**ROGER TAYLOR,**

**Grievant,**

**v.** **Docket No. 02-20-075**

**KANAWHA COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Grievant, Roger Taylor, filed this grievance against his employer, the Kanawha County Board of Education ("KBOE"), on October 15, 2001. The statement of grievance reads:

> Grievant is regularly employed as a bus operator. Grievant contends that Respondent incorrectly calculates the time required to perform his regular bus route. As a consequence he receives more difficult and less desirable “flex” time assignments. Grievan[t] alleges a violation of West Virginia Code §18A-29-2 (discrimination and favoritism).

As relief Grievant seeks “proper calculation of the time required for his regular schedule, compensation for any overtime pay to which he is entitled, and less time consuming 'flex' time assignments based on his actual work time.”

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

## FINDINGS OF FACT

1. Grievant has been employed by KBOE as a bus operator for 31 years. He is assigned to the St. Albans bus terminal.

2. KBOE requires bus operators to perform assignments between their morning and afternoon runs, which are referred to as “mid-day assignments.” The goal is to assign each bus operator duties between the regular runs which, when added to the time it takes the bus operator to complete his regular morning and afternoon run, will add up to 30 hours each week. Bus operators are allocated a

lunch break, break time, time for pre-trip inspections of the bus, time for cleaning and fueling the bus, and time for traffic jams, trains, and other similar types of delays, amounting to 10 hours, which, when added to the 30 hours a week to be made up on morning and afternoon runs, and mid-day assignments, totals a 40 hour week.

3. Grievant's supervisor determines what work is available for mid-day assignments, and which drivers will be assigned particular duties. Mid-day assignments consist of driving mid-day runs, driving students on trips, office duties, and other assignments. Grievant's supervisor is not able to make mid-day assignments to all drivers in the St. Albans bus garage which result in each driver working exactly 30 hours on his bus run and his mid-day assignment. Most drivers, including Grievant, end up from 5 minutes to 55 minutes short of 30 hours.

4. During the 2001-2002 school year Grievant transported special education students on his regular morning and afternoon runs. His afternoon run was not the same as his morning run. At the beginning of the school year he left the bus garage at 6:40 a.m. each morning. The schedule prepared for Grievant showed he would return to the busgarage at 8:15 a.m. In the afternoon he left the bus garage at 2:20 p.m. (See footnote 2) His schedule showed him returning to the bus garage at 4:15 p.m. each day.

5. By Grievant's calculation, at the beginning of the school year he did not return to the bus garage until 8:45 a.m. and 4:30 pm. He attributed this to the fact that the location of one stop was changed on the morning run, and to several students being added to the evening run.

6. After two weeks, Grievant's schedule was changed somewhat. He was scheduled to leave the bus garage at 6:45 a.m., and return at 8:15 a.m. Grievant left at the appointed time, but by his calculation, still did not return to the bus garage until 8:45 a.m. At some point, Grievant began returning to the bus garage at 8:50 a.m., by his calculation, but it is not clear when this occurred, or how long this lasted. The change in the afternoon schedule resulted in Grievant departing the bus garage at 2:20 p.m., and returning at 4:30 p.m. Grievant did not get back to the bus garage until 4:45 p.m. At some point, Grievant was not getting back to the bus garage until 4:50 p.m., but it is not clear when this occurred, or how long this lasted.

7. Sometime in September 2001, KBOE adjusted Grievant's schedule to show a departure time in the morning of 6:45 a.m., and a return time of 8:40 a.m., and an afternoon departure time of 2:20 p.m. and a return time of 4:45 p.m. Brenda Taylor, KBOE's Transportation Supervisor for Safety,

Training and Special Education, later discovered that the first student on Grievant's route was not going to school due to a medical problem, and she again adjusted Grievant's morning to a departure time of 6:50 a.m. and a return time of 8:30 a.m. 8. Ms. Taylor rode Grievant's bus on or about September 20, 2001. Ms. Taylor asked Grievant the time when they departed the bus garage in the morning, and her watch was four minutes faster than Grievant's, with her watch showing 6:55 a.m., and Grievant's showing 6:51 a.m. At each stop, Grievant announced the time, and Ms. Taylor recorded Grievant's time and the time on her watch. At 7:50 a.m., Grievant's watch caught up with Ms. Taylor's. Grievant returned to the bus garage and turned the bus off at 8:39 a.m. Grievant had not made one stop that morning, but he got off the bus and went into a school for four minutes. When Grievant left Alban Elementary, he traveled 10 to 12 blocks out of the way to return to the bus garage. Ms. Taylor told Grievant he was not to backtrack, and he did not do so after this. In the afternoon, Grievant departed the bus garage at 2:21 p.m., and returned to the bus garage at 4:21 p.m., and shut the engine off at 4:23 p.m. Not all the students were on the bus that afternoon.

9. Ms. Taylor drove Grievant's route on September 19, 2001, and was able to stay within the schedule she had developed. She also rode Grievant's bus on the afternoon of January 9, 2002, and Grievant returned to the bus garage ahead of schedule that day.

10. Grievant often does not transport all the children on his route, as the special needs students on his route are often ill and miss school. Many times the parent will call and advise that the child will not be going to school, and Grievant will not have to travel to the area where the child boards the bus.

11. Grievant acknowledged the schedule can fluctuate 5 to 10 minutes each day.

12. At the beginning of the school year KBOE's estimate of the time it took to complete Grievant's morning and afternoon runs was inaccurate. KBOE corrected this estimate in September, 2001. Thereafter, KBOE did not underestimate the time it took to complete Grievant's runs. In his calculation of the time it took him to complete his runs,Grievant did not take into account breaks he took for his personal needs as he should have, and he did not accurately track his time.

13. During the 2001-2002 school year, Grievant was given mid-day assignments 4 days a week for 17 weeks, 3 days a week for 16 weeks, 2 days a week for 4 weeks, and 1 day 1 week. Many other bus operators had mid-day assignments 3 or 4 days a week, and a few had mid-day assignments 5 days a week. From the beginning of school until the time this grievance was filed,

Grievant had a mid-day assignment 4 days a week 4 weeks, and a mid-day assignment 3 days a week for 3 weeks. During the first 7 weeks of school at least 8 other bus operators at the St. Albans garage were given mid-day assignments 4 days a week or more during 4 weeks or more. Bus operator L. Richards had a mid-day assignment 4 days a week during 6 of the 7 weeks.

14. During the 2001-2002 school year, Grievant often was assigned to drive a mid-day bus run, but it was not always the same run. (See footnote 3) Other drivers were also assigned to drive a bus as their mid-day assignment.

15. During the 2001-2002 school year, the amount of time Grievant was required to work on mid-day assignments varied. At the beginning of the school year, during weeks when school was in session 5 days, Grievant was required to make up 10 hours and 50 minutes a week. This was reduced to 10 hours and 25 minutes a week, and then to 9 hours and 10 minutes a week on September 24, 2001. On October 15, 2001, the date this grievance was filed, the time Grievant was required to make up on mid-day assignmentswas reduced to 8 hours and 20 minutes a week, and on November 26, 2001, it was reduced to 7 hours and 30 minutes a week. On March 11, 2002, Grievant's mid-day make- up time was reduced to 7 hours and 5 minutes a week, and on May 6, 2002, it was increased to 8 hours and 45 minutes a week. During weeks when school was not in session for five days, Grievant's mid-day make-up time varied. Grievant's Level IV Exhibit 2. The record does not reflect the reason for these changes, or how these changes impact this grievance.

16. During the 2001-2002 school year Grievant often ended the week with a balance owed on mid-day assignments of from 35 to 50 minutes, meaning he was 35 to 50 minutes short of working a 40 hour week. During weeks when Grievant ended the week owing 50 minutes, very few other drivers owed this much time. The time Grievant owed varied each week, as did the time owed by other drivers. During the first week of school Grievant ended the week owing 1 hour and 35 minutes. The driver closest to him in time owed had a balance of 1 hour and 20 minutes owed. Grievant's Level IV Exhibit 2.

## DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant argued it takes him longer to complete his regular morning and afternoon run than he is given credit

for. He stated KBOE has underestimated the amount of time it takes him to complete his morning and afternoon runs by 20 to 30 minutes a day. Grievant concluded that, even using what he believes to be the proper time for completing his morning and afternoon runs, he still was not required to work more than 40 hours a week. (See footnote 4) Rather, he argued due to his time being incorrectly computed on themorning and afternoon runs, he is required to make up more time on mid-day assignments. He argued that because he has mid-day assignments three or four days each week, and because his mid-day assignment consists of driving a bus route, as opposed to working in the office or working on construction projects, he has been discriminated against, and favoritism has been shown. Respondent denied all of this.

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.

Favoritism is defined as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

W. Va. Code § 18-29-2(o). In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
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> (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.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); 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).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons forits actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

The undersigned concludes from the evidence presented that once Grievant made KBOE aware that his morning and afternoon runs were taking more time than had been allotted, this was corrected. The last changes made to Grievant's schedule in September 2001, accurately portrayed Grievant's schedule at that time. At some point, additional changes were made which resulted in Grievant owing even less time on mid-day assignments; however, this was not addressed by Grievant.

Grievant's claims of discrimination and favoritism in mid-day assignments are not supported by the evidence. As noted in Finding of Fact 13, Grievant's Level IV Exhibit 2 shows Grievant was not the only bus operator given mid-day assignments four days a week. In fact, L. Richards had more four day weeks than Grievant. Grievant was not treated differently than other bus operators at the St. Albans garage with regard to the number of days a week he was assigned to work mid-day. While it is true that some bus operators worked only one or two mid-days a week, many of the bus operators had a lot less time to make up than Grievant did, with some of them having five hours or less to make up, while Grievant had ten plus hours to make up when school began. L. Richards had nine hours and ten minutes to make up. Grievant did not identify any particular bus operator as having received preferential treatment.

Finally, as to Grievant's claim of discrimination and favoritism in the types of assignments he received, as is noted in footnote three above, the undersigned cannot draw any conclusions on this issue from the evidence. The following Conclusions of Law support the Decision reached.

## CONCLUSIONS OF LAW

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

2. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), 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 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.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); 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).

3. Grievant was not treated differently than other bus operator in the St. Albans bus garage.

Accordingly, this grievance is **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.

**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: September 11, 2002**

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Footnote: 1

*The grievance was denied at Level I on December 11, 2001. Grievant appealed to Level II, where a hearing was held on February 28, 2002. A Level II decision denying the grievance was issued on March 14, 2002. Grievant bypassed Level III, appealing to Level IV on March 25, 2002. A Level IV hearing was held on June 11, 2002. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision on July 16, 2002, upon receipt of the parties' written arguments.*

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Footnote: 2

*According to the Level II transcript Grievant testified he was to leave the bus garage at 2:00 p.m. However, all the documents placed into evidence show Grievant was to leave the bus garage at 2:20 p.m. Either Grievant misspoke, or the transcript is inaccurate in this regard.*

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Footnote: 3

*The undersigned's reading of Level IV Grievant's Exhibit 2, based upon the information on the exhibit and the brief explanation of the exhibit by Grievant's supervisor, is that Grievant was often assigned to work as a bus aide and to do grounds work. This contradicts Grievant's testimony that he always had to drive a bus for his mid-day assignment. Neither party addressed this, and it is possible that the exhibit is not consistent in its explanation of mid-day assignments. However, if this exhibit does not accurately reflect Grievant's assignments, it cannot be used to reflect the assignments given to other bus operators, and cannot be used to support Grievant's argument that he was given what he considered the more strenuous driving assignments, while other bus operators worked what he considered less strenuous non-driving assignments.*

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Footnote: 4

*The undersigned does not understand how this is possible based upon the information on the mid-day assignment sheet (Grievant's Level IV Exhibit 2). Apparently, this conclusion is based upon Grievant's testimony that the mid-day run he stated he has everyday takes an hour and a half a day. Grievant's Level IV Exhibit 2 is not consistent with this testimony.*