LEONARD MOONEY,

Grievant,

v. **DOCKET NO. 05-20-342**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Leonard Mooney filed this grievance on May 13, 2005, alleging discrimination and favoritism in the assignment of shifts, and violations of the uniformity and seniority provisions of the school personnel laws. He seeks assignment to the 5:00 a.m. to 1:00 p.m. shift at his garage.

After denials at levels one and two, and a waiver of level three, the parties agreed to submit the matter for decision at level four based on the record developed below. Grievant was represented by John Roush, Esq., of the West Virginia School Service Personnel Association, and Respondent was represented by James Withrow, Esq. The matter became mature for decision on November 22, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant is employed by Respondent as a Mechanic, and alleges violations of W. Va. Code §§ 18-29-2, 18A-4-5b and 18A-4-8b. He claims other, similarly-situated coworkers were offered the early morning shift, and he was not. His grievance stems from the fact that he prefers an early morning shift, which he used to work, but was not offered a position on that shift that recently became open. That position became available, but it was given to a less senior Mechanic who was multi-classified as a Bus Operator, on the grounds that Grievant was not certified to drive a bus. Respondent contends it acted appropriately. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Mechanic assigned to the Elkview bus terminal,

and he has worked for Respondent thirty-four years. He works the 8:00 a.m. to 4:00 p.m. shift.

2. Orville “Junior” Fields is a Mechanic/Bus Operator who used to work at the Elkview Terminal on the early (5:00 a.m. to 1:00 p.m.) shift. He left that multi-classified Mechanic/Bus Operator position to work at another garage, resulting in the position opening at issue.

3. Most Mechanics employed by Respondent are required to have Bus Operator certification and are multi-classified. Grievant is not required to be certified as a Bus Operator because he was “grandfathered” in, and he has no desire to drive a bus and no plans to become certified to do so.

4. As is the normal practice when a position comes open, Transportation Supervisor David Pauley asked the other regularly-employed Mechanics if they were interested in the opening.

5. Other than Grievant, all the other Mechanics working at the Elkview Terminal have Bus Operator certification and are multi-classified. Two of the multi-classified employees, John Burford and Mark Byrd, are temporarily excused from bus operator duties for medical reasons, and they were not considered for the position because its multi- classified nature is related to the need to have backup bus operators on that shift. 6. Dallas Maynard was offered the position. Although he has less Mechanic seniority than Grievant, Mr. Burford or Mr. Byrd, he is classified as a Mechanic/Bus Operator, and is not excused from driving.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant's allegations, however, seem to have no bearing on the outcome of the case. He claims discrimination, but compares himself to two other employees who also were not selected for the position he seeks. Initially, his argument makes sense, because although Mr. Burford and Mr. Byrd are multiclassified and Grievant is not, they nevertheless are unable to perform bus operator duties, just like Grievant.

The only evidence offered at level two was the testimony of Grievant and of Mr. Pauley. Neither stated that Mr. Maynard is unable to operate a bus. There is no evidence in the record that Mr. Maynard is unable to drive, and he was selected for the position. “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.'” *Hogsett,*

et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). Favoritism is defined by W. Va. Code § 18- 29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. ofEduc.*, Docket No. 00-40-011 (May 4, 2000). In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not proven that he has been treated differently than any similarly- situated employee. He has also failed to prove the difference in treatment between himself and Mr. Maynard is unrelated to the actual job responsibilities of the position in question. Hence, he has not proven discrimination or favoritism.

Grievant also claims a violation of W. Va. Code § 18A-4-5b. This section of the code address county salary supplements for school service personnel, and holds that salaries and benefits must be uniform for all persons performing like duties. It is entirely unrelated to the issues raised. Grievant has proven no violation of this provision.

West Virginia Code § 18A-4-8b, the remaining Code section Grievant claims was violated, deals with seniority rights of school service personnel. He claims this provision was violated because Mr. Maynard has less seniority than he does, but was nonetheless offered the position. Subsection (a) of that section requires a county board of education to make hiring decisions based on “seniority, qualifications, and past service.” However, the term “qualifications” as used in that requirement is defined in the following subsection as meaning “the applicant holds a classification title in his category of employment[.]” Here,the position Grievant is seeking is multiclassified as Mechanic/Bus

Operator, but Grievant is only classified as a Mechanic. He is therefore not “qualified” according to the definition in the Code. Respondent had no obligation under W. Va. Code § 18A-4-8b to offer Grievant the first opportunity for the Mechanic/Bus Operator position vacated by Mr. Fields.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. “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.'” *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

3. Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. of Educ.*, Docket No. 00-40-011 (May 4, 2000). 4. In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

5. Grievant has not met his burden of proving discrimination or favoritism.

6. West Virginia Code § 18A-4-8b, requires a county board of education to make hiring decisions for service personnel based on "seniority, qualifications, and evaluation of past service," where "qualifications" means the service employee "holds a classification title in his category of employment." The most senior, qualified employee with acceptable evaluations must be given the first opportunity for promotion and filling vacancies, unless the board shows valid cause why the employee is not considered.

7. Grievant is not qualified for Mechanic/Bus Operator positions, as he does not hold that classification title.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty 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 servea 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.

January 6, 2006

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M. Paul Marteney

Administrative Law Judge