WILLIAM McBRIDE, et al.,

Grievants,

v. **DOCKET NO. 01-45-614**

SUMMERS COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On August 27, 2001, Grievants (See footnote 1) filed this grievance stating:

> Grievants, regularly employed school bus operators, are performing or have been advised that they will have to perform an extracurricular assignment(s) without compensation. This assignment also has not been posted. The Grievants also contend that other school bus operators do receive compensation for performing similar assignments. The Grievants allege a violation of West Virginia Code §§ 18-29-2(m), 18-29-2(o), 18A-4-16, and 18A-4-8b.

As relief, they seek the posting of this assignment and retroactive compensation for the dates that each grievant performed the assignment and interest on all monetary sums.

The grievance was denied at levels one and two, and level three was waived. A level four hearing was held on June 17, 2002 for purposes of supplementing the record. Grievants were represented by WVSSPA Attorney John E. Roush, Esq., and Respondent was represented by Kathryn Bayless, Esq. The parties agreed to submit their proposedfindings of fact and conclusions of law by July 17, 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. Grievants are all regularly employed by Respondent as Bus Operators with various morning and afternoon regular runs transporting students from their homes to various schools and back.

2. At the beginning of the 2001-2002 school year, Respondent advised Grievants that, on a rotational basis, they would be making a mid-day run to transport band students from Summers County Middle School (SCMS) to Summers County High School (SCHS) and back.

3. The rotation would be based on seniority, starting with the least senior bus operator, and each driver would perform the assignment for one week, and would receive no additional compensation. With a pre-trip inspection, the round trip (including a wait while the students are in class for 90 minutes) takes approximately two hours.

4. The trip is necessitated by an arrangement whereby eighth grade students at SCMS are transported to SCHS so they can participate in band class with SCHS students, allowing them to participate with the band at athletic events and other functions. The band class schedule lasted for approximately 12 weeks in the first semester of the school year, and it is anticipated that it will also be used in the 2002-2003 school year (See footnote 2) .

5. The midday assignment did not interfere with the drivers' regular morning and evening runs.

6. Other drivers have been paid at the extra-duty rate for performing the “Pizza Hut Run,” taking students from school to a work location for vocational training during the middle of the day.

DISCUSSION

The issue raised by Grievants requires a determination as to whether the midday band run is extracurricular, extra-duty, or just part of a regular workday. Grievants argue the assignment is extracurricular and that the uniformity of pay provisions of W. Va. Code § 18A-4-5b apply. Respondent asserts that the assignment is not extracurricular or extra- duty, but is curricular in nature. It argues that a State Superintendent's opinion allows it to make the assignment without additional compensation. (See footnote 3) These issues are non- disciplinary, so Grievants bear the burden of proof, and their 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.

West Virginia Code § 18A-4-16(1) (1996) discusses and defines extracurricular assignments. It states:

> The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of thisarticle, or extra-duty assignments, as provided by section eight-b of this article.

This Grievance Board in the past has held that "'W. Va. Code §§ 18A-4-8a and 18A- 4-8b do not prohibit a county board of education from requiring bus operators to be assigned on a rotational basis for in-county bus trips during regular school hours without additional compensation.' Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995)." Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997). (See footnote 4) These cases were decided on the proposition that extracurricular and extra- duty assignments necessarily were not part of the employee's regular work day, but if an employer made what would normally be an extracurricular assignment part of an employee's regular duties, even on an irregular basis, then it was not required to pay additional compensation for that work.

Here, Respondent informed Grievants prior to the start of the school year that the band run would be part of their regular work hours on an irregular basis, so it falls within the ambit of Broughman. However, Blankenship found that the Broughman holding was tempered by a State Superintendent's opinion that requires the employer to be consistent in making extra duties part of the regular workday. "[I]f a county has been paying Bus Operators for duties during the school day, such as irregular co-curricular field trips, it must continue to do so. However, 'if the board has treated this additional work as simply work done while the bus operator is on call for work during his or her regular workday, and, therefore, has not been paying extra for it, then it can continue not paying specially for it . . . .'" Blankenship, *supra*, citing a 1988 opinion of the State Superintendent of Schools. In showing that Respondent has been paying Bus Operators for duties during the school day, Grievants also established the elements necessary to make a *prima facie* discrimination claim. 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, 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).

At the time of the Level II hearing, Respondent was indeed compensating Wilford Adkins for making the "Pizza Hut Run," a thrice-weekly trip taking students from SCHS to Pizza Hut and back for vocational job training during the school day. The drivers who have performed this mid-day duty were compensated at their hourly rates. A similar run taking nursing students to a nursing home for practical training three days a week for several weeks was also paid at the drivers' hourly rate. These runs are similar enough to the band run to meet the three criteria for a *prima facie* case, and also establish that Respondent "has been paying Bus Operators for duties during the school day."

Once Grievants establish a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievants 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. Dept. ofCommunity 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).

Respondent contends that the legitimate reason for its decision is that the band run is a curricular assignment, occurring during regular working hours. It contends that because it occurs during the regular school day it is during the drivers' regular hours, and because it is for a specific class, it is curricular rather than extracurricular or extra-duty. It relies on a September 11, 1991, opinion of the State Superintendent of Schools that a daily bus run from a high school to a vocational school for morning and afternoon classes for secondary students is not an extra-duty assignment. Level II Administration's Exhibit No., 3. However, that opinion is qualified by additional language referring to runs “which are driven on a regular basis.” What is regular for the students is not necessarily regular for the drivers. In this case, any particular driver might have the duty for one week every two years - hardly a regular occurrence. Although the trip itself is regular for the students, it is not regular for the bus operators driving the trip - and they are the ones whose employment is controlled by the statute in question.

This irregularity excludes the band trip from the definition of “extracurricular assignment” cited above, but fits within the definition of “extra-duty assignment” as used in W. Va. Code § 18A-4-8b(f): “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic

events, proms, banquets and band festival trips." Like extracurricular assignments, extra-duty assignments may not be imposed on a driver involuntarily. By dividing the duty into irregular one-week fragments, Respondent may not take advantage of the State Superintendent's Opinion that would allow it to make the assignment without additional compensation. Respondent's argument that the assignment is curricular because it occurs during regular school hours, or is part of the student'scurriculum does not advance its cause - nothing in the definition of "extra-duty assignment" excludes work performed during the school day or in furtherance of the student's studies. In fact, the definition does not contemplate the advantage to the student at all - only its effect on the employee's schedule. The statute in question deals with the employment situation of the service personnel affected, not with the curriculum of the students or their class schedules. The term, "irregular" must be applied to the schedule of the employee, not to the schedule of persons unaffected by the statute. Respondent has not, therefore, established a legitimate reason for its discriminatory action. The band trip was an extra- duty assignment for which the drivers should have been assigned based on W. Va. Code § 18A-4-8b(f) and compensated according to W. Va. Code § 18A-4-8a(8).

The following conclusions of law support are based on this discussion:

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

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. "'W. Va. Code §§ 18A-4-8a and 18A-4-8b do not prohibit a county board of education from requiring bus operators to be assigned on a rotational basis for in-county bus trips during regular school hours without additional compensation.' Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995)." Blankenship v Mingo County Board of Education, Docket No. 96-29-334 (Apr. 22, 1997).

5. "[I]f a county has been paying Bus Operators for duties during the school day, such as irregular co-curricular field trips, it must continue to do so. However, 'if the board has treated this additional work as simply work done while the bus operator is on call for work during his or her regular workday, and, therefore, has not been paying extra for it, then it can continue not paying specially for it . . . .'" Blankenship, *supra*, citing a 1988 opinion of the State Superintendent of Schools.

6. West Virginia Code § 18A-4-16(1) (1996) discusses and defines extracurricular assignments. It states:

> The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.

7. The band trip was an irregular assignment, and therefore was not extracurricular.

8. "Extra-duty assignments" as used in W. Va. Code § 18A-4-8b(f) are "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips."

9. The band run was an extra-duty assignment.

10. Respondent paid other drivers at the extra-duty rate for performing similar assignments.

11. Once Grievants establish a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievants 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. Dept. 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).

12. Respondent did not establish a legitimate, non-discriminatory reason for the difference. For the foregoing reasons, this grievance is hereby **GRANTED.**

Respondent is ordered to compensate the drivers who performed the band run at the rate they would have earned under W. Va. Code § 18A-4-8a(8).

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Summers 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: August 20, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

All Summers County Regular Bus Operators, namely: William J. McBride, Wilfred Adkins, James J. Allen, Richard Allen, Benny Basham, Gary Basham, Maynard Blankenship, Bryan Boone, Connie Brandon, Peter Burdette, Chris Cales, Criss Cales, Hayward Cales, Mayo Donohoe, Mike Fleshman, Jeffrey Lane, Bobby Lilly, Billy Meadows, Elizabeth Meadows, Randy Meadows, James Nelson, Sr., Gary Pack, Larry Pack, Charles Richmond, Kenneth Shrewsbury, Terry Smith and James Utterback.

Footnote: 2

Not all of the grievants performed the assignment during the first rotation, but may be expected to perform it next year. Based on the number of bus operators and the fact that the band class lasts only 12 weeks, each bus operator would be required to perform the one-week assignment about once every two years.

Footnote: 3

Respondent's Level IV brief did not address the discrimination/favoritism issue.

Footnote: 4

West Virginia Code § 18A-4-8a was entirely re-written in 1998, but the revisions are mostly format changes and do not add or subtract any provisions which would affect the reasoning upon which Broughman was based.