CURTIS NOTTINGHAM,

Grievant,

v. **DOCKET NO. 02-20-062/077**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant filed two separate grievances in November 2001, that were denied at Levels I and II. Level III was bypassed in each. The first Grievance, filed November 11, 2001, contained a lengthy allegation of discrimination and nonuniformity of benefits in the assignment of county vehicles and beepers. Grievant sought use of a vehicle or to be paid travel expense from his home to wherever he is directed to meet his work partner, and a beeper (See footnote 1). The second, filed November 15, 2001, stated:

> In July 2001, I spoke with Mr. Allred about my concerns with the distribution of overtime in the plumbing craft. I was assured that it would be equalized. Since that time, the distribution of overtime has been neither equalized nor rotated. I contend that favoritism has been shown to R. Edens and B. Jackson and discrimination toward others and myself in the distribution of overtime. I contend this action violates West Virginia Code § 18-29-2 and § 18-A-4-8b [sic]. I seek equalization of the overtime in the plumbing craft for the 2001-2002 school year or in the alternative payment of backpay to me to equalize the overtime payments thus far in the 2001-2002 school year followed by strict rotation of overtime assignments in the future.
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> When Norton Bashler [sic], Supervisor of maintenance/Plumbing and heating and Air conditioning is off from for [sic] work, R. Edens is always permitted to replace him, doing his job and receiving out of classification pay. I contend that this is favoritism. Such action violates West Virginia Code § 18- 29-2 & 18A-4-15. I seek rotation of the opportunity to substitute for N. Bashler [sic] when he is absent.

These grievances were consolidated at Level IV, and a hearing was held on July 13, 2002, at the Grievance Board's Charleston office, with Grievant represented by WVSSPA attorney John E. Roush, Esq. and Respondent represented by its attorney, James Withrow, Esq. Following the hearing, the parties agreed to submit their proposed findings of fact and conclusions of law by July 19, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant Curtis Nottingham is employed by Respondent as a Plumber II/General Maintenance headquartered in its Crede maintenance shop, and has been employed there in various capacities for roughly 20 years. His immediate supervisor is Norton Bashlor.

2. For staffing purposes, Respondent has divided the county into four geographic areas: St. Albans/South Charleston, Sissonville, Elk River and Riverside/East Bank. Two plumbers who usually work together are assigned to each area unless needed to assist with projects in other areas. Two plumbers with special expertise in certain skills, such as working with boilers or sewage treatment plants and lift stations, also are assigned county-wide responsibility for jobs requiring that expertise. Grievant is assigned to the St. Albans area, and works with a partner, Jesse Randolph.

3. Many of the plumbers are assigned county vehicles that they are permitted to take home after work. Grievant is not assigned a vehicle, but Mr. Randolph is. The vehicles were assigned to maintenance employees, one truck per area, based on seniority in a given geographic area. Mr. Randolph has more seniority than Grievant. The plumbing employees with county-wide responsibility, Randy Edens and Carl Roberts, are also assigned vehicles.

4. The two plumbers in the Elk River area, Allan Chambers and Darren Wines, are both assigned vehicles because they used to do a lot of traveling to other areas to help out or fill in for absent workers.

5. Occasionally, a situation arises where a maintenance employee is called out after work hours to repair something in an emergency, usually resulting in overtime pay for that employee. Whether an employee has a county vehicle at home makes a difference as to who is called out after hours to work on emergency jobs.

6. Grievant is paid mileage for his commute from the shop in Crede to his work area near Ben Franklin, where he meets Mr. Randolph. No other employee is paid mileage. He lives in Clendenin.

7. If an after-hours job requires a particular expertise, the employee with that expertise is called out regardless of whether it is in his normally-assigned area.

8. Normally, the plumbers' supervisor, Mr. Bashlor, makes the determination as to who gets called out for after-hours and overtime work. If a school that needs a plumber cannot reach Mr. Bashlor, it usually calls Jeff Allred, Director of Maintenance and Energy, who then calls out the

necessary employee or employees. 9. Respondent attempts to equalize overtime, but the senior employee in the geographic area where the problem lies is given first option of being called out, if that employee was at work that day. If the job requires specialized expertise, the person with the expertise is called out. Other than those limitations, workers are called in order of seniority within the area, then from outside the area in order of seniority, according to availability.

10. The call-out list is not rotated. If the most senior employee is called out one day and another emergency occurs the next day, he will be called out again.

11. For planned overtime, the senior man is called out first, unless the job calls for special expertise.

12. Grievant has missed many days of work. As a 261-day employee, he gets 18 sick days per year and 21 vacation days per year. At the time of the Level II hearing, he had used all his available leave.

13. Both Mr. Chambers and Mr. Wines are less senior than Grievant. The reason Grievant has not been given a vehicle so he could be called out to fill in for other employees who are off is because he is absent from work too often. Tim Smith, Tommy Kuhn and Richard Connors, none of whom are plumbers, are other maintenance employees who had vehicles and had them taken away because they were absent too often.

14. If an after-hours emergency occurs in the St. Albans area, Mr. Randolph is called first because he is most senior and he has the truck. If he needs assistance, he calls Grievant. 15. From July 2, 2001 to February 15, 2002, Grievant accumulated 161 hours of overtime, and had used 40 days of leave. Of all plumbers, only Ureal Burgess had used more leave (99 days), and he had 23 total hours of overtime. Overtime totals for the plumbing craft ranged from Berry Jackson's 359 hours to Mr. Burgess' 23 hours. The average overtime was 168 hours. The average leave usage was 23 days. Grievant's overtime was not significantly different than the average, while he was absent almost twice as often as the average employee. Often, Grievant could not be offered overtime because he was not at work that day.

16. On occasions when Mr. Bashlor was absent, Grievant was not temporarily upgraded to fill in for him.

DISCUSSION

Grievant claims discrimination and favoritism in three areas: he is not assigned a county vehicle

and other plumbers are; his lack of a county vehicle results in a disparity in the amount of overtime offered to him; and he has not been offered the opportunity to fill in for Mr. Bashlor at an upgraded pay rate, while another employee has. None of these allegations involve a disciplinary action, so Grievant bears the burden of proof. Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95- DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id. Grievant's allegations are that these disparities are the result of discrimination and favoritism. West Virginia 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.” Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *See* Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

In order to establish a claim of discrimination or favoritism, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that he has, to his detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (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).

Grievant's first two contentions are related: he is not allowed to take home a county vehicle while other plumbers are, and because he does not have a county vehicle at home, he is not called to respond to after-hour emergencies while the plumbers with county vehicles are. He argues he should

also be given a county vehicle, and that overtime assignments should be rotated according to seniority regardless of whether the employee has a vehicle at home. Grievant established that he is similarly situated to the other plumbers employed by Respondent, except those with specialized expertise, but he failed to prove he has been treated differently (See footnote 2) in either overtime assignments or vehicle use.

With respect to overtime, Grievant was allowed to work more overtime than six of the 12 plumbers, all but one of whom came to work more faithfully than Grievant. While Grievant does not have a county vehicle, neither do other plumbers who are least senior in their areas, unless they have cross-county responsibilities. Respondent stated Grievant would have a vehicle but for his attendance, and demonstrated that other employees with attendance issues did not have vehicles. Although Grievant did prove the overtime assignments are not rotated, he did not prove he was harmed by the lack of rotation, as his overtime assignments have been equitable.

Grievant also avers that the choice of who should fill in for Mr. Bashlor when he is absent should be rotated. He attributes Mr. Bashlor's favoritism towards Randy Edens as the reason why Mr. Edens normally fills in when Mr. Bashlor is absent. While Grievant did testify he had never filled in for Mr. Bashlor, and other witnesses testified they perceived a bias on Mr. Bashlor's part for his former work partner, he did not present any evidence that he should be entitled to be “temporarily upgraded” to the Maintenance Supervisor's position. He cites W. Va. Code § 18A-4-15, Employment of Service Personnel Substitutes, which states in subsection (b) in part, “Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regularemployees shall first be offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position.” Grievant is not entitled by this section to substitute for Mr. Bashlor, because Mr. Bashlor is classified as a Maintenance Supervisor, while Grievant is Plumber II, and they do not have the same work locations. Grievant did not present any evidence that he even qualified to substitute for Mr. Bashlor or that the persons who did fill in were not as qualified as he was. Further, Grievant presented no evidence that Mr. Bashlor even chooses his own substitutes. The tenuous evidence Grievant presented to support this claim falls well short of meeting his burden of proof.

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92- HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

2. "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.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

3. Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment ofanother or other employees." *See* Rice v. Putnam County Bd. of Educ., Docket No. 00-40- 011 (May 4, 2000).

4. In order to establish a claim of discrimination or favoritism, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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 their 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant did not establish a *prima facie* discrimination or favoritism claim.

6. The employment of service personnel substitutes, is governed by W. Va. Code § 18A-4-15, which states in subsection (b) in part, "Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall first be offered the

opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position."

7. Grievant did not establish that he was employed in the same classification category and same building or working station as Mr. Bashlor.

For the foregoing reasons, this grievance is hereby **DENIED.** Any party may appeal this Decision to the Circuit Court of Kanawha 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.

Date: September 11, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant was granted a beeper at Level II.

Footnote: 2

Except in the case of his receiving mileage from the Crede shop to his work area, which no one else receives.