BARBARA REDMAN,

Grievant,

v. **Docket No. 04-18-121**

JACKSON COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Barbara Redman ("Grievant") was employed by the respondent, the Jackson County Board of Education ("BOE"), as a bus operator serving special needs students during the 2003-2004 school year. Grievant claims that BOE violated a number of statutory provisions by requiring her to park her school bus at Ripley rather than the main garage at Sandyville.

The resulting grievance was filed on October 23, 2003. Relief was denied at Level I on November 5, 2003. After a hearing was conducted on February 4, 2004, the grievance was denied at Level II. (See footnote 1) The written grievance forms for Levels I and II were cursory, consisting of nothing more than an allegation that West Virginia Code sections 18-29-2(m) through (p) had been violated.

A more substantive statement, clarifying the grounds upon which she alleged violations of those statutory provisions, was submitted at Level III. With slight amendment, the same grievance statement was submitted at Level IV, where it read as follows:

> The Grievant, a regularly employed school bus operator, alleges that the Respondent has erred in unilaterally changing the location where herschool bus is stored from the Sandyville area to the Ripley bus garage. Other school bus operators are permitted to park the buses that they drive at their respective homes or other convenient locations. The Grievant alleges a violation of West Virginia Code § 18-29-2(m), (n), (o), and (p).

As relief, Grievant seeks "the reinstatement of the assigned parking place to Sandyville and compensation for the additional time and expenses incurred in traveling to and from Ripley."

This appeal ensued on March 8, 2004, after BOE waived Level III proceedings. A Level IV

hearing was conducted on May 12, 2004. Attorney John Everette Roush of the West Virginia School Service Personnel Association represented Grievant and Attorney Howard E. Seufer, Jr., represented BOE. This grievance matured for decision on June 4, 2004, upon submission by the parties of their respective proposed findings of fact and conclusions of law.

Upon review of the entire record, including the proceedings at Level IV, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievant, who has been employed by BOE as a bus operator for over twenty years, drove a bus serving special needs students in the Ripley area during the 2003-2004 school year.

2 2. Grievant's immediate supervisor was James Stewart, Jr., Supervisor of Transportation ("Supervisor Stewart").

3 3. Supervisor Stewart's immediate supervisor was Gary Samples, Assistant Superintendent and Director of Transportation ("Assistant Superintendent Samples"). 4 4. School bus garages in Jackson County are located at Sandyville, Ripley and Eastwood.

5 5. Prior to the beginning of the 2003-2004 school year, Assistant Superintendent Samples determined that it would be best if Grievant parked at the Ripley lot, rather than Sandyville, because her run started at Ripley Elementary School.

6 6. The Ripley parking lot, where Grievant was required to park, is in close proximity to Ripley Elementary School where Grievant stopped first thing each morning to pick up her transportation aide.

7 7. The decision as to where the aides would be picked up was made by Lisa Martin, Director of Special Education. Grievant's aide worked at Ripley Elementary after assisting Grievant on the morning run, so the pick-up location gave her access to her personal vehicle during the school day.

8 8. Grievant's request that she be allowed to park at Sandyville, where she had parked the previous school year, was denied.

9 9. Bus operator Stan Lewis (Bus # 08) was allowed to park at Eastwood where he picked up his aide.

10 10. Bus operator Jay Farra (Bus #09) was allowed to park at Sandyville because it was closer to the beginning of his run than the Ripley lot.

11 11. Bus operator Tom Nutter (Bus # 21) was allowed to park at the Sandyville garage in the evening because Sandyville was closer than the Ripley lot to the beginning of his run. 12 12. Bus operator Arthur Winter (Bus #33) was allowed to park at home in the evening because he ended his route close to home. During the day he could park at his home or at Sandyville because it made no difference in the deadhead mileage.

13 13. Bus operator Joe Boggess (Bus # 42) was allowed to park at his home in the evening because his home was closer to the end of his run than the Ripley garage.

14 14. The substitute, Richard Galloway, who took over Tom Redman's (See footnote 2) route (Bus #45), after he retired during the 2003-2004 school year, was allowed to park at the main garage at Sandyville because there was no difference in the distance from either Sandyville or Ripley to the start of his run.

15 15. Bus operator Jack Quesenberry (Bus # 48) was allowed to park his bus at his home at night because his wife was his transportation aide and constituted his first pick-up in the morning. During the school day his wife worked at Ripley Middle School. (See footnote 3)

16 16. Supervisor Stewart chastised several bus operators for failing to park in their designated locations.

17 17. During the break between the morning and afternoon runs, bus operators Jay Farra, Tom Nutter and Joe Boggess transported buses from the Ripley lot to the main garage at Sandyville for service and repairs.

18 18. Transporting buses from Ripley to the main garage at Sandyville took place approximately four days a week and involved varying numbers of buses. 19 19. On two occasions Jay Farra refused to transport a bus to the main garage for bus operator Hubert K. Mullinex.

20 20. The Sandyville garage is close to Grievant's home but it is approximately six miles away from Ripley Elementary School. If Grievant had parked her bus at Sandyville, she would have driven approximately six extra miles to pick up her aide each morning, as well as each time she completed her run and returned her bus to the lot.

21 21. Parking her bus at the Sandyville garage would have, unnecessarily, increased the mileage Grievant's bus was accumulating.

22 22. Although Sandyville is the main garage and is better equipped than the other parking

locations, there were mechanics and a spare special education bus available to Grievant at the Ripley lot.

23 23. Grievant was given her parking assignment approximately one month before her son, who is also a bus operator, filed his first grievance against BOE.

24 24. At the beginning of the school year, Grievant began her run at 6:20 a.m. but she was unable to comply with her schedule in terms of getting students to school by the required times. Level II, Exhibit 7.

25 25. The school system had already been cited for failing to have special education students report to school on time, so this was a sensitive issue for BOE.

26 26. Supervisor Stewart rode Grievant's bus to ascertain if there were reasonable changes that could be made so that Grievant could get the students to school on time.

27 27. Ultimately, Grievant's departure time in the morning was changed from 6:20 a.m. to 6:10 a.m. or 6:05 a.m., which resolved the problem. Level II, Exhibit 7. 28 28. The schedules of other bus operators were also fine-tuned after school began to insure that students arrived on time.

Discussion

During the 2003-2004 school year, Grievant was assigned to park her bus at the Ripley lot. Her request to park at Sandyville was denied. Grievant was required to park at Ripley because her first stop each morning was at Ripley Elementary School where she picked up her aide. During the rest of the day, Grievant's transportation aide worked at Ripley Elementary School and thus had access to her personal vehicle. Ripley Elementary School is in fairly close proximity to the Ripley bus garage, whereas the Sandyville bus facility is approximately six miles from the school.

Grievant asserts that she should be allowed to park at Sandyville because it is closer to her home and because it is more likely that there will be a mechanic on duty there in the event she has trouble with her bus. However, mechanics were available at both garages by 6:00 a.m. each morning. In addition, an extra bus equipped for special needs students was kept on the Ripley parking lot in the event Grievant or another special education driver needed to use a replacement bus.

Grievant claims that her parking assignment was the result of favoritism or discrimination. She argues that all of the bus operators were directed to park at the Ripley lot during the 2003-2004 school year but that she was the only bus operator who complied with that directive. She asserts that the others were allowed to return to Sandyville or to take their buses home. In addition to asserting a

claim of favoritism or discrimination, Grievant asserts that she was the victim of harassment or retaliation because her son, who is also a bus operator, filed grievances against BOE. BOE responds that decisions about where buses should park were based, in large part, upon where their runs began and ended. BOE sought to lower fuel consumption and to reduce wear and tear on the bus fleet by limiting the distances buses had to deadhead, meaning travel without students aboard. Another factor that could have influenced the bus operator's parking assignment was the need to allow bus aides to retain access to personal transportation during the work day, in case of emergency. In cold weather, buses needed to be parked where they had access to electricity because they had to be plugged in. Based upon logistics and cost-savings, BOE was able to offer a reasonable explanation for the parking assignments of all of the other bus operators with whom Grievant compared herself.

"'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (November 30, 1999)(additional citations omitted) Grievant did not allege that BOE's decision that Grievant should park at Ripley in any way impinged upon her job performance, health or safety. It was clear that her desire to park at Sandyville was motivated by her desire to park closer to home. Grievant's suggestion that allowing her aide access to her personal vehicle was merely a pretext for requiring Grievant to park at Ripley is nonsensical and unsupported by the record.

Grievant introduced evidence that Jay Farra may have been dilatory in his duties to ferry buses back to Sandyville for service. Such evidence does not have any probativevalue absent a showing that Supervisor Stewart was aware that there were problems in Jay Farra's job performance and failed to take action to correct those problems. Grievant's assertion that there was no need for buses to be transported to the main garage for service and repair is not supported by any evidence and does not assist Grievant in meeting her burden.

Grievant has failed to prove that she was the victim of favoritism, discrimination, or retaliation. Requiring her to park at the Ripley lot made economic sense for BOE. Grievant argues that it would have made more economic sense to require Grievant's aide to meet Grievant at the Sandyville bus garage each morning. This suggestion, even if it were being offered seriously, is simply untenable in

that it would have left Grievant's aide without access to her personal transportation throughout the workday. Although Grievant can point to one or two aides who chose to ride the bus from their homes, BOE noted that, if those aides had objected to being stranded at work without transportation, other arrangements would have been made for placing them on their buses in the morning. There is no evidence that the personal convenience or preferences of other bus operators overrode economic considerations in selecting parking locations for bus operators in school year 2003-2004.

Nor is there any evidence that grievances filed by her son had any impact upon Grievant's parking location. To the contrary, her parking assignment preceded the date of his first grievance.

To the extent that Grievant complained at lower levels that her supervisor rode on the bus with her several times, it is clear that she has abandoned that complaint at Level IV, where her proposed findings of fact include the statement that Supervisor Stewart “rodeher bus, but Grievant did not consider this to be a problem.” Grievant failed to present any evidence to support her proposed finding of fact that “[t]he problems with Mr. Stewart started when William Guy Redman, Grievant's son, started filing grievances.” Grievant failed to identify any “problems” she had with Supervisor Stewart. Assistant Superintendent Samples, rather than Supervisor Stewart, made the decision that Grievant should park at Ripley. Lisa Martin, Director of Special Education, rather than Supervisor Stewart, made the decision that Grievant's aide was to be picked up at Ripley Elementary.

Although Grievant did not identify the change in the starting time for her run as a basis of her grievance at Level IV, both Grievant and BOE have addressed the issue. Therefore it is appropriate to note that Grievant has failed to establish a causal connection between changing the start time of her run and the grievances filed by her son.

Grievant failed to meet her burden of proving, by a preponderance of the evidence, the elements of favoritism, discrimination, retaliation or harassment. This grievance must be denied.

Based upon the foregoing findings of fact, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

29 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. Va. Code St. R. § 156-1-4.21 (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).

30 2. Grievant must prove her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "The preponderance standard generally requiresproof 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).

Favoritism/Discrimination

31 3. West Virginia Code section 18-29-3(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

32 4. "'Discrimination' means 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).

33 5. To establish a *prima facie* case of discrimination or favoritism under West Virginia Code sections18-29-2(m) or (o), a grievant must establish the following:

> a. that he is similarly situated, in a pertinent way, to one or more other employees;
>
> 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.

Bd. of Educ. of County of Wood v. Airhart, 212 W. Va. 175, 569 S.E.2d 422, 169 Ed. Law Rep. 744 (2002) (citing *Flint v. Bd. of Educ. of County of Harrison*, 207 W. Va. 251, 256, 531 S.E.2d 76, 81 (1999) (*per curiam*)).

34 1.

> Grievant has met the burden of establishing that she is similarly situated, in a pertinent way, to other bus operators in Jackson County who were directed to park at the Ripley lot.

35 2.

Grievant has failed to demonstrate that parking assignments were based on anything other than the school system's transportation needs, concern about reducing unnecessary wear and tear on the bus fleet, minimizing fuel costs, and allowing aides access to transportation during the school day.

36 1.

Grievant cannot satisfy the third prong of *Airhart* because there were legitimate grounds, that were inapplicable to Grievant, for allowing some bus operators to park at locations other than Ripley.

37 1.

Grievant has failed to make a *prima facie* case of favoritism or discrimination in the assignment of parking locations.

Reprisal/Retaliation

38 1.

West Virginia Code section 18-29-2(p) defines reprisal as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.”

39 1.

Grievant may prove a *prima facie* case of retaliation by proving the following:

a. Grievant engaged in a protected activity, such as filing a grievance;

b. she was subsequently treated in an adverse manner by the employer or the employer's agent;

c. the employer's official or agent had actual or constructive knowledge that Grievant engaged in the protected activity; and

d. there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse

treatment.

Tibbs v.Hancock County Bd. of Educ., Docket No. 98-15-016 (June 16, 1998)(quoting *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995))

17 1.

The starting time of Grievant's run was altered for the legitimate purpose of getting the students to school on time and cannot be construed as having been an inappropriate response to her son's actions in exercising his right to grieve.

18 Grievant failed to prove that she was the victim of retaliation or reprisal.

Harassment

19 19. West Virginia Code section 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy, and profession.”

20 1.

There is no evidence in the record to support a conclusion that Grievant was subjected to any treatment that could fall within the foregoing definition of harassment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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 West Virginia Code section 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 actionnumber so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 30, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Exhibit 7 at Level II, which contained student names, has been redacted by the undersigned to preserve the privacy of those students.

Footnote: 2

Tom Redman is Grievant's husband.

Footnote: 3

If Mrs. Quesenberry objected to being at the school without access to her personal vehicle, BOE would have made different transportation arrangements.