BALLARD KIRK,

Grievant,

v. DOCKET NO. 01-33-494

MCDOWELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance at Level I on June 6, 2001, alleging that Respondent requires him to take one-half day's leave to accept and be paid for a midday, extra-duty bus run that does not interfere with his regular morning and evening runs. He charges that Respondent has not required other bus operators to do the same, and it has not required other Chief Bus Operators to do so in the past. The grievance was denied at Level I and Level II. Grievant elected to bypass Level III and appealed to Level IV on November 13, 2001.

A Level IV hearing was held in the Grievance Board's Beckley Office on November 13, 2001, at which WVSSPA representative John E. Roush, Esq. represented Grievant and McDowell County Assistant Prosecuting Attorney Danny Barie, Esq. represented Respondent . The parties agreed to submit their proposed findings of fact and conclusions of law by December 17, 2001, whereupon the matter became mature for a decision (See footnote 1) . Based on a preponderance of the credible evidence of record, the undersigned makes the following factual findings:

FINDINGS OF FACT

1. For transportation purposes, Respondent has divided the county into three areas, each having a designated Chief Bus Operator. Grievant is regularly employed by Respondent as Chief Bus Operator for the Big Creek Area. He is paid at a rate two pay grades higher than other bus operators. He is employed on a 240-day contract with 21 non-work (NW) days per year.

2. As Chief Bus Operator, Grievant is responsible for the general direction of all school transportation and drivers assigned to the Big Creek Area. In addition to his regular bus route, he opens and closes the area bus garage, assigns extra-duty trips, arranges for substitute bus drivers as needed, does some maintenance on the buses, and responds to any emergency situations within

the area. His workday usually runs from about 5:00 a.m. to 5:00 p.m. He stays and works at the area bus garage between his morning and afternoon bus runs.

3. In addition to these duties, Grievant is available to accept at his option extra- duty bus runs that fall between his morning and afternoon runs. These voluntary opportunities are offered to bus operators on a rotating basis. However, if no other bus operator is available or wishes to accept the assignment, the extra-duty run becomes a mandatory part of the Chief Bus Operator's regular duties. 4. When Grievant accepts a midday, extra-duty bus run, he must either receive his regular pay and forego any additional pay for the run (See footnote 2) or he may be paid for the extra run and take a NW day. These are the only options available to Grievant, even if the midday, extra-duty run does not interfere with his regular morning and afternoon runs.

5. On or about May 31, 2001, Grievant took an extra-duty assignment between his morning and afternoon runs. He was paid for the run, but was required to take one-half NW day. Although Grievant was available for his afternoon run, Respondent used a substitute to cover the run. In the 27 years Grievant worked for Respondent as a bus operator before becoming a Chief Bus Operator, he was able to take midday, extra-duty runs that did not interfere with his regular runs without losing any of his regular pay.

6. Grievant mistakenly believed that the Chief Bus Operator who was his predecessor, Manuel Dawson (See footnote 3) , had taken midday extra-duty runs without using his NW days. When Mr. Dawson had a midday, extra-duty run, he either used an NW day or did not turn in a request to be paid for the extra-duty run.

7. Catherine Dotson, Chief Bus Operator for the Sandy River Area, on at least one occasion when she was obligated to accept a midday, extra-duty bus run because no other driver was available, was paid for the assignment without taking one-half NW day. When she voluntarily accepts the extra-duty run, she does use an NW day. On at least one occasion, Grievant also took a required midday extra-duty run and was paid for it without using an NW day or portion thereof. 8. The third Chief Bus Operator, Robert Redd, who covers the Welch Area, does not accept midday, extra-duty assignments. The evidence does not reveal what he does when no other driver is available.

9. Approximately two days per month, part of Grievant's regular duties includes greasing the buses in his shop. For this Grievant is paid an extra $10 per bus if the bus he is working on is not normally based in his area, even if he does the work between his morning and afternoon runs.

Grievant is not docked any regular pay on these days, and is not paid extra if the bus is normally based in his area.

DISCUSSION

This is a non disciplinary grievance in which Grievant bears the burden of proof. Grievant must prove his allegations by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C.S.R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant filed this grievance in the mistaken belief that his immediate predecessor had been able to get paid for both a full day's work as Chief Bus Operator and for extra- duty runs that fell within his normal workday. Grievant's allegation amounts to a charge of discrimination. "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). To establish a claimof discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. To meet this burden, 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 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 job responsibilities of Grievant and/or the other employee(s) and were not agreed to by Grievant in writing.

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

It is undisputed that regular bus operators normally get paid for midday, extra-duty bus runs that do not interfere with their regular runs, without losing any regular pay. However, Grievant is a Chief Bus Operator, with other work duties that he must perform during the day between his morning and afternoon runs, so he is not similarly situated to regular bus operators.

Both Grievant and Ms. Dotson testified that on at least one occasion, they were required to take a midday, extra-duty assignment, and were paid at the extra-duty rate without being required to use any NW time. Grievant testified at Level II that on that occasion, he contacted Mr. Dawson's secretary, who said she would have to find out from Superintendent Roberts how to handle the paperwork because the situation had not arisen before. On the occasion that gave rise to this grievance, however, Grievant was told that he would have to call a substitute for his afternoon run and take one-half NW day, or else not get paid for the extra-duty run. Mr. Dawson testified that he was required to either use at least part of an NW day, or he would not get paid extra for midday runs. Ms. Dotsonalso testified that when she voluntarily takes an extra-duty trip, she does use an NW day. Mr. Redd claimed that he did not take extra-duty trips.

While not similarly situated to regular bus operators, Grievant is similarly situated to the other Chief Bus Operators. However, he has not shown that he has been treated differently in a significant particular. Only Ms. Dotson testified that she at some point in time was paid without using an NW day, but Grievant had been also. Clearly, there was some confusion on the issue at the central office, but Grievant has not shown that these situations have been inconsistently handled since the confusion was cleared up.

Nor is Respondent's position on the issue arbitrary and capricious. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. [citations omitted]” Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Because Chief Bus Operators are already being paid for work that they are to perform between their morning and evening runs, Respondent's reluctance to also pay them for extra-duty work that falls within the same hours is reasonable. If an employee is out driving students, he cannot also be at the garage to perform his normal Chief Bus Operator duties. Respondent has defined a policy that is neither arbitrary nor capricious of requiring Chief Bus Operators to use an NW day or part of an NW day in order to get paid for extra-duty assignments that occur during their normal work hours. While respondent is required to compensate Grievant for the work he does, it is not required to pay him for both the work he is actually performing and the work he is missing. Grievant also made a showing that there are occasions when he and other Chief Bus Operators are paid for extra work

they perform during the day. Part of their regular duties is to help maintain the buses based in their areas, including regular lubrication. If they lubricate a bus at their garage that is not usually based in their area, they get paid $10 because this work is not a normal part of their regular duties. However, this extra work is not analogous to the extra-duty bus runs, in that it is not nearly as time consuming and is performed at their regular duty location.

Consistent with the foregoing, the following Conclusions of Law are appropriate:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which the Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its 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. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

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

4. Grievant failed to make a prima facie showing of discrimination or favoritism.

5. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

6. Respondent has defined a policy that is neither arbitrary nor capricious of requiring Chief Bus Operators to use an NW day or part of an NW day in order to get paid for extra-duty assignments that occur during their normal work hours.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 byW. 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.

Dated: January 8, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *No brief was received from Respondent.*

Footnote: 2

Drivers are paid at an hourly rate equal to one seventh of their regular daily rate for extra- duty assignments.

Footnote: 3 *Now Respondent's Director of Transportation.*