THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL DINGER,
Grievant,

v. **DOCKET NO. 2013-1047-MerED**

MERCER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Michael Dinger, filed a grievance against his employer, the Mercer County Board of Education, on December 18, 2012. The statement of grievance reads:

> On 8/24/12 I was given a football trip for Montcalm High School. The trip was then taken away from me. I was told by Mr. Fred Scott that it was against policy to let a school bus travel more than 200 miles. On 12/1/12 a trip was approved for a trip that was 203 miles from Pike View School to Morgantown. I think that is discrimination.

As relief Grievant sought, "14 hrs of lost wages."

A conference was held at level one, and a level one decision denying the grievance was issued on January 9, 2013. Grievant appealed to level two on January 17, 2013, and a mediation session was held on April 2, 2013. Grievant appealed to level three on April 15, 2013, and a level three hearing was held before Acting Deputy Chief Administrative Law Judge William B. McGinley on May 28, 2013, in Beckley, West Virginia. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Kermit J. Moore, Esquire. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact

and Conclusions of Law, on July 1, 2013, and was subsequently reassigned to the undersigned Administrative Law Judge for administrative reasons, on September 4, 2013.

Synopsis

Grievant accepted an extra-duty assignment scheduled for August 24, 2012, but was then advised that, because the trip would exceed 200 miles one-way, Respondent's Policy I-42 required that a charter bus be used. Grievant learned in December 2012, that an extra-duty trip had been carried out by two co-workers on December 1, 2012, transporting students from Pike View Middle School to a West Virginia University football game in Morgantown, West Virginia, and that the total mileage turned in by one of the bus operators was 404 miles. Grievant claimed that Policy I-42 had been applied in a discriminatory manner. Respondent acknowledged that if the December 1, 2012 trip exceeded 200 miles one-way, the use of a school bus and driver for the trip violated county policy, and was an error, and has taken steps to try to ensure that this error is not repeated. No further relief is available.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Mercer County Board of Education ("MBOE"), as a bus operator for 37 years. In addition to his regular bus run, Grievant has placed his name on the extra-duty assignment list for the Montcalm area of Mercer County.

2. On August 23, 2012, Grievant was called by Jo White, a secretary in the Transportation Department, and asked if he wanted to drive an extra-duty trip the next day,

transporting the Montcalm High School football team from the high school to Hundred, West Virginia, and back for a game. Grievant accepted this trip.

3. On August 24, 2012, Grievant obtained the trip sheet from Ms. White. While he was doing so Grievant's supervisor, Transportation Supervisor Fred Scott, came out of his office and told him that the trip had not been approved for a school bus to transport the team. Mr. Scott explained to Grievant that the distance of the trip was 226 miles one-way, and that MBOE had a policy in place that a charter bus must be used for all trips that exceed 200 miles one-way. A charter bus was used for this trip.

4. MBOE Policy I-42 , revised August 28, 2007, states, in pertinent part at section 3.4, "[c]ounty school buses may not be used for trips exceeding 200 miles one way, with the exception of WVDE, SSAC or other regional or state sponsored competitions or invitational events." The August 24, 2012 trip did not fall within one of the listed exceptions.

5. The reason Policy I-42 was adopted was to provide students who are traveling a long distance a more comfortable means of transportation than a school bus, so that they could use the travel time to complete homework or rest.

6. On Saturday, December 1, 2012, MBOE bus operators Rachael Pitcher and Sam Hill transported students who were members of the Fellowship of Christian Athletes, on county school buses, from Pike View Middle School in Mercer County to Morgantown, West Virginia, to attend a West Virginia University football game. This was a social trip. Ms. Pitcher's travel report shows the total mileage for the trip, round-trip, as 404 miles. This trip did not fit within any of the exceptions to Policy I-42.

7. It is the responsibility of the person requesting the school bus for a trip to check the mileage and request a charter bus if the trip will exceed 200 miles one-way. In the case of the December 1, 2012 trip to Morgantown, the individual planning the trip died suddenly four days before the trip, and there was some discussion about canceling the trip.

8. MBOE acknowledged that it was an error to send a school bus on the December 1, 2012 trip to Morgantown, rather than using a charter bus. Since this occurred, the practice has changed, and now a Principal requesting a school bus for any trip out of county must submit a "Google map" with the request.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued that by allowing Ms. Pitcher to transport students on a bus on a trip over 200 miles one-way, Respondent had discriminated against him, and that he was entitled to the 14 hours of compensation he would have received had he transported students to and from Hundred on August 24, 2012. Respondent acknowledged that the

trip to Morgantown in December 2012, should have been made by a charter bus, and that it was a mistake that a school bus was used for the trip. This mistake apparently was a result of the unfortunate, untimely death of the trip's organizer. Respondent has taken steps to try to ensure that this mistake is not repeated. Respondent argued that Grievant was not discriminated against because it was not part of Grievant's job responsibilities to transport students on bus trips exceeding 200 miles one-way.

Extra-duty trips are trips which are "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." W. VA. CODE § 18A-4-8b(f). That CODE Section describes how extra-duty assignments are to be made, stating:

> (A) A service person 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.
>
> (B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used 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.

The trips at issue were extra-duty trips.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant demonstrated that he was treated differently from a similarly-situated employee, and that the difference in treatment was not related to the actual job responsibilities, nor was it agreed to in writing. Respondent's argument that it was not part of Grievant's job responsibilities to transport students over 200 miles one-way is creative, but the undersigned finds it a stretch.

However, there is no evidence to suggest that the December 1, 2012 trip was anything other than an isolated incident, which should not have occurred, resulting from an unfortunate situation. To grant the relief requested would represent a violation of Respondent's Policy I-42.

"The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.,* Docket No., 2008-0533-LinED (Oct. 31, 2008). "In addition, prior 'mistakes [do] not create an entitlement to future incorrect reimbursement. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-

HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995).' *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006)." *Mullins v. McDowell County Bd. of Educ.*, Docket No. 07-33-076 (Oct. 20, 2008). Respondent recognized and admitted its mistake, and has taken steps to try to assure that no other trips over 200 miles one-way will be awarded to a bus operator. No other relief is available.

The following Conclusions of Law support the Decision reached.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant demonstrated that he was treated differently from a similarly-situated employee, and that the difference in treatment was not related to the actual job responsibilities, nor was it agreed to in writing.

4. "The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.,* Docket No., 2008-0533-LinED (Oct. 31, 2008). "In addition, prior 'mistakes [do] not create an entitlement to future incorrect reimbursement. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995).' *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006)." *Mullins v. McDowell County Bd. of Educ.*, Docket No. 07-33-076 (Oct. 20, 2008).

5. Respondent recognized and admitted its mistake, and has taken steps to try to assure that no other trips over 200 miles one-way will be awarded to a bus operator. To grant the relief requested would represent a violation of Respondent's Policy I-42. No other relief is available.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: September 19, 2013