WILLIAM REDMAN,

Grievant,

v. Docket No. 04-18-027

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant William Redman is employed as a Special Education bus operator by the Jackson County Board of Education ("JCBOE"). His Statement of Grievance alleges:

> **Grievant is a regularly employed as a school bus operator and currently performs a special education route. Grievant contends that there is a tremendous disparity between the amount of time required to perform his route and those of other bus operators. Grievant alleges that Respondent has violated West Virginia Code §§ 18A-4-5b, 18-29-(m) & (o) by its failure to address this disparity.**
>
> **Relief sought: Grievant seeks compensation at his regular hourly rate for the disparity in the bus schedules currently in existence and revision of routes in the future to eliminate this disparity.**

The grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on January 20, 2004, and a Level IV hearing was held on March 15, 2004. This case became mature for decision on April 13, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts because there is "tremendous disparity" in the length of his bus run as compared to other bus operators, he should receive additional compensation. He alsomaintains some of the students on his bus do not need to ride a Special Education bus and could ride on a regular bus with an aide.

Respondent avers Grievant works approximately seven to seven and one half hours a day and receives pay for eight hours day. Respondent notes the students' IEP's (See footnote 2) require the students on Grievant's bus to ride on a Special Education bus, and his is the only bus that services that portion of Jackson County. Respondent also notes the time Grievant reports it takes him to complete his route is inflated.

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

Findings of Fact

1. Grievant has been employed as a regular bus operator for seven years. All of this time has been as a Special Education bus operator.

2. All bus operators are paid for an eight-hour day whether they work the entire eight hours or not.

3. Other bus operators are required to deal with disciplinary problems. Because Grievant drives a Special Education bus and has an aide always present, he is not required to deal with these issues.

4. Grievant's run is the longest in the county, but it does not take more time than the eight hours he is paid for, including his duty-free lunch. (See footnote 3) 5. Many bus operators in the county have runs that are greater than six hours, and several have runs that are almost seven hours long. See note 7.

6. Grievant drives a Special Education bus for approximately nine students. Grievant also has an aide to assist these students. Contrary to his assertion that he drives 108 miles every day, he drives 88 miles every day and has only six stops. The parents of the Special Education students are required to call in before school starts to inform the Transportation Department if their child will be absent that day.

7. Grievant has had numerous opportunities to bid on other runs and has not done so.

8. Because of Grievant's complaints, JCBOE, at the first of the school year, tried placing some of Grievant's students on regular buses. This endeavor did not work out, and the students were replaced on Grievant's bus.

9. Grievant's time to complete his run has decreased since he started in September

because one student's father now picks him up after school. (See footnote 4) Additionally, the student who is in a wheelchair and requires the lift has not attended regularly for sometime. The absence of these two students has decreased Grievant's time in the afternoon by at least a half hour. For example, Grievant's running time of seven hours and 33 minutes, had decreased by fifteen minutes a day in November and another fifteen minutes a day by the time of the Level IV hearing.

10. Grievant's assertion that the Special Education students he drives are seldom absent is incorrect. By the time of the Level IV hearing, there were already confirmed student absences for approximately a third of the 2003 - 2004 school year. Resp. No. 1, at Level IV. (See footnote 5) On many of these days there were multiple absences. (See footnote 6)

11. When Grievant's students are absent or do not need to be driven home, the amount of time needed to complete Grievant's run is decreased.

12. Both the Supervisor of Transportation and the Assistant Superintendent in charge of transportation have examined the bus schedules in detail because of Grievant's numerous complaints, but there is no other Special Education bus to take these students where they need to be.

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 CountyBd. 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 & 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.

I. Compensation

The first issue to address is Grievant's desire to receive additional payment for the fewer than eight hours a day he works. Grievant works approximately seven hours on a typical day.

(See footnote 7) This seven hours, of course, includes his duty-free lunch. Grievant is paid for eight hours. He is now seeking to be paid additional compensation because his run is longer than the other drivers. Grievant did not point to any statute, rule, or regulation that would allow a board of education to compensate Grievant in such a manner.

It is noted that generally, new or beginning drivers receive the worst or longest runs, and then through the years and the bidding process and as they gain seniority the older bus operators receive better and shorter runs. Although Grievant's run is the longest, it unquestionably has positive factors. It has only nine students, a smaller bus, and only six stops. He has an aide to deal with discipline and health problems.

Numerous runs have been posted, and Grievant has not bid on any of them. While he is certainly not required to bid to another position, it was unclear why he would not do so if he does not like the length of his run. Apparently, Grievant wants to have a run withan aide, few students and stops, and be paid extra money for doing the same things the other drivers are doing.

Grievant's beliefs were stated in his testimony at Level II. When asked if he thinks the Special Education students should ride another bus because it inconvenienced him, his reply was no, but they should ride another bus, "When it inconvenienced them and me." Test. at 12, Level II Hearing. There was absolutely no evidence that the Special Education students who rode his bus were inconvenienced in any way. In fact the testimony was the opposite, the students' IEP's required them to ride a Special Education bus.

The undersigned Administrative Law Judge cannot find any statutory basis for granting the relief requested with this set of facts.

II. Credibility

Another issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health & Human

Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. **(See footnote 8)** **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

Grievant's testimony about the amount of time it usually took to make his run is incorrect. He stated his students were seldom absent, and this testimony was untrue. The students on his bus are frequently absent, and because he has so few students and their boarding time can be time intensive (such as loading and locking a wheel chair), these absences can make a real difference in his travel time. It is noted that it does not make as much difference in the morning, but Grievant did indicate he has a cell phone, and if a student is not going to be riding the bus, he can call ahead to notify the others he will be running early. Further, under cross-examination, Grievant admitted the time of his run had decreased because one student was picked up by his father, and this has been the case since November 2003. Further, another student has been quite ill for an extended period of time and has not been able to attend school.

III. Uniformity

Grievant alleges JCBOE is violating W. Va. Code §18A-4-5b, which states "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 thecounty." It is noted that county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994).

A similar issue was addressed in Fowler v. Mason County Board of Education, Docket No.

94-26-037 (Oct. 6, 1994). In Fowler, grievants had much longer mid-day runs than two other bus operators; all were paid one-half a day's salary for this work. In Fowler, the administrative law judge recognized that in Miller v. Lincoln County Board of Education, Docket No. 89-22-654 (June 28, 1990), this Board had addressed a similar situation regarding a bus operator whose mid-day vocational runs required him to perform driving duties for approximately two hours and twenty minutes per day while other bus operators driving similar mid-day vocational runs were only required to drive for forty minutes, one hour and twenty minutes and one hour and fifty minutes, while receiving the same rate of pay. Miller, supra, at 7. The grievant in Miller was determined to be receiving uniform pay in accordance with W. Va. Code § 18A-4-5b. The Fowler grievants attempted to distinguish Miller on the basis of the disparity between their hours worked, and the hours worked by their colleagues. Notwithstanding this factual distinction, the administrative law judge found grievants' situation was controlled by this Board's holding in Miller.

The Fowler administrative law judge found:

> **Grievants are receiving the same rate of pay as other employees in their classification performing like, though not identical, work. W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work butreceive dissimilar pay. Grievants here are receiving equal pay but are being required to perform a greater amount of comparable work. Grievants have not identified any bus operators performing similar work but receiving greater pay. While Morgan v. Pizzino, [256 S.E.2d 592 (W. Va. 1979)] requires school laws to be construed in favor of the employees it was designed to protect, it does not require reversing the direction of a remedial statute to attain the result Grievants are seeking. Thus, Grievants have not demonstrated a violation of § 18A-4-5b nor have they presented any other viable theory to support the additional compensation they request.**

In Munson v. Morgan County Board of Education, Docket No. 97-32-038 (Sept. 24, 1997), the administrative law judge applied the Fowler and Miller reasoning to a bus operator's regular duties. The administrative law judge found Grievant had not shown "his compensation is not 'uniform' to other bus operators as required by the provisions of W. Va. Code §18A-4-5b" and cited to Fowler. The Munson administrative law judge also noted W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay, and the grievant had not identified any other employee who was operating a similar bus run and is receiving a greater amount of pay. See Gleason v. Mason County Bd. of Educ., Docket

No. 94-26-282 (Dec. 22, 1994); Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). Additionally, the Munson administrative law judge noted that as stated in Harper, supra, all bus runs cannot be the same, and can differ in driving time and mileage. Munson at 6. Within each county someone will have the longest bus run and someone will have the shortest. As previously noted, there are other bus operators in the county whose work hours are almost as long as Grievant's. See note 7. As long as all bus operators receive the same compensation and are paid for eight hours, there is no violation of the Code Section.

IV. Discrimination and favoritism **Grievant asserts he has been discriminated against and treated differently than other similarly situated employees. Discrimination is defined in W. Va. Code § 18-29-2(m), 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." Similarly, W. Va. Code § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."**

This Grievance Board has determined that a grievant, seeking to establish a prima facie case **(See footnote 9)** **of discrimination and/or favoritism under W. Va. Code § 18-29-2(m) & (o), must demonstrate 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.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep'tof 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not demonstrated a prima facie case of either discrimination or favoritism. All bus operators are paid for eight hours whether their duties take that full time or not. Grievant is treated the same as all other bus operators. The difference in the time worked is related "to actual job responsibilities" of each bus operator.

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 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 & 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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a mannerwhich is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994).

3. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons

performing like assignments and duties. Weimer-Godwin v. Bd. of Educ., 369 S.E.2d 726 (W. Va. 1988); Mersing v. Preston County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89-43-74 (Aug. 31, 1989).

4. W. Va. Code §18A-4-5b requires boards of education to provide uniform compensation and benefits to similarly-situated service employees, that is, to employees with like classifications, ranks, assignments, duties and actual working hours. Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Mersing v. Preston County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89-43-74 (Aug. 31, 1989).

5. Grievant failed to prove by a preponderance of the evidence any violation, misapplication, or misinterpretation of W. Va. Code §18A-4-5b.

6. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "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."

7. W. Va. Code § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." 8. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate 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.**

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. Once a grievant establishes a prima facie case of discrimination under W. Va. Code § 18-29-2(m), or favoritism under W. Va. Code § 18-29-2(o), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 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).

10. Grievant failed to establish a prima facie case of discrimination or favoritism, as all bus operators are paid to work for an eight hour day.

Accordingly, the 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 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: May 21, 2004

Footnote: 1

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

Footnote: 2

Individual Educational Plan

Footnote: 3

On several occasions, Grievant's father, Thomas Redman, another bus operator, observed/followed many non-Special Education bus operators in the Ripley area to see if the driving times they reported at the first of the year were correct. At the Level IV hearing, he reported on three of these drivers. (See footnote 10) Mr. Redman believed the times submitted by threedrivers were wrong, and these bus operators left earlier than they needed to in order to complete their runs. Mr. Redman's testimony in this regard is rejected, as only checking for several days what time someone left would not give an accurate picture of a normal run. Additionally, Julie Reed, another bus operator and friend of Grievant's, checked on the arrival time of a Special Education bus one time. Again this testimony is rejected, as only checking the arrival time after one morning run would not give an accurate picture of a normal run. On the contrary, the Supervisor of Transportation, Jim Stewart, believed the times to be fairly accurate. It is noted the times turned in by all the bus operators were calculated in September, and they may have changed slightly.

Footnote: 4

Confusingly, Grievant contended this father began picking up his son because he filed this grievance. This belief is unfounded as the grievance was filed in September, and the father began picking up his son in November or December.

Footnote: 5

It is noted that these were only the absences the Director of Special Education could confirm. Respondent believed there were additional absences, but they were not recorded.

Footnote: 6

The running time in for Grievant's morning run is usually not decreased by these absences, but the afternoon time is.

Footnote: 7

Some of the regular bus operators also have long runs. For example, one run is 6 hours and 58 minutes, and two other runs are 6 hours and 48 minutes.

Footnote: 8

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the

United States Merit Systems Protection Board ***152-53 (1984).***

Footnote: 9

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 10

Mr. Redman, a bus operator, used his bus to do this on at least one occasion.