cannot be granted merelybecause Grievant has different ideas on how Mountain View Elementary School should be managed or operated. See Phillips v. W. Va. Div. of Corrections, Docket No. 96-CORR-112 (June 19, 1996). The undersigned declines to disturb MCBE's sensible decision in this matter.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievant has the burden of proving 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. County boards of education must maintain uniformity of salaries and rates of pay for all school service personnel who perform like assignments and duties. W. Va. Code § 18A-4-5b.

3. W. Va. Code § 18-29-2(m) defines discrimination 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.” In order to establish a prima facie case of discrimination, a

grievant must prove:

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

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion in personnel matters must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. Grievant failed to establish a prima facie case of discrimination.

6. Grievant failed to establish a violation of the pay uniformity provisions of W. Va. Code § 18A-4-5b.

Accordingly this Grievance is hereby **DENIED**.

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

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 17, 2000

Footnote: 1

1 The student involved in this matter has been identified only by initials, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998); Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994).