JOHN ANDERSON,

Grievant,

v v.

Docket No. 03-20-282

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Anderson, filed this grievance on May 8, 2003, against his employer the Kanawha County Board of Education ("KCBOE" or "Board"). His Statement of Grievance reads:

> The Grievant, a regularly employed school bus operator, was denied an opportunity to take an extra-duty assignment as he was performing his regularly assigned duties. However, the extra-duty assignment was awarded to Warren Young, a substitute school bus operator[,] who was substituting for another regularly employed school bus operator. Mr. Young was permitted to abandon his duties in order to perform the extra-duty assignment. The Grievant alleges a violation of West Virginia Code § 18A-4- 15, § 18A-4-8b, & § 18-29-2.
>
> Relief sought: Grievant seeks compensation for the extra-duty assignment in question with interest and the opportunity to make similar extra-duty assignments in the future.

This grievance originally had two Grievants, both of whom asserted they should have been given the extra-duty assignment. This grievance was denied at Level I. At Level II, the grievance was granted as to Grievant Michael Miller, and he was found to be entitled to be paid as if he had completed the extra-duty assignment. Grievant Anderson's claim was denied. Grievant by-passed Level III, and appealed to Level IV on September 28, 2003. A Level IV hearing was scheduled January 12, 2004, but Grievant did not attend. Another hearing was scheduled for March 1, 2004, and this hearing was held. Thiscase became mature for decision on April 2, 2004, after receipt of the

parties' proposed findings of fact and conclusions of law. (See footnote 1)

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

Findings of Fact

1. Grievant is employed as a bus operator by KCBOE, and he is assigned to the Elkview Terminal.

2. Mr. Miller, whose grievance was granted at Level II, is employed as a regular bus operator, but he is currently serving in a long-term substitute position as a mechanic at the Elkview Terminal. (See footnote 2) When the mechanic for whom Mr. Miller substitutes returns to work, Mr. Miller will return to his regular bus operator position at the St. Albans Terminal. Most of KCBOE's mechanics are certified bus operators.

3. KCBOE has a long-term practice that prevents bus operators from taking extra-duty assignments if they overlap with their regular runs.

4. State Board of Education Policy 4336, which deals with transportation and bus operators, states at XII, A2, "Schedules for approved [extra] trips shall not interfere with the regular transportation schedule."

5. Grievant is aware of and accepts this practice. Level II Trans. at 40.

6. On April 4, 2003, KCBOE needed a bus operator to take athletes to a track meet in Parkersburg. This extra-duty assignment left at 2:00 p.m. 7. The next bus operator on the extra-duty assignment list was off on a personal leave day, making Grievant the next bus operator on this list.

8. Grievant does not finish his regular afternoon run until 4:40 p.m.

9. The bus terminal supervisor, Nancy Bowen-Kerr, checked the extra-duty assignment rotation list, and only one of the regular bus operators, Mr. Miller, would finish his regular assignment before the departure time of the extra-duty assignment.

10. Mr. Miller was available because, although he was a regular bus operator, he was currently filling a long-term substitute position as a mechanic. As a mechanic, his work schedule is 5:00 a.m. to 1:00 p.m.

11. Ms. Bowen-Kerr noted Mr. Miller had just been assigned an extra-duty assignment one

week before and did not think it would be fair to give him this assignment. 12. Ms. Bowen-Kerr checked with substitutes in her terminal and other terminals, and none were available.

13. Since this inability to find a driver had never occurred before, Ms. Bowen-Kerr sought guidance from her supervisor. He was not available to assist in deciding how to resolve the situation.

14. Ms. Bowen-Kerr decided to pull a substitute, Warren Young, off his afternoon run and assign him to the Parkersburg run, and then assigned another mechanic to complete Mr. Young's afternoon run.

15. Both Grievant and Mr. Miller filed grievances, and these were consolidated at Level II.

16. At Level II, the Hearing Examiner granted Mr. Miller's grievance as he was a bus operator available for the trip. 17. Because Mr. Miller was not asked to make the Parkersburg run, he was asked and did work four hours of overtime as a mechanic on April 4, 2003. (See footnote 3)

Issues and Arguments

In his grievance filed to Level IV, Grievant asserted Respondent had violated W. Va. Code §§ 18A-4-15, 18A-4-8b, & 18-29-2. (See footnote 4) In his proposals, Grievant argued Mr. Miller, the grievant whose grievance was granted at Level II, was not a regular employee, and thus could not be "available" to take the extra-duty assignment. (See footnote 5) Grievant's proposed findings of fact and conclusions of law. Additionally, since Mr. Miller was working overtime, he was not available. Since Mr. Miller was not "available," the run should have gone to Grievant as the next available bus operator in the rotation.

Respondent maintains the issue was one that had not arisen before, an error was made, and Grievant Miller should have received the position. Grievant Anderson was not entitled to the position because he was unavailable to complete the extra-duty assignment because it would overlap with his regular run.

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 & 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.

W. Va. Code § 18-4-8b(f) discusses extra-duty assignment and states:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

As previously noted, State Board of Education Policy 4336, XII at A2 states, "Schedules for approved [extra] trips shall not interfere with the regular transportation schedule." Additionally, the Grievance Board has consistently held that "[i]mplicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." McClintock v.Morgan County Bd. of Educ., Docket No. 02-32-378 (Apr. 18, 2003); Skeens v. Lincoln County Bd. of Educ., Docket No. 02-22-070 (June 19, 2002); White v. Monongalia County Bd. of Educ., Docket No. 00-30-279 (Jan. 2, 2001); Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996); O'Neal v. Kanawha County Bd. of Educ., Docket No. 20-86-239 (May 13, 1987); Russell v. Mason County Bd. of Educ., Docket No. 03-26-028 (June 3, 2003), aff'd Kanawha County Cir. Ct. Civil Action No. 03-AA-95 (Jan. 13, 2004). The extra-duty assignment at issue started at 2:00 p.m., and Grievant did not finish his regular run until 4:40 p.m. Accordingly, Grievant was not "available to assume the duties of [the] position." Russell, supra.

Additionally, Grievant has asserted other drivers were treated more favorably than he. 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 favoritism under W. Va. Code § 18- 29-2(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 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.

Board v. Div. of Rehabilitation Serv., Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). 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).

Once a grievant establishes a prima facie case of favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the 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. Dep't 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).

While Grievant did make a prima facie case and demonstrate a long-standing practice was not followed, and a substitute bus operator was relieved of his assigned afternoon run to make an extra-duty run, he did not demonstrate he is entitled to any relief. Mr. Miller was available for the trip and Grievant was not. Thus, the extra-duty assignment should have been assigned to Mr. Miller. Grievant did not identify any bus operators that were similarly situated who were allowed to take an extra-duty assignment that interfered with their regular run, other than this one incidence, and this error was corrected by the decision at Level II.

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. "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." McClintock v. Morgan County Bd. of Educ., Docket No. 02-32-378 (Apr. 18, 2003); Skeens v. Lincoln County Bd. of Educ., Docket No. 02-22-070 (June 19, 2002); White v. Monongalia County Bd. of Educ., Docket No. 00-30-279 (Jan. 2, 2001); Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996); O'Neal v. Kanawha County Bd. of Educ., Docket No. 20-86-239 (May 13, 1987); Russell v. Mason County Bd. of Educ., Docket No. 03-26-028 (June 3, 2003), aff'd Kanawha County Cir. Ct. Civil Action No. 03-AA-95 (Jan. 13, 2004).

3. When a bus operator has another assignment that interferes with the extra- duty assignment, he is not "available to assume the duties of [the] position." Russell, supra.

4. 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." 5. In order to establish a prima facie case of favoritism under W. Va. Code § 18- 29-2(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 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.

Board v. Div. of Rehabilitation Serv., Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). 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).

6. Once a grievant establishes a prima facie case of favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the 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. Dep't 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).

7. While Grievant did make a prima facie case, demonstrated a long-standing practice was not followed, and a substitute bus operator was relieved of his assigned afternoon run to make an extra-duty run, he did not demonstrate he is entitled to any relief. Grievant was still not available for the trip, and another bus operator was. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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 30, 2004

Footnote: 1

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and the Board was represented by James Withrow, Esq.

Footnote: 2

It is noted the Pay Grade for a bus operator is "D" and for a mechanic it is "F."

Footnote: 3

It is clear from the record that because Mr. Miller received payment as if he had made the run, he was paid twice for four hours of overtime, once as a mechanic and once as a bus operator.

Footnote: 4

The manner in which these Code Sections were violated was not specified.

Footnote: 5

Grievant asserted because Mr. Miller was stationed at St. Albans as a regular bus operator, and he is in a long-term substitute capacity at Elkview as a mechanic, Mr. Miller was not a regular employee at the time of the extra-duty assignment. Grievant cited no statute, policy, or regulation to support this theory, and it will not be discussed further.