TIM WHIPKEY,

Grievant,

v v.

Docket No. 03-07-360

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Tim Whipkey, filed this grievance on September 10, 2003, against his employer, the Calhoun County Board of Education ("CCBOE"). His Statement of Grievance reads:

> I feel the summer work should have been paid as multi-class split shift. "Grievance alleged violation 18A-4-8 subsection" "F" and 18-5-39
>
> Relief sought: Split shift - multi[-]class pay

This grievance was denied at Levels I and II, and Level III was waived. (See footnote 1) Grievant filed to Level IV on November 24, 2003, and a Level IV hearing was held on February 17, 2004. This case became mature for decision on March 17, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. During the school year, Grievant is employed by CCBOE as a regular bus operator.
2. On May 21, 2003, CCBOE posted four positions for "Summer Program Bus Operators/Custodians."

3. Grievant applied for and received one of these positions.

4. Grievant's initial schedule was:

- Bus operator duties from 7:00 a.m. to 8:30 a.m.
- Custodial duties from 8:30 a.m. to 12:30 p.m.
- No duties from 12:30 p.m. to 3:00 p.m.
- Bus operator duties from 3:00 p.m. to 5:00 - 5:30 p.m.

5. During the last three weeks of this summer position, Grievant's duties were changed, and Grievant returned to the school to perform custodial duties from 2:30 p.m. to 3:00 p.m.

6. Grievant received split shift pay during these last three weeks of the summer.

7. When Grievant was first hired as a regular employee by CCBOE, in the Fall of 1991, Grievant performed both bus operator and custodial duties and received split shift pay.

8. Grievant presented no evidence to show this practice had continued for any employee.

Issues and Arguments

Grievant asserts he should receive split shift pay for the entire six weeks, instead of just the last three weeks. Additionally, Grievant asserts because CCBOE paid him for a split shift approximately ten years ago, it is required to do so now.

Respondent maintains Grievant was not entitled to split shift pay during this period because bus operators do not receive split shift pay, and his custodial duties were not split the first three weeks. Further, Respondent notes the prior split shift pay decision ten years ago was in error, and a board of education is not required to continue an error.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. "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 employer has not met its burden. Id.

Two Code Sections are applicable to this issue. W. Va. Code § 18A-4-8(f) states:

> Custodians, aides, maintenance, office and school lunch employees required to work a daily work schedule that is interrupted, that is, who do not work a continuous period in one day, shall be paid additional compensation equal to at least one eighth of their total salary as provided by their state minimum salary and any county pay supplement, and payable entirely from county funds: Provided, That when engaged in duties of transporting studentsexclusively, aides shall not be regarded as working an interrupted schedule. Maintenance personnel are defined as personnel who hold a classification title other than in a custodial, aide, school lunch, office or transportation category as provided in section one, article one of this chapter.

(Emphasis added).

W. Va. Code § 18-5-39(f) states:

> The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to all rights, privileges and benefits provided in sections five-b, eight, eight-a, ten and fourteen, article four, chapter eighteen-a of this code: Provided, That those persons are not entitled to a minimum employment term of two hundred days for their summer position.

W. Va. Code § 18A-4-8(f) does not list bus operators as one of the groups of employees who are to receive the split shift pay, but custodians are specifically listed. Typically, all bus operators drive a split shift. A review of Grievant's schedule indicates he did not have a custodial split shift during the first three weeks of the summer.

This issue was addressed in Fleece v. Morgan County Bd. of Educ., Docket No. 99- 32-090 (August 13, 1999). In that case the grievant, a bus operator/truck driver, worked as a truck driver after completion of his morning bus run, and before he performed his afternoon run. The administrative law judge held, "Grievant does not qualify [for split shift pay] because the sole reason he works a split shift is to accommodate his bus operator duties and not to facilitate his alternate classification. . . ." (citing Gue v. Morgan County Bd. of Educ., Docket No. 93-32-288 (Apr. 8, 1994), aff'd Morgan County Circuit Court, Civil Appeal No. 94-P-14G (Feb. 24, 1995), appeal denied W. Va. Supreme Court of Appeals (Sept. 20, 1995)). The same reasoning applies here for Grievant's first three weeks in his summer position. W. Va. Code § 18A-4-8(f) requires boards of education to give custodians additional compensation if their shifts are split. No such requirement is included for bus

operators. For the first three weeks, Grievant's custodial duties were not split; accordingly, there is no requirement for additional compensation.

Further, Grievant's assertion that because CCBOE paid him in a different manner approximately ten years ago, it must to do now, is without merit. Grievant did not identify any employee who is currently receiving or had received in the recent past this compensation. As stated in Goins v. Raleigh County Board of Education, Docket No. 97- 41-116 (Oct. 17, 1997), "[n]either W. Va. Code § 18A-4-5b nor any other statute, policy, rule, or regulation requires a board of education to compensate one employee the same as another similarly situated employee where the higher paid employee was receiving such pay as the result of an error or mistake." See Peters v. Kanawha County Bd. of Educ., Docket No. 20-88-168 (Dec. 28, 1988). Accord, Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989); Crowder v. Kanawha County Bd. of Educ., Docket No. 20- 86-307-1 (June 25, 1987); Fisher v. Mercer County Bd. of Educ., Docket No. 27-86-112 (July 25, 1986). CCBOE is not required to pay Grievant split shift pay for the first three weeks of the summer.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rulesof 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. "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 employer has not met its burden. Id.

2. W. Va. Code § 18A-4-8(f) requires boards of education to pay a custodian split shift pay if the employee is required to return to those duties after down time.

3. Because Grievant did not return to his custodial duties after their completion in the morning, he was not entitled to split shift pay for the first three weeks of the summer.

4. "Neither W. Va. Code § 18A-4-5b nor any other statute, policy, rule, or regulation requires a

board of education to compensate one employee the same as another similarly situated employee where the higher paid employee was receiving such pay as the result of an error or mistake." Goins v. Raleigh County Board of Education, Docket No. 97-41-116 (Oct. 17, 1997). See Peters v. Kanawha County Bd. of Educ., Docket No. 20-88-168 (Dec. 28, 1988). Accord, Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989); Crowder v. Kanawha County Bd. of Educ., Docket No. 20- 86-307-1 (June 25, 1987); Fisher v. Mercer County Bd. of Educ., Docket No. 27-86-112 (July 25, 1986). 5. CCBOE is not required to pay Grievant for a split shift just because it did so once ten years ago, if such payment is not required by law. Goins, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Calhoun 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 8, 2004

Footnote: 1

No record was made of the Level II hearing, but the parties agreed to continue at Level IV rather than having the grievance remanded for a recorded hearing.

Footnote: 2

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and CCBOE was represented by Howard Seufer of Bowles Rice McDavid Graff and Love.