EDMOND C. TONELLI,

Grievant,

v.

DOCKET NO. 03-41-242

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Edmond C. Tonelli, filed this grievance against his employer, the Raleigh County Board of Education ("Board"), on May 28, 2003:

> Negative compensation for performing an extra assignment in addition to my regular morning runs, ie high school, junior high, and elementary school. The extra assignment I'm referring to is the Alternative Education Center run.
>
> Relief sought: Other drivers with an Alternative Education Center run receive pay solely for that run. I ask only the same, to be compensated, since this trip is in addition to my regular morning run.

Ronald L. Cobb, Grievant's immediate supervisor, denied the grievance at level one on May 28, 2003. A level two hearing was held July 10, 2003, and Superintendent Charlotte Hutchens denied the grievance by decision dated August 5, 2003. Grievant bypassed level three, and appealed to level four on August 12, 2003, where the parties agreed to submit the grievance based upon the lower level record. This grievance became mature for decision on September 8, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented at level twoby John E. Roush, Esq., West Virginia School Service Personnel Association, and at level four he represented himself. The Board was represented at level two by Dr. Emily Meadows, and at

level four by Kathryn Reed Bayless, Esq., Bayless Law Firm, PLLC. (See footnote 1)

SUMMARY OF EVIDENCE

LII Joint Exhibits

Ex. 1 -

Grievance statement and level one response.

Ex. 2 -

June 16, 2003 letter from Charlotte Hutchens to Edmond C. Tonelli; June 3, 2003 letter from Charlotte Hutchens to Edmond C. Tonelli; June 5, 2003 letter from Edmond C. Tonelli to Charlotte Hutchens.

Ex. 3 -

Raleigh County Policy C.3.5. Mid-Day Assignments and Compensation for Transportation Employees.

Ex. 4 -

Raleigh County Schools January 6, 2003 Vacancy List; February 11, 2003 portion of Board minutes.

LII Grievant's Exhibits

Ex. 1 -

April 28 and 30, 2003 School Bus Schedules for Ed Tonelli.

Ex. 2 -

October 28, 2002 School Bus Schedule for Thomas G. Maxey.

Ex. 3 -

September 12, 2002 School Bus Schedule for Richard Gosnell.

Ex. 4 -

Lilly/Akers v. Raleigh County Board of Education, Docket No. 02-41-037 (June 5, 2002).

LII Board Exhibits

Ex. 1 -

January 30, 2003 Personnel Recommendation Form for Edmond Tonelli.

Ex. 2 -

April 4, 2003 School Bus Schedule for M. Halstead.

Ex. 3 -

Portions of Board minutes for September 10, 2002 through March 11, 2003.

Ex. 4. -

October 29, 2002 School Bus Schedule for David K. Mitchell.

Ex. 5 -

April 6, 2003 School Bus Schedule for James R. Howell.

Ex. 6 -

September 5, 2002 School Bus Schedule for Bill Waddell.

Ex. 7 -

September 30, 2002 School Bus Schedule for William O. Tolliver.

Ex. 8 -

August 19, 2002 School Bus Schedule for Ray Meadows.

Ex. 9 -

September 20, 2002 School Bus Schedule for Wallace Davenport.

Ex. 10 -

Raleigh County Schools August 8, 2002 Vacancy List; Portion of August 27, 2002 Board minutes.Ex. 11 -
Raleigh County Schools August 28, 2002 Vacancy List; Portion of October 8, 2002 Board minutes.

Ex. 12 -

Raleigh County Schools January 21, 2003 Vacancy List; Portion of February 25, 2002

Board minutes.

Ex. 13 -

Portion of June 10, 2003 Board minutes.

Testimony

Grievant testified in his own behalf, and presented the testimony of Ronald Cobb. The Board presented no additional witnesses.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed by the Board as a bus operator for approximately five years.

2. Grievant voluntarily transferred to Bus #55 on January 30, 2003. Jt. Ex. 4; Board Ex. 1.

3. Grievant was aware at the time he transferred to Bus #55 that the morning run included (a) a junior/senior high school run (5:50 a.m. - 6:50 a.m.); (b) a hold-over at Liberty High School (6:50 a.m - 7:10 a.m.), during which he monitors students on his bus who are to be transported to the Alternative Education Center ("AEC"); (c) a run from Liberty High School to the AEC (7:10 a.m. - 7:38 a.m.), and (d) an elementary run (7:45 a.m. - 8:25 a.m.). Grievant's evening run does not include the AEC run.

4. Other bus operators in Grievant's area have a junior/senior high school run and an elementary run, but no AEC run.

5.

Bus No. 17 makes only a morning AEC run, and this is a half-time position. 6. Bus No. 45 makes only an evening AEC run as the p.m. portion of a regular full-time assignment.

7. Bus No. 89 makes a mid-day run to the Vo-Tech center for which he receives extracurricular compensation.

8. No regular full-time driver receives additional compensation for having the AEC as part of his or her morning or afternoon bus run.

DISCUSSION

In a non-disciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). *See* W. Va. Code § 18-29-6. Grievant asserts he is being treated differently than other drivers with respect to compensation for the AEC run, claiming violations of W. Va. Code §§ 18A-4-5b and 18-29- 2(m) and (o).

The Board denies Grievant is entitled to any extracurricular compensation for his AEC run, or that any other similarly-situated drivers are receiving extra compensation for an AEC run. Furthermore, the Board raised a timeliness defense at level two, contending Grievant's filing is beyond the statute of limitations for filing a grievance. Because a ruling on the timeliness issue could defeat the grievance, that issue will be resolved 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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93- BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

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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 Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant transferred to Bus #55 in January, 2003, but did not file this grievance until May 28, 2003. Grievant knew when he voluntarily accepted Bus #55 that it included the AEC run, and knew he would not receive extra compensation for that run. The grievance is clearly untimely with respect to the beginning of the practice. However, “[a] disparate- treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if it 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. Martin, *supra.* W. Va. Code § 18A-4-5b provides that “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[.]” Similarly, W. Va. Code § 18- 29-2 prohibits discrimination and favoritism with respect to any employee of a board of education. 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." W. Va. Code § 18-29-2(o) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism, a grievant must establish the following:

> (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 the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Flint v. Bd. of Educ. of Harrision County, 207 W. Va. 251; 531 S.E.2d 786 (1999). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision.

The evidence does not establish that any bus driver, full-time or part-time, transporting students to the AEC receives any additional compensation for suchassignment. In all instances students are transported to or from the AEC by bus operators as part of the drivers' regular assignments.

Grievant has the burden of establishing that he is similarly-situated to a bus driver who is receiving what Grievant asserts should be a "mid-day" or extracurricular run pay for the part of his regular run which involves the AEC. While he can establish that he is similarly-situated to other regular bus drivers that transport students to the AEC from other schools, he has failed to establish a single instance where the other bus operator has been given advantage or treated with preference in any significant manner not similarly afforded him. He has failed to demonstrate that any other regular driver has been paid "extra" sums for the trips to the AEC, and thus, his claims of discrimination and favoritism must fail.

Grievant also asserts that transporting students to the AEC is an extracurricular run because it involves a "school-to-school" run. Grievant relies on the Grievance Board decision of Lilly/Akers v.

Raleigh County Board of Education, Docket No. 02-41-037 (June 5, 2002), to support this claim. In that case, the grievant proved that another driver who made the exact same Vo-Tech run as he, was receiving extracurricular compensation, while the grievant was not. The grievant prevailed on his claim of discrimination. Buried in the discrimination argument was a contention that a "school-to-school" run was always an extracurricular run, as opposed to a "home-to-school" or "school-to-home" run, which would always be considered the bus operator's regular morning or evening run. Thus, Grievant in the instant case argues that, since he transports students from the high school to the AEC, a "school-to-school" run, he is entitled to extracurricular compensation. This"school-to-school" language came from 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 2)

The Board denies that the portion of Grievant's bus run which entails transporting students from the high school to AEC constitutes an extracurricular or "mid-day" assignment, and denies any similarity between this case and Lilly. (See footnote 3) Raleigh County Policy C.3.5, Mid-day Assignments and Compensation for Transportation Employees, defines mid-day assignments as "bus routes that occur on a regular or periodic basis but occur at times other than the regularly scheduled work hours of transportation employees on morning and evening bus run schedules." Jt. Ex. 3.

Grievant contends he transports students from Liberty High School to the AEC in the middle of his regular morning run; the Board believes the AEC trip is simply a portion of his regular morning run and nothing else. The undersigned agrees with the Board. For students attending the Vo-Tech Center, their home school is the high school to which they are assigned. They then leave the high school for a portion of the day to attend Vo-Tech classes. For the students attending the AEC, that is their home school. Those students are not permitted to enter the high school while waiting there for the bus. In effect, the high school is merely a stop in Grievant's overall bus run. Just as the elementary portion of his morning run does not constitute an extracurricular run just because it is separate from the high school run, neither is the AEC a separate run just because it is separate from the highschool and the elementary run. It is simply part and parcel of Grievant's morning run. Grievant's reliance on Lilly is inapplicable in this case.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). *See* W. Va. Code § 18-29-6.

2. 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).

3. 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. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. "[a] disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if it 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 isproven, 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, 383 S.E.2d 490 (1989); Martin, *supra.*

5. The Board has proven Grievant's claim was untimely filed; however, since his claim is of compensation disparity, it is a continuing practice, and any relief is limited to fifteen days prior to the filing of the grievance.

6. W. Va. Code § 18A-4-5b provides that "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[.]"

7. Grievant has failed to demonstrate that he is not compensated in a uniform manner as any other bus operator for performing like assignments and duties.

8. 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."

9. W. Va. Code § 18-29-2(o) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

10. In order to establish a prima facie case of discrimination or favoritism, a grievant must establish the following:

(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 the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

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11. Grievant has failed to establish a prima facie case of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: September 29, 2003

Footnote: 1

This grievance was reassigned to the undersigned Administrative Law Judge on September 10, 2003, for administrative reasons.

Footnote: 2

No citation to this opinion was cited.

Footnote: 3

The Board uses these terms interchangeably.