LARRY L. LILLY and

DENNIS E. AKERS,

Grievants,

v. DOCKET NO. 02-41-037

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Larry L. Lilly filed this grievance on December 14, 2001, alleging a disparity in how bus operators are paid for afternoon runs, and requesting to be paid extra for afternoon runs to the vocational-technical (Vo-Tech) center, plus back pay from the start of the school year. The grievance was denied at Level I and at Level II (See footnote 1). Level III was waived, and the matter was heard at Level IV on April 15, 2002, at the Grievance Board's Beckley office.

Grievant Lilly was represented by WVSSPA attorney John E. Roush, Esq., and Respondent was represented by Erwin Conrad, Esq. The parties agreed to submit their proposed findings of fact and conclusions of law by May 13, 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 is regularly employed by Respondent as a Bus Operator, with seniority from September 29, 1983.

2. Grievant's morning run begins at his home with a pre-trip inspection of the bus at about 6:15 a.m. and proceeds from there at about 6:55 a.m. to pick up students and drop them off at Independence Junior High School (IJHS) and Independence High School (IHS), concluding at about 7:15 a.m. IHS students then board the bus at 7:20 a.m. and Grievant transports them to Raleigh County Vo-Tech, arriving at 7:45 a.m. Grievant then returns home, usually by 8:15 a.m.

3. Grievant then begins his pre-trip inspection for his afternoon runs at 12:35 p.m., and leaves his house at 12:55 p.m. to arrive at the Vo-Tech center at 1:35 p.m. Students there (See footnote 2) board at 1:45 p.m., and he transports them back to IHS, arriving about 2:15 p.m.

4. Grievant then picks up his morning IHS students, travels to IJHS to pick up those students, and returns them to their homes, ending at about 2:50 p.m. He then proceeds to Coal City Elementary School, where he picks up additional students at 3:20 p.m., and returns them to their homes, ending his evening runs at his own home at 3:50 p.m.

5. Grievant has been driving the same runs for 16 years.

6. In November, 2001 Grievant learned from another Bus Operator, Doug Lucas, that he was being paid extra for an afternoon run from the Vo-Tech center to LibertyHigh School at the same time as Grievant's afternoon Vo-Tech run. He was also told by Mr. Lucas that he was not paid extra for the run until that year.

7. Respondent's long-standing unwritten policy is that if a bus operator's afternoon run commences at 1:00 p.m. or later, it is part of the operator's evening run, but if it starts before 1:00 p.m., it is considered a midday run, for which the bus operator is employed on an extracurricular contract. The location, duration and ending time of the midday runs are nondeterminative.

8. Mr. Lucas is paid for 3.75 hours per day, five days per week, for mid-day Vo- Tech runs beginning at 10:30 a.m. and ending at 2:15 p.m. [Lvl. III Gr. Exh. 1]. He transports students from Liberty High School to the Vo-Tech center and back, picking up his first students at 10:50 a.m. and dropping them off at 11:45 a.m., then picking them back up at 1:37 p.m. and returning them by 2:15 p.m. The 3.75 hours includes the time from 11:45 a.m. to 1:37 p.m. when he is idle.

9. Mr. Lucas is paid under a "contract of employment for extracurricular duty assignment" for the 2001-2002 school year. The contract characterizes his duties as a midday run starting at 10:30 a.m.

10. Grievant is not paid for his afternoon Vo-Tech run even though he begins before 1:00 p.m. because Transportation Director Richard Cobb does not think he needs to start until later. However, pretrip inspection times and departure times are usually left to the judgment of the driver.

11. Respondent has no written policy mandating the 1:00 p.m. cut-off time for midday run pay.

12. Drivers who begin their midday runs before 1:00 p.m. get paid extra for the work they perform on those runs after 1:00 p.m. 13. Respondent interpreted an unidentified 1970's Opinion of the Attorney General as identifying a bus operator's regular job duty as transporting students from home to school.

14. There is no uniformity in the way bus operators report the time they spend on school-to-

school runs. Some operators report and are paid from the time they leave their terminal in the morning until they return in the afternoon as one run, while others report two separate runs. Some are paid as Mr. Lucas is, for the entire time, and some are paid only for the actual time they spend on the run.

15. Respondent raised a timeliness defense at Level II.

DISCUSSION

Although not explicitly stated as such, Grievant has articulated a discrimination argument. 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 in writing 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).

In this non-disciplinary grievance, Grievant bears the burden of proving his allegations by a preponderance of the evidence. Respondent has asserted the affirmative defense of timeliness, having also done so at Level II, arguing that Grievant has known of the facts upon which his grievance is based for several years. Because untimely filing will defeat an otherwise meritorious grievance, that issue will be considered first. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner.

Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997).

Grievant testified that he has had the same schedule for 16 years, and has never been paid extra for the afternoon Vo-Tech run. A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Kessler, *supra*. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). However, some practices are "continuing" in nature and may be grieved at any time during the continuation of the practice.

The undisputed evidence is that Grievant knew his afternoon Vo-Tech run was not considered extra duty when he first started making the run sixteen years ago, so it is clearly untimely with respect to the beginning of the practice. "[A] disparate-treatmentemployment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred." Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 498 (1996). If the discrimination is proven, the untimely filing would simply limit the amount of back pay to fifteen days prior to the filing of the grievance, if any. *See*, W.Va. Inst. of Technology v. W. Va. Human Rights Commission, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989); Martin, *supra*. This puts the ball back squarely in the court of the discrimination claim. Grievant alleges that Mr. Lucas is a similarly situated employee who is paid extra for a midday assignment, while Grievant is not, and that Respondent's stated reason for the difference does not justify the difference. In order to establish a *prima facie* discrimination claim, he must prove these allegations by a preponderance of the evidence. Lawton, *supra*.

The evidence does establish that both Grievant and Mr. Lucas are employed as bus operators who, in the afternoon, transport students from the Vo-Tech center back to their respective high schools. The difference in which school the drivers go to is not significant - they are to be at the Vo-Tech center at the same time in the afternoon, and leave at the same time, to do the same thing. The Vo-Tech run is not part of their regular evening runs transporting students from their schools back home. These similarities justify the finding that these two employees are similarly situated.

Mr. Lucas is given a significant benefit over Grievant, in that Mr. Lucas is compensated at the extra-duty rate for his midday run, while Grievant is not. In fact, Mr.Lucas is paid extra for almost one

hour and 45 minutes of waiting between runs (See footnote 3) . Like Grievant, Mr. Lucas transports students in the morning to the Vo-Tech center from a high school. Unlike Grievant, he is paid for doing so. Like Grievant, he transports them back in the afternoon. Unlike Grievant, he is paid for doing so. These are substantial inequities without an apparent justification. Although Grievant agreed to accept his contract that includes his school-to-school runs as part of his regular duties, he did not agree in writing to be paid differently than his peers. Grievant has established a *prima facie* discrimination claim.

"Once the grievant establishes a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. [Citations Omitted.]" Butts v. Berkeley County Bd. Of Educ., Docket No. 01-02-052 (Apr. 3, 2001). Respondent argued that its policy is to consider all runs starting after 1:00 p.m. as part of the driver's evening run. However, according to Supervisor of Transportation Arnold Ryan, that is a general procedure, but there is no such policy and the procedure is not followed as a rule. He testified that several drivers on similar school-to-school runs were paid even though they start after 1:00 p.m., because the morning portions of their runs start before 1:00 p.m. He further testified the general procedure was based on a 1970's Attorney General's Opinion that said "a regular bus operator's job was the time it takes to take children to school and from school." (See footnote 4) [Tran. pp. 75-76]. However, he stated no reason thisinterpretation is not applied to Grievant's morning school-to-school run (See footnote 5) , or how this opinion justifies discrimination based on a 1:00 p.m. starting time.

Transportation Director Ronald Cobb testified that he took over his job from Mr. Ryan five years ago. He also testified that the 1:00 p.m. criterion is not written into policy. He stated that he was told that anything starting before 1:00 p.m. was paid as a midday run, independent of how much time the run actually took. However, he also stated that even though Mr. Lilly starts his pretrip inspection at 12:35 p.m. and leaves before 1:00 p.m., he is not being paid for a midday run, because Mr. Cobb does not think he needs to leave until after 1:00.

There is no uniform method used for calculating the time a driver spends on and is paid for his or her midday school-to-school assignment. Drivers fill out their own midday run time sheets, and they do so differently. Mr. Lucas' duty is the same as Grievant's; he actually makes two runs, one starting at 10:30 in the morning and the second starting at 1:37 p.m. Mr. Lucas is paid from the time he

begins his morning school-to-school run to the time he ends his afternoon run. Driver Phyllis Davis similarly makes two school to school runs, and is only paid for the actual time she spends on the runs (See footnote 6) . Greg Daniel makes two separate runs, but lists on his time sheet only the start time for the morning runand the end time for the afternoon run, so he is paid for six hours and five minutes (See footnote 7) . Of the 14 midday run time sheets in evidence, all show the respective drivers are paid for work they perform after 1:00 irrespective of when they began the run.

Respondent has failed to articulate any legitimate reason for its entirely subjective application of its unwritten policy. As testified to by Mr. Cobb, a driver starting a school-to- school run at 12:55 p.m. and ending at 1:55 p.m. would be paid extra for one hour, while a driver on essentially the same run who happens to start at 1:00 and ending at 2:00 would not be paid anything extra. “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. There is no uniform treatment of bus operators performing midday runs in Raleigh County. Even though there is in place an unwritten policy, it is not always followed. Drivers' extra assignments are added to their regular contracts at the whim of the transportation directors to save the county money, but without regard to the uniformity requirements. When the policy is followed in this discriminatory fashion, it results in illegitimate disparities in pay for employees performing like assignments.

Respondent failed to produce evidence substantiating a legitimate job-related reason for its actions to rebut Grievant's *prima facie* discrimination claim. The following conclusions of law support this discussion:

CONCLUSIONS OF LAW

1. 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 in writing 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).

2. Grievant made a *prima facie* showing if discrimination in bus operator pay for midday runs.

3. "Once the grievant establishes a *prima facie* case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a 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. 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995)." Butts v. Berkeley County Bd. of Educ., Docket No. 01-02-052 (Apr. 3, 2001).

4. Respondent failed to demonstrate a legitimate reason for its actions. 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. "Unlawful employment discrimination in the form of compensation disparity . . . is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists. . . . Therefore, a disparate- treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred." Martin v. Randolph County Bd. Of Educ., 195 W. Va. 297, 465 S.E.2d 498 (1996), citing W. Va. Inst. of Technology v. W. Va. Human Rights Commission, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989).

7. The untimely filing of a grievance against a continuing practice "restricts the length of the back pay period, but it does not bar the claim entirely. Accordingly, if [Grievant] proved the discrimination, [he] would have been entitled to be made whole retroactive to . . . (fifteen days preceding the filing of the grievance), and to receive prospective relief." Martin, *supra*.

For the foregoing reasons, this grievance is hereby **GRANTED.** Respondent is ordered to begin compensating Grievant for the actual time (See footnote 8) he spends on his midday school-to-school runs, and to pay him back wages for the period of time he has performed such run from 15 working days prior to the filing of this grievance. This decision does notpreclude Respondent from developing

and implementing a uniform policy for compensating its drivers for midday runs in the future.

It is further ordered, inasmuch as Respondent has indicated the issues relating to Mr. Akers are settled, that the grievance of Mr. Akers is hereby **DISMISSED.**

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 (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: June 5, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

At Level II, Mr. Lilly's grievance was consolidated with a similar Grievance filed by Dennis Akers. Respondent represented that the grievance of Mr. Akers had been resolved by a settlement agreement prior to the Level IV hearing, and the parties agreed to proceed with the hearing only on the issue raised by Mr. Lilly's grievance.

Footnote: 2

These are different students than the ones he transported to the Vo-Tech center, those students having returned to IHS earlier on a different bus.

Footnote: 3

It is noted that Mr. Lucas, as a regular bus operator, receives as full day's pay for this idle time anyway, so with the extracurricular contract, he is actually paid twice for the same idle time.

Footnote: 4

No citation to this opinion was provided.

Footnote: 5

Grievant did not request midday pay for this run, even though it meets Respondent's articulated definition of a midday run by being a school-to-school run beginning before 1:00 p.m. In light of the relief granted, the parties may wish to discuss this issue.

Footnote: 6

Her morning run from Beaver Elementary to Daniels Elementary begins at 8:00 and ends at 9:00; her afternoon return run begins at 12:25 and ends at 1:35. She is paid for 2 hours and 10 minutes.

Footnote: 7

He begins his morning run from Coal City Elementary to Crab Orchard Elementary and Crescent Elementary at 8:15, then reverses the trip in the afternoon, returning to his terminal at 2:20.

Footnote: 8

Although Respondent does pay some bus operators extra amounts for time they are idle between runs, this practice is clearly improper. Grievant would not be entitled to be treated in a similar improper manner despite the resulting disparity.