

DENNIS GARNER,

Grievant,

v.

Docket No. 00-30-025

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Dennis Garner, employed by the Monongalia County Board of Education (MCBOE) as a bus operator, complains that:

On August 16, 1999, Grievant was instructed to transport students from Morgantown High School to the Technical Education Center and has continued to perform this assignment. Grievant contends (1) that this assignment is extracurricular in nature and he should be compensated accordingly; (2) that this assignment causes his daily work schedule to exceed the normal work day of six hours established for school bus operators; and, (3) Ila Hess, another regularly employed school bus operator, receives compensation for performing a similar assignment while the Grievant does not receive such compensation. Grievant alleges a violation of West Virginia Code §§18A-4-5b, 18A-29-2(m), and Respondent's own policies and practices.

The record does not indicate that the grievance was filed at level one. A level two grievance was dated October 19, 1999; the decision at that level was undated, and Grievant represented that he received it on January 13, 2000. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and appeal was made to level four on January 19, 2000. A hearing was conducted in the Grievance Board's Morgantown office on March 13, 2000, at which time Grievant was represented by John E. Roush, Esq. of WVSSPA, and MCBOE was represented by Harry M. Rubenstein, Esq., of Kay Casto & Chaney. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on April 20, 2000. The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by MCBOE as a regular, full-time bus operator for approximately thirteen years.
2. MCBOE has adopted Policy GDJ, which provides the normal work day for service personnel shall consist of a specific number of hours for each classification. Under the terms of this Policy, bus operators work six hours per day, with no lunch period.
3. Grievant's regular assignment at the beginning of the 1999-2000 school year, according to MCBOE's Transportation Schedule, was as follows: beginning at 6:40 a.m., he transports students from the Bruceton Mills area to University High School (UHS). At 8:05 a.m., he shuttles students from UHS to the Technical Education Center, and returns to the bus garage at 8:20. At 2:25 p.m. he leaves the bus garage and proceeds to complete his afternoon run by 4:30.
4. Grievant claims that his work day differs from that provided by MCBOE, and states that his schedule requires that he leave the bus garage at 6:25 a.m., completing the morning portion of his run at 8:20 a.m. His afternoon run begins at 2:00 p.m., and concludes back at the bus garage at 4:35 p.m.
5. Grievant additionally holds a mid-day run transporting special education students from the Technical Education Center to MHS for lunch, and back. He is compensated an additional two hours for this assignment.
6. In addition to the time required to complete his run, Grievant is required to complete miscellaneous duties, including washing the bus, adding oil and fueling the bus, attending disciplinary hearings, and preparing required reports. None of these duties are to be completed on a daily basis.
7. On or about August 27, 1999, Grievant was asked to transport children from MHS to the Technical Education Center following his return to the bus garage at 8:20 a.m. Although Grievant understood this to be a temporary assignment, he was later advised it was to be part of his regular morning run.
8. Grievant is required to use another vehicle for the run between MHS and the Technical Education Center. This requires that he complete a pre-trip inspection and allow the bus to warm up prior to this portion of his assignment which concludes at 9:00 a.m.
9. During the 1998-99 school year, another bus operator was awarded an extra- curricular assignment that required her to use a separate vehicle to transport a child who lived in a particularly isolated area of the county to and from school.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. 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. Dept. of Health and Human Res., 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 argues that he is entitled to relief on any one of three possible theories. First, he is regularly employed for a six hour day, and holds an additional, mid-day assignment two hours in duration. By his calculation, the morning run to UHS requires two hours and five minutes. His extracurricular assignment requires two hours and fifteen minutes, and his evening run is completed in two hours and thirty-five minutes. Grievant also includes thirty minutes a day for his miscellaneous duties and another thirty minutes for a duty-free lunch period, for a total of one hour per day. When the twenty-five minutes for the trip from MHS to the Technical Education Center is added, Grievant concludes that he is working a minimum of eight hours and twenty minutes. He notes that he is not being paid for this part of the assignment, whether the time worked is considered “regular” or “extracurricular”.

Grievant's second argument involves a comparison between himself and Ms. Hess, who received extra compensation during the 1998-99 school year for a run that required her to use a second vehicle. [\(See footnote 1\)](#) Grievant asserts that the uniformity requirement of W. Va. Code §18A-4-5b, and the prohibitions against discrimination, demand that he also receive such compensation for his “second vehicle assignment”.

Grievant's third argument is that the run is clearly extracurricular in nature because it occurs between his a.m. and p.m. regular routes, as do all the mid-day assignments. Further, the trip is between two schools rather than between school and home. MCBOE asserts that it has acted reasonably within its discretion to combine shuttle runs between schools with home to school runs.

Grievant's claim that the MHS to Technical Education Center portion of the run causes him to exceed the six hour work day established by policy, is disputed by MCBOE, which notes that according to Grievant's own level two testimony, his work day consists of five hours and forty minutes, including the twenty-five minute run in question, and thirty minutes for a pre-trip inspection. Because Grievant is not working beyond his contracted six hour day, MCBOE asserts that he should not receive supplemental compensation for the twenty-five minute run which is part of his regular a.m. run.

MCBOE denies any violation of W. Va. Code §18A-4-5b, and/or discrimination, noting that Grievant does not perform a like assignment or duties to the individual with whom he has compared himself. The assignment performed by Ms. Hess was posted, and required that she work more than six hours per day, therefore, MCBOE asserts that the two runs in question are not the same in nature, and Grievant is not due additional compensation under the non-uniformity/discrimination claim.

Accepting Grievant's own schedule, including the MHS shuttle to the Technical Education Center, Grievant's a.m. run is two hours and thirty-five minutes. His afternoon run is of the same duration. Allowing thirty minutes for his miscellaneous duties, Grievant's regular work day is five hours and forty minutes in length, well within the six hours set by MCBOE policy. His schedule would exceed the six hours if it included, as he does, a thirty minute lunch period. W. Va. Code §18A-4-14 generally provides that all full-time service personnel be provided a daily, duty-free lunch break of not less than thirty consecutive minutes. However, MCBOE's Policy GDJ provides that bus operators do not receive a lunch break. The Grievance Board has previously held that bus operators are an exception to the duty-free lunch requirement, based upon a determination that they agree to forego a lunch recess benefit for a six-hour work day, albeit a split duty schedule, but with free time in between. Terek v. Ohio County Bd. of Educ., Docket No. 91-35-367 (Mar. 31, 1992). Even if Grievant should be entitled to a lunch break, MCBOE reasonably points out that he could schedule one during his extracurricular assignment, while he is waiting for the students to eat their mid-day meals. ([See footnote 2\)](#)

Grievant's argument that the assignment is extracurricular in nature, thereby entitling him to additional compensation, is not persuasive. W. Va. Code §18A-4-16 defines extracurricular duties to "mean, but not be limited to, activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis." Grievant apparently defines his morning

run as having concluded upon his return from transporting students from UHS to the Technical Education Center, because he asserts that the add-on from MHS to the Technical Education Center occurs between his a.m. and p.m. runs. This determination is arbitrary and illogical, because the shuttle transports students to the same destination, for the same instruction, at the same time, as the UHS to the Technical Education Center portion of his run.

The fact that the MHS to the Technical Education Center run transports students between schools rather than between home and school lacks merit in that he already transports students from UHS to the Technical Education Center, and does not allege that to be an extracurricular assignment. Further, this Grievance Board has previously determined that a county board has discretion to combine shuttle runs between schools with home-to-school, or school-to-home, runs in order to create a regular, full-time service personnel bus operator position. Conner v. Barbour County Bd of Educ., Docket No. 92-01-191 (Feb. 26, 1993). Therefore, the MHS shuttle was simply an addition to Grievant's a.m. run, and does not constitute an extracurricular assignment.

Grievant's third argument, that another employee received additional compensation for a run that required her to use a second vehicle, therefore, MCBOE has engaged in discrimination and violation of statutory uniformity requirements, must also fail. W. Va. Code §18A-4-5b requires uniformity of salaries, rates of pay, benefits, increments or compensation for "all persons regularly employed and performing like assignments and duties" 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 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. 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 failed to establish that he is similarly situated to another MCBOE bus operator who received separate compensation for a run which required that she use a second vehicle. Grievant's focus upon the use of the second vehicle is not persuasive because there is no authority which limits a bus run to one vehicle. Although MCBOE attempts to distinguish Ms. Hess' assignment from Grievant's based upon the isolated location of the student, the fact that a regular bus could not reach her home, and that the assignment expanded Ms. Hess' schedule beyond the six hour limit, these factors are irrelevant. MCBOE could have taken the same action in that instance that it has with Grievant, the assignment could simply have been added to a bus operator's regular a.m. run. If added to Ms. Hess', certainly, overtime compensation would have been a factor if other schedule adjustments were not made. However, the simple fact is that the assignment need not have been posted as an extracurricular run. In any event, Grievant's discrimination argument must ultimately fail because Ms. Hess' run was for the previous school year. Thus, they were not treated differently during the same time period, and therefore, were not similarly situated. Grievant has failed to prove a violation of W. Va. Code §§18A-4-5b or 18-29-2(m).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

___1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. Grievant failed to prove that a shuttle run added to his regular morning run extended his work day beyond the six hours set by county policy.

3. Grievant failed to prove that the addition to his morning run constituted an extracurricular assignment as defined by statute.

4. 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."

5. In order to establish a prima facie case of discrimination 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)

6. Grievant failed to establish a prima facie case of discrimination by proving that he was similarly situated to another employee.

___Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: June 8, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

Ms. Hess no longer holds this assignment as the child has moved.

[Footnote: 2](#)

At level two, Grievant indicated that he takes a thirty minute lunch break daily, albeit not one that is slotted into a specific time in his schedule.