DWIGHT DOUG LUCAS,

Grievant,

v. **DOCKET NO. 01-41-463**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Dwight Doug Lucas filed this grievance at Level I on December 13, 2000 stating:

> I request to be paid my mid-day run when I have to go to my lung specialist. I developed asthma after being exposed to chemical from a improperly attached fire extinguisher on the bus that broke away, and I inhale [sic] for several minutes. I have long term problems from the accident which require medical follow up.

The grievance was denied at Level I because Grievant's supervisor did not have the authority to grant the relief requested. It was then filed at Level II on December 14, 2000 and a Level II hearing was convened on December 21, 2000, during which Grievant requested that the matter be placed in abeyance pending resolution of a new policy proposal to the Board of Education and no evidence was taken. The proposed policy was not adopted, and a Level II decision denying the grievance was issued on June 26, 2001. Level III having been waived, a Level IV hearing was requested but the Administrative Law Judge assigned to the matter remanded the grievance to Level II for an evidentiary hearingand decision (See footnote 1) . This hearing was held on July 24, 2001. On July 31, 2001, the Level II hearing examiner issued her decision denying the grievance, and the matter was advanced to Level IV for a decision based on the lower level record.

At the second Level II hearing, the parties submitted the grievance stated above as a joint exhibit. Although no evidence appears in the record that the parties agreed to an amendment of the statement of grievance and relief sought, the grievance filed by Grievant's representative at Level IV on August 2, 2001, states:

> Grievant, a regularly employed school bus operator, contends that the Respondent has erred in (a) failing to compensate him for his extracurricular assignment on days

Grievant must miss the assignment in order to attend therapy for a work-related injury. Grievant contends that other employees are excused from performance of their extracurricular assignments, but still receive compensation. Grievant alleges a violation of West Virginia Code §§ 18A-4-5b (uniformity) and 18-29-2 (discrimination and favoritism).

As relief, Grievant requests: "(a) compensation for any and all wages and all benefits lost as a result of Respondent's actions and (b) interest on any sums to which he is entitled." In a phone conference held at the request of the undersigned on September 10, 2001, the representatives of the parties stipulated that the relief requested is any payment due to Grievant for the four days he missed his extracurricular assignment.

Following the submission of proposed Findings of Fact and Conclusions of Law by Respondent's representative Erwin L. Conrad, Esq. on August 29, 2001 and by Grievant's representative John Everett Roush, Esq. on September 4, 2001, this matter became mature for a decision. Based on the record developed at Level II and the stipulations of the parties, the following findings of fact are appropriate:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a bus operator. In addition to his regular morning and evening run assignment, Grievant has a supplemental or extracurricular assignment covering a vocational-technical center run midday, five days a week, for which he receives $15 per day extra pay.

2. On October 1, 1999, Grievant inhaled fumes on his bus from a fire extinguisher that had broken loose from its bracket, expelling its contents. This injury was ruled compensable by the Workers' Compensation Commission.

3. Grievant was scheduled with a lung specialist for treatments related to his on-the-job injury. These appointments were scheduled during Grievant's midday assignments on November 9, 2000, January 23, 2001, February 28, 2001 and May 18, 2001, and did not interfere with his regular morning/evening driving assignment.

4. Grievant's medical costs for these treatments were covered by Workers' Compensation, but he was not compensated by Workers' Compensation nor by Respondent (See footnote 2) for his missed midday runs when he attended the treatment sessions.

5. Respondent had no formally-adopted policy on compensation for midday assignments; it had

a practice in recent years that did not allow employees missing onlytheir midday assignments to receive their extra pay for those absences through partial use of personal leave.

6. Respondent has established a school bus safety program for students called “Buster the Bus,” that bus operators may choose to participate in from time to time in lieu of their normal assignments. These operators are not paid extra for participating in the program.

7. Bus operators who choose to work in the program occasionally miss their midday extracurricular assignments to do so, at which time a substitute is used to cover their runs. They are not required to use personal leave when they miss their normal extracurricular assignments.

8. Bus operators who miss their extracurricular assignment to participate in the Buster the Bus program are still paid as if they had worked their assignment.

9. If a driver were to use a day of personal leave and miss both his regular run and his midday assignment, he would be paid as if he had completed both assignments.

DISCUSSION

Grievant argues that he is a victim of discrimination and favoritism because bus operators who miss their midday assignments for the Buster the Bus program get paid, but he does not get paid when he misses a midday assignment due to a medical appointment. In the alternative, he argues that the disparity in pay for missed midday runs violates the uniformity provisions of W.Va. Code § 18A-4-5b.

Discrimination is "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to inwriting by the employees." W. Va. Code § 18-29-2(m). In order to establish a *prima facie* case of discrimination, a grievant must demonstrate:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s)
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Lawton v. Hancock County Bd. of Educ., Docket No. 00-15-275 (Jan. 30, 2001).

Grievant and the other bus operators are similarly situated, in that they perform the same job for the same employer. Additionally, the operators who are paid for missed midday runs are given an advantage over Grievant, who is not. The evidence does support the conclusion that some bus operators are paid for missed midday runs, but Grievant was not. There is no evidence that Grievant agreed to the difference in treatment complained of, so the question turns on whether the difference is related to the job responsibilities of the bus operators. However, there is an apparent justification for the difference in treatment that prevents Grievant from satisfying the third part of the test. The "Buster the Bus" program for which the other drivers miss their midday runs is a job-related activity for their employer. Those operators do miss their normal midday runs, but they are still working for Respondent, albeit in an assignment of their own choosing. When Grievant misses his midday run for a medical appointment, it is for personal reasons and his employer does not benefit. Had Grievant presented evidence that another bus operatorwas paid for missing a midday run due to a medical appointment or other non work-related absence, the test would have been satisfied.

Grievant's alternate argument is based on uniformity. West Virginia Code § 18A-4- 5b states in part, "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." The difference between the Grievant's reason for absence and the Buster the Bus participants also defeats this argument. Grievant is not performing a like assignment when he attends a medical appointment, and he would be paid for missing a midday run if he were to participate in the safety program.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 §§ 18-29-2, 18-29-6.

2. Discrimination is defined in W. Va. Code § 18-29-2(m) 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. In order to establish a *prima facie* case of discrimination, a grievant must demonstrate:

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

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Lawton v. Hancock County Bd. of Educ., Docket No. 00-15-275 (Jan. 30, 2001); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant did not establish a *prima facie* case of discrimination because the difference in treatment was justified. The difference was related to the actual job responsibilities of the employees.

5. Uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county. W.Va. Code § 18A-4-5b.

6. Compensating employees who miss their midday runs for an alternate work- related activity while failing to compensate employees who miss their midday runs for personal reasons does not violate the uniformity requirement of W. Va. Code 18A-4-5b. Grievant is not entitled to pay for his midday run when his absence is due to a medical appointment and he does not use personal leave.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any such appeal must be filed within thirty 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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M. Paul Marteney

Administrative Law Judge

Dated: September 18, 2001

Footnote: 1 *Docket No. 01-41-426 (July 25, 2001).*

Footnote: 2

Grievant was not allowed to use sick leave or personal leave for these absences. He was mistakenly paid for one of these days, but he was informed the amount would be adjusted off of his next paycheck in 2001.