THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT L. LANHAM, ET AL.,

Grievants,

v. **DOCKET NO. 2008-1691-CONS**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Fourteen Grievants[1] initiated this matter on May 15, 2006,[2] and it was subsequently held in abeyance until May 27, 2008, when twenty-eight Grievants[3] filed a Level One

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[1] Fourteen (14) Grievants requested a conference on May 15, 2006. These Grievants include: Carl Burdette, Roger Casto, Anthony "Vernon" Clark, Roger Doneff, Deborah Lett (formerly "Deborah Hill"), Larry Jackson, Robert Lanham, Debra Shantie, Charles Smith, Sherry Tabor, Brenda Turley and Cindy Vance. Linda Hardway's name was misspelled on the initial meeting request. Eloise Ord's name appears on the initial request, though she is not listed on the May 27, 2008, grievance form, and she presumably did not wish to take part in this grievance. No evidence was submitted to support her claims and she is not further addressed in this Decision.

[2] In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. VA CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See Executive Order No. 2-07*, May 8, 2007. Any references in this decision are to the former statutes, which control the proceedings in this case. All that is required to begin a grievance under the "old" procedure is that a grievant schedule a conference with his or her immediate supervisor or designated representative. *See* W.VA. CODE § 18-29-4(a)(1)(2003).

[3] After the matter was brought out of abeyance, a Level One grievance form was filed on May 27, 2008. Several additional Grievants joined in this matter. According to the May 27, 2008, Level One grievance form, Grievants in this proceeding are: Robert Lanham, Larry Jackson, Roger Casto, Charles Smith, Carl Burdette, Anthony Clark, Roger Doneff, Joyce Holley, Brenda Turley, Cindy Vance, Larry Harper, Robert Thompson,

grievance form. Grievants challenge the action of their employer, Respondent Putnam County Board of Education ("BOE"), alleging a "[v]iolation of § 18A-4-8(m)[4] by changing grievants' supplemental contracts from 200-day contracts to 'as needed' contracts without their consent. Violation of WV Code § 18A-4-5b by paying some employees on an 'as needed' basis while others were given a 200 day contract [sic]." As relief, Grievants seek "[b]ack salary and benefits for all supplemental runs as if the grievants were on a 200-day contract instead of the 'as needed' contract."

This grievance was denied at Level One on June 18, 2008. A September 9, 2008, Level Two mediation was unsuccessful. A Level Three hearing was held before the undersigned Administrative Law Judge ("ALJ") on Saturday, February 28, 2009, in

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Marsha Armstead, Ramona "Kay" Dooley, Lora Bailey, Debra Shantie, Patricia S. Melton, Karen Richardson, Linda Hardway, Cora Combs, Betty Thompson, Bessie Casto, Richard Douglas, Deborah Lett and Melinda Bailey. *Lower Level Record*, Tab 2 YY. Grievant Charles Absten appears on the grievance form, but withdrew his grievance prior to the Level One conference. *Lower Level Record*, Tab 3. Grievant Sharon Meadows also appears on the Level One grievance form; however, on February 19, 2009, Grievant Sharon Meadows represented that she wished to withdraw her Level Three appeal and was accordingly dismissed from the grievance by Order entered on February 20, 2009. Grievant Sherry Tabor's name appears on the Level One grievance form; however, no evidence was presented to support any of her claims. Based upon the Level One decision, it appears she has retired. Recognizing that no evidence was presented to support her claims, Grievant Tabor's claims are summarily **DENIED**.

[4] The Grievants have not directly addressed nor advanced any argument concerning the non-relegation clause of WEST VIRGINIA CODE § 18A-4-8(m). In fact, Grievants' proposed findings of fact and conclusions of law specifically assert that the "Grievants are pursuing a discrimination grievance (also known as a violation of the uniformity requirement) . . . ." *Grievants' Proposed Findings of Fact and Conclusions of Law*, 6. As the non-relegation argument was not raised at Level Three or further pursued, the undersigned considers it abandoned. *See Louk v. Barbour County Bd. of Educ.*, Docket No. 95-01-386 (May 23, 1996); *Yokum v. W.Va. Schools for the Deaf & Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

Charleston, West Virginia.[5] Grievants appeared by and through their counsel Andrew J. Katz, Esquire, with The Katz Working Families' Law Firm, L.C. Respondent appeared by and through its counsel, Rebecca M. Tinder, Esquire, with the law firm of Bowles Rice McDavid Graff & Love, LLP.

This matter became mature for decision on or about April 13, 2009, the deadline for submitting proposed findings of fact and conclusions of law. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievants argue that they are being discriminated against and are not being treated uniformly because at least one other extracurricular bus operator is being compensated under a 200-day contract as opposed to an "as needed" contract. 200-day extracurricular contracts provide the benefit of additional compensation for snow days, holidays, sick days and non-instructional professional days.

Respondent BOE generally alleges that the Grievants are not similarly situated to the bus operator with which they compare themselves and are not performing like assignments and duties. Further, the BOE maintains that this grievance was not timely filed by some of the Grievants.

Similarly situated employees performing like assignments and duties must be treated uniformly. Some Grievant bus operators have established, by a preponderance

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[5] At the Level Three hearing, the BOE, via oral motion, moved to dismiss this grievance because the Grievants did not copy the precise "Statement of Grievance" and "Relief Sought" from the May, 2008, Level One grievance form and write it on the form the Grievants used to appeal to Level Three. The BOE showed no express or implied prejudice, and it is abundantly clear that it received fair and adequate notice of the Grievants' claims. This motion was denied at the Level Three hearing.

of the evidence, that they are not receiving uniform benefits for like assignments and duties when compared to at least one other bus operator who holds a 200-day extracurricular contract. Their claims are **GRANTED**. Other Grievant bus operators have not established, by a preponderance of the evidence, that they are performing like assignments and duties when compared to another bus operator who holds a 200-day extracurricular contract. Their claims are **DENIED**.

Insofar as some Grievants are transportation "bus" aides, they are not similarly situated to any employee holding a 200-day extracurricular contract and are not performing like assignments and duties when compared to a bus operator. The bus aide Grievants' claims must be **DENIED**. Grievant Bessie Casto's claims are **DISMISSED** based upon the doctrines of issue preclusion and claim preclusion.

Based upon a detailed review of the entire record, the undersigned makes the following findings of fact:

Findings of Fact

1. At all relevant times herein, Grievants were (and are) employees of Respondent BOE.

2. Grievants Joyce Holley, Ramona ("Kay") Dooley, Betty Thompson and Lora Bailey are transportation "bus" aides.[6] Bus aides work closely with the bus operators, usually working with special needs students. Bus aides receive specialized training to perform their tasks. They ride the bus with students and the bus operator. They assist students on the bus. Level Three, Testimony of Charlie Tribble (Putnam Co. BOE

[6] Transportation "bus" aides fall into the general "Aide" categories as established by W.VA. CODE § 18A-4-8(8) through (11).

Coordinator of Transportation).

3. The rest of the Grievants are bus operators.[7] The twenty-two (22) "bus operator" Grievants are: Robert Lanham, Larry Jackson, Roger Casto, Charles Smith, Carl Burdette, Anthony Clark, Roger Doneff, Brenda Turley, Cindy Vance, Larry Harper, Robert Thompson, Marsha Armstead, Debra Shantie, Patricia S. Melton, Karen Richardson, Linda Hardway, Cora Combs, Bessie Casto, Richard Douglas, Deborah Lett, Melinda Bailey and Charles Absten.

4. All Grievants worked under so-called "extracurricular" contractual runs, meaning that the bus runs were not part of their "regular" runs or employment contracts.[8]

5. Extracurricular runs, regardless of whether made under a "200-day" extracurricular contract or under an "as needed" extracurricular contract, are paid by the hour, as follows:

- $10 for up to and including one hour; and
- $2.50 for each additional 15 minutes.

Level Three, Testimony of Charlie Tribble.

6. At some time prior to 2004, several Putnam County *bus operator* extracurricular

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[7] As statutorily defined, "'bus operator' means a person employed to operate school buses and other school transportation vehicles as provided by the State Board." W.VA. CODE § 18A-4-8(16).

[8] WEST VIRGINIA CODE § 18A-4-16(1) provides, in part, that "[e]xtracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article."

positions were paid under 200-day contracts. Under a 200-day extracurricular contract, an employee is paid for the actual days that he or she works and is also given the benefit of paid time off for snow days, holidays, sick days, or non-instructional professional days.

7. The difference between a 200-day extracurricular contract and an "as needed" extracurricular contract is that under an "as needed" contract the operator or aide is not given the benefit of pay for snow days, holidays, sick days, or non-instructional professional days.

8. The length of the extracurricular contracts at issue is for a term of one year. However, these contracts are oftentimes not updated every year, and Grievants continue making the same run from the previous year(s).

9. After 2004, Respondent BOE attempted to modify the terms of employment of Putnam County bus operators' extracurricular contracts, changing some contracts from 200-day contracts to "as needed" contracts.

10. On or about August 16, 2006, all Putnam County bus operators and bus aides were asked to sign "as needed" extracurricular contracts for the 2006-2007 school year. The employees could either accept or decline the contract and were not given the opportunity to modify the contractual terms. The BOE took this measure, in part, to ensure uniformity. At that time, several bus operators signed their contracts "under protest."[9]

11. On or about August 17, 2006, bus operator Johnny Sargent filed a grievance against Respondent BOE, alleging that moving him from a 200-day contract to an "as

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[9] These bus operators include: Carl Burdette, Bessie Casto, Roger L. Casto, Anthony Clark, Cora Combs, Roger Doneff, Linda Hardway, Larry Jackson, Robert Lanham, Karen Richardson, Debra Shantie, Charles Smith and Robert Thompson.

needed" contract violated the non-relegation clause of WEST VIRGINIA CODE § 18A-4-8(m). *See Sargent v. Putnam County Bd. of Educ.*, Docket No. 06-40-229 (Sept. 25, 2006).

12. Bus operators Bessie Casto and James Henson filed a grievance similar to Johnny Sargent's on or about May 17, 2006. *See Casto & Henson v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007).[10]

13. On or about May 15, 2006, fourteen (14) Grievants requested an informal conference in order to grieve the BOE's decision to make all contracts "as needed."[11]

14. In August of 2006, an agreement was reached whereby this grievance would be held in abeyance until the grievance filed by Johnny Sargent was resolved.[12]

15. Mr. Sargent ultimately prevailed in his grievance. The West Virginia Public Employees Grievance Board ruled in favor of Mr. Sargent. *Sargent v. Putnam County Bd. of Educ.*, Docket No. 06-40-229 (Sept. 25, 2006). The Kanawha County Circuit Court affirmed this ruling and the matter concluded on October 11, 2007, when the West Virginia

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[10] Bessie Casto and James Henson ultimately prevailed in their grievance. The BOE was ordered to "reinstate the 200-day compensation held by the Grievants on the extracurricular runs, along with Grievant Henson's shuttle run prior to the 2006-2007 school year, with back pay and interest." *Casto & Henson v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007). This decision was affirmed by the Circuit Court of Kanawha County on March 14, 2008. The West Virginia Supreme Court of Appeals refused the BOE's Petition for Appeal on September 25, 2008.

[11] These Grievants include: Carl Burdette, Roger Casto, Anthony Clark, Deborah Lett, Larry Jackson, Robert Lanham, Debra Shantie, Charles Smith, Sherry Tabor, Cindy Vance, Brenda Turley and Roger Doneff. Linda Hardway's name was spelled wrong on the initial meeting request. Eloise Ord's name appears on the request, though she is not a Grievant in this matter. Mrs. Ord's name does not appear on the Level One grievance form dated May 27, 2008.

[12] There was some testimony presented that several Grievants believed that the outcome of the *Sargent* grievance would resolve this matter. Clearly, it did not.

Supreme Court of Appeals refused the Petition for Appeal filed on behalf of the BOE.

16. The parties exchanged a series of letters which did not resolve the matter.

17. On May 27, 2008, a Level One grievance form was filed. This form included many Grievants who were not part of the 2006 conference request or agreement to hold this grievance in abeyance.

18. At all relevant times hereto, no bus aide held a 200-day extracurricular contract.

19. At all relevant times hereto, each Grievant performed his or her "as needed" extracurricular contract and seemingly still does so. No Grievant refused to perform his or her duties or declined to accept the extracurricular contract because it was "as needed."

20. Currently, bus operators Sargent, B. Casto[13] and Henson are working under 200-day extracurricular contracts.

21. At all times relevant, Johnny Sargent was a bus operator for the BOE and had been a full-time employee of the BOE since October 13, 1992. Level Three, Testimony of Johnny Sargent. Mr. Sargent holds a contract as a regular bus operator and extracurricular contracts to "shuttle" students to and from the vocational school ("vocational run"). He holds two extracurricular "vocational runs," One run occurs in the morning while the other occurs in the afternoon. Both taking approximately thirty (30) minutes each way, for a total of two (2) hours daily. These runs carry approximately forty (40) regular education students within the Hurricane area. Vocational runs typically occur five days per week. Level Three, Testimony of Charlie Tribble.

22. All bus operator Grievants are classified as "Bus Operators." All hold

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[13] Mrs. Casto has one extracurricular bus run. It is a "trade school" run which presumably transports students to and from the trade school.

extracurricular bus run contracts. All assignments/duties at issue are extracurricular assignments/duties, as defined by WEST VIRGINIA CODE § 18A-4-16(1).

23. One bus operator Grievant is currently not making runs. Specifically,

- bus operator Armstead's run is not currently running. This operator performed an "exceptional education run" wherein the runs vary depending upon the attendance and needs of the one severely disabled special education student.

24. All bus runs usually occur on a regularly scheduled basis. All bus runs involve transporting students from one location to another. All bus operator Grievants perform the same general duties: they operate buses. The *specific*s of the remaining Grievant bus operators' runs are as follows:

- bus operators Lanham, Burdette, Shantie, B. Casto, R. Casto, Smith and Melton conduct "vocational runs," wherein high school students are transported to the technical school and back, approximately five days per week. *Lower Level Record*, Tabs 2J, 2N, 2M, 2X, 2GG, 2MM, 2NN. Level Three, Testimony of Charlie Tribble.

- bus operators M. Bailey, Turley and Lett[14] perform "preschool runs," four days per week (everyday preschool is in session), and the student population is preschool age. *Lower Level Record*, Tabs 2JJ, 2NN, 2TT. Level Three, Testimony of Charlie Tribble.

- bus operators Combs,[15] Harper,[16] Doneff[17] and Douglas perform "community-based work experience runs," wherein the runs occur up to five days a week at the discretion of the teacher, and the student population is special needs only. *Lower Level Record*, Tabs 2S, 2R, 2T, 2AA, 2BB, 2CC, 2SS, 2RR, 2QQ. Level Three, Testimony of Charlie Tribble.

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[14] Grievant Lett has two of these runs.

[15] Grievant Combs has three of these runs.

[16] Grievant Harper has two of these runs.

[17] Grievant Doneff has three of these runs.

- bus operators Clark and Lett perform "after school tutoring runs," wherein at-risk students are permitted to stay after school for tutoring up to three evenings per week and are transported home. *Lower Level Record*, Tabs 2O, 2II. Level Three, Testimony of Charlie Tribble.

- bus operators Clark and Melton performs a "PCTC run" to transport high school students to and from the hospital for clinicals, wherein the runs occur four days per week during the spring semester. *Lower Level Record*, Tab 2P. Level Three, Testimony of Charlie Tribble.

- bus operators Vance,[18] Richardson and Melton perform "driving range runs," wherein high school drivers education students are transported to the driving range in Poca one to two days per week at the discretion of the drivers' education instructor from various schools. Although school may be in session, trips to the driving range sometimes get cancelled as a result of range flooding or poor driving conditions. *Lower Level Record*, Tabs 2W, 2Y, 2LL, 2WW. Level Three, Testimony of Charlie Tribble.

- bus operators Combs, Jackson, Hardway and R. Thompson perform "gifted runs," wherein the runs occur one day per week, taking gifted students to a central location. *Lower Level Record*, Tabs 2K, 2V, 2Z, 2EE. Level Three, Testimony of Charlie Tribble.

- bus operators Combs and Lett performed "middle school alternative runs" for students with behavioral problems or who have been expelled from the regular programs where the students were transported to a particular middle school for education in the alternative program. However, these runs are not currently being run. This day program was eliminated prior to the 2007-2008 school year. However, a high school program just recently started after school hours. This high school run also has middle school students on it. *Lower Level Record*, Tab 2DD and 2KK. Level Three, Testimony of Charlie Tribble; Level Three, Ex. 11.

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[18] Grievant Vance has two of these runs. Grievant Vance also holds a "special needs" run contract. There is no indication when this "special needs" run occurs, if at all. No evidence has been presented on this issue, and Grievant Armstead's "special needs" run is no longer occurring. Grievant Vance has not established discrimination or non-uniformity as it relates to her special needs contract and these claims are hereby **DENIED**.

Discussion

I. Issue preclusion and claim preclusion

As an initial matter, the BOE moves to dismiss Grievant Bessie Casto and Mr. James Henson based upon issue preclusion and claim preclusion. The Grievants respond and claim that Mr. Henson is not a party to this grievance. Grievants recognize that both Bessie Casto and Henson prevailed in a previous grievance and the prior decision is binding. However, Grievants' counsel cryptically argues that Grievant B. Casto may be entitled to some additional compensation, such as attorney's fees, under this particular grievance.[19] An assertion that a grievance is precluded by claim preclusion or issue preclusion must be proven by a preponderance of the evidence. *See generally Vance v. Jefferson County Bd. of Educ.*, Docket No. 03-19-018 (May 27, 2003).

The doctrine of claim preclusion (or *res judicata*) may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." *Liller v. W. Va. Human Rights Comm'n,* 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988). "Before the prosecution of a lawsuit [grievance] may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must

[19] Grievants' counsel advances this argument, though it was never fully developed in the proposed findings of fact and conclusions of law. It is unclear how any claim for attorney's fees would flow from this grievance, as opposed to the *Casto & Henson* grievance.

be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

Relatedly, "[c]ollateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

On May 17, 2006, Grievant Bessie Casto and Mr. Henson initiated a separate and distinct grievance alleging violation of WEST VIRGINIA CODE §§ 18-29-2, 18A-4-5b, 18A-4-8(m), 18A-4-8b and 18A-4-16. They maintained that the BOE terminated their extracurricular assignments[20] for the purposes of altering the compensation received by the employees. *Casto & Henson v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007). They sought reinstatement of the assignments they held during the 2006 school year, back pay and benefits.

The *Casto* ALJ found that the BOE violated the non-relegation clause of WEST VIRGINIA CODE § 18A-4-8(m). The grievance was granted, and the BOE was ordered to "reinstate the 200-day compensation held by the Grievants on the extracurricular runs,

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[20] It is noted that the ALJ in the *Casto* decision permitted an extra-duty "shuttle run" to be included in the grievance as this run also concerned the BOE's practice of eliminating contracts to alter the terms in a preceding year.

along with Grievant Henson's shuttle run prior to the 2006-2007 school year, with back pay and interest." *Casto & Henson v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007). This decision was affirmed by the Circuit Court of Kanawha County on March 14, 2008, and the West Virginia Supreme Court of Appeals refused the appeal on September 25, 2008. As such, Grievant B. Casto and Mr. Henson currently hold 200-day extracurricular contracts.

In recognition of the nature of the above-styled grievance and the final adjudication of *Casto & Henson v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007), Grievant Bessie Casto's claims have merged into the previous judgement and are barred. There is no indication Mr. Henson is a party to this grievance.

The BOE's *Motion to Dismiss Grievants Casto and Henson* is hereby granted, in part, and Bessie Casto is hereby **DISMISSED**. The merits of the grievance are now considered.

II. Merits

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. *See 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).

This grievance concerns two issues: first, whether all or some of the Grievants were

discriminated against or paid in a non-uniform manner for like assignments and duties, and second, assuming discrimination or non-uniformity, whether the claims raised by the various Grievants were timely.

A. Discrimination and non-uniformity

It is well-recognized that "[c]ounty 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, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). County boards of education may not arbitrarily discriminate against employees and must provide uniform benefits to employees performing like assignments and duties. WEST VIRGINIA CODE § 29-6A-2(d)(2003) 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." In order to establish a discrimination claim under the grievance statute, Grievants must prove, by a preponderance of the evidence:

> (a) that the employees have been treated differently from one or more similarly[21]-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(s).

See Frymier v. Higher Educ. Policy Comm'n, 221 W.Va. 306, 655 S.E.2d 52 (2007).

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[21] The word "similar" "is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance . . . ." *County of Frederick Fire & Rescue v. Dodson*, 20 Va. App. 440, 446, 457 S.E.2d 783, 786 (1995)(citation omitted).

Chaddock v. Div. of Corr., Docket No. 04-CORR-278 (2005)(Feb. 14, 2005). Hence, the burden is upon the Grievants to establish that they are arbitrarily being treated differently than another similarly situated employee.

Intertwined with the discrimination analysis is the consideration of the uniformity requirement contained in WEST VIRGINIA CODE § 18A-4-5b. WEST VIRGINIA CODE § 18A-4-5b provides, in part, that:

> county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, 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 the county.

Employees performing like assignments and duties must be compensated uniformly. When considering this statute, it must be "strictly construed" in favor of the employee. Syl. Pt. 1, *Morgan v. Pizzino*,163 W.Va. 454, 256 S.E.2d 592 (1979). *See also Cruciotti v. McNeel*, 183 W. Va. 424, 428, 396 S.E.2d 191(1990) (citing WEST VIRGINIA CODE §18A-4-16, concerning extracurricular assignments, and requiring "strict construction" in favor of the employee). The term "strict" may generally be defined as narrow and restricted. *See* BLACK'S LAW DICTIONARY 1153 (7th ed. 2000). The term "construction" embodies a concept that "permits going beyond the express words used." *See International Nickel Co. v. Commonwealth Gas Corp.*, 152 W. Va. 296, 302,163 S.E.2d 677, 681 (1968). When considering these terms together, WEST VIRGINIA CODE § 18A-4-5b must be construed in a manner that is narrowly in favor of the employee beyond the express words provided in the statute.

It is not necessary for employees to perform *identical* duties in order to meet the "like assignments and duties" requirement for uniform benefits under WEST VIRGINIA CODE § 18A-4-5b. *Reed v. Jackson County Bd. of Educ.*, Docket No. 03-18-287 (Feb. 11, 2004); *Ward v. Cabal County Bd. of Educ.*, Docket No. 03-06-211 (Dec. 17, 2003). When assignments and duties are "substantially similar," the uniformity requirement applies. *Id*. "'Like' refers to having a distinctive character, no matter how widely different in nonessentials. 'Like' has also been defined as having the same or nearly the same qualities or characteristics; resembling another; or substantially similar." *Weider-Godwin v. Bd. of Educ. of the County of Upshur*, 179 W. Va. 423, 437, 369 S.E.2d 726, 731 (1988)(citations omitted). *C.f. Durig v. The Bd. of Educ. of The County of Wetzel*, 215 W.Va. 244, 599 S.E.2d 667 (2004)(per curiam)(finding a violation of the uniformity statute where another employee did nearly all the welding work and the grievant was absent, pursuant to his contract, from the workplace for a three-week summer period and did not perform mechanic duties during this time).

In this grievance there are two groups of Grievants: (1) bus operators and (2) bus aides. The linchpin of establishing a claim of discrimination or non-uniformity rests upon the Grievants' identification of a similarly situated employee being compensated under a 200-day extracurricular contract for like assignments and duties. Grievants seeking to enforce the uniformity provision must establish that their assignments and duties are like those of the employee to which they compare themselves. *Lockett v. Fayette County Bd. of Educ.*, Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-165 (Sept. 24, 1997).

1. Bus operators

The first group considered is the bus operators. They compare themselves with bus operator Sargent.[22] Mr. Sargent holds two 200-day extracurricular assignments performing "vocational runs" where he shuttles students from one location to another. "Vocational runs" typically occur five days per week. When comparing Mr. Sargent's assignments and duties, several bus operators are performing like assignments and duties.

a. Prevailing bus operators Grievants

Bus operators Robert Lanham, Carl Burdette, Roger Casto, Debra Shantie, Charles Smith and Patricia Melton conduct "vocational runs," and transport students five days per week. Bus operators Cora Combs, Larry Harper, Roger Doneff and Richard Douglas perform "community-based work experience runs," wherein the runs likewise occur up to five days a week. Similarly, bus operators Melinda Bailey, Brenda Turley and Deborah Lett perform "preschool runs," four days per week (everyday preschool is in session).

"Like" assignments do not have to be identical. *Weider-Godwin v. Bd. of Educ. of the County of Upshur*, 179 W. Va. 423, 428, 369 S.E.2d 726, 731. When considering the totality of the evidence, the nature of the above Grievants' assignments and duties are "like" Mr. Sargent's vocational runs. All are within the "bus operator" classification. All have extracurricular contracts as opposed to extra-duty contracts.[23] Their runs occur at

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[22] The Grievants have presented no arguments or evidence that they are comparable to bus operators Casto or Henson.

[23] Extracurricular runs occur at regularly scheduled times. Otherwise, the runs and therefore the contracts, would be *extra-duty* runs or contracts. 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." WEST VIRGINIA CODE § 18A-4-8b (f)(1).

regularly scheduled times, nearly everyday school is in session. The frequency of their runs are similar. All are paid the same rate of pay for their particular runs. The only difference is that Mr. Sargent receives the benefit of payment for non-instructional work days, snow days, vacation days and sick days, while the Grievants do not. Bus operators who perform like assignments and duties are similarly situated for the purpose of pay uniformity. *See generally Barlow v. Mercer Co. Bd. of Educ.*, Docket No. 07-27-163 (Oct. 21, 2008); *Taylor v. Kanawha Co. Bd. of Educ.*, Docket No. 02-20-075 (Sept. 11, 2003), *affirmed* by Cir. Ct. July 22, 2004); *McBride et al. v. Summers Co. Bd. of Educ.*, Docket No. 01-45-614 (Aug. 20, 2002).

The above-Grievant bus operators have established, by a preponderance of the evidence, that they are similarly situated to another bus operator in Putnam County receiving a 200-day extracurricular assignment and performing like assignments and duties. Accordingly, their claims of discrimination and non-uniformity are **GRANTED**.

b. Non-prevailing bus operator Grievants

All bus operator Grievants are not similarly situated to Mr. Sargent or performing assignments and duties that are "like" Mr. Sargent's extracurricular runs. As aforementioned, Mr. Sargent performs his duties approximately five days per week "shuttling" vocational students.

Several Grievant bus operators' assignments and duties are not "like" Sargent's runs due to the number of days they actually perform their runs. Bus operator Marsha Armstead's run is not currently running. Clearly, she is not performing like assignments

and duties when compared to Sargent. She is performing no assignment or duty.[24]

Bus operators Anthony Clark and Patricia Melton perform runs to transport high school students to and from the hospital for clinicals, wherein the runs occur four days per week *only* during the spring semester. Bus operators Cindy Vance, Karen Richardson and Patricia Melton perform "driving range runs," wherein high school drivers education students are transported to the driving range in Poca *only* one to two days per week at the discretion of the drivers' education instructor from various schools. Although school may be in session, trips to the driving range sometimes get cancelled as a result of range flooding or poor driving conditions. Bus operators Cora Combs, Larry Jackson, Linda Hardway and Richard Thompson perform "gifted runs," wherein the runs occur *only* one day per week, taking gifted students to a central location. Bus Operators Cora Combs and Deborah Lett previously performed "middle school alternative runs." However, these runs are currently not running. There is some evidence that suggests a high school run has recently started. However, there is no evidence establishing the frequency or length of runs.

Previous grievance decisions have addressed the issue of "like assignments and duties" within the context of bus runs. For example, in *Fowler v. Mason County Board of Education*, Docket No. 94-26-037 (Oct. 6, 1994), the grievants held mid-day bus assignments that lasted longer than other bus operators within the county. The *Fowler* grievants identified two comparable bus operators who were receiving equal pay for shorter

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[24] Bus operator Armstead did not testify at the Level Three hearing, and there is no evidence or argument that her previous run was comparable to Sargent's runs. There is no evidence that she has some claim to back pay based upon this previous run.

bus runs. The "comparable" *Fowler* bus operators' runs took 38 minutes and one hour and twenty-minutes respectively, while the grievant bus operators' runs took three hours and twenty minutes, and three hours and fifty minutes. Further, the "comparable" bus operators traveled a total of twenty miles, while the *Fowler* grievants traveled a total of 156 miles. The *Fowler* ALJ found this distinction to be inconsequential, finding that the pay was uniform and the assignments and duties were like. *See also Redman v. Jackson Co. Bd. of Educ.*, Docket No. 04-18-027 (May 21, 2004). However, unlike *Fowler*, the above-Grievants are not performing assignments or duties most of the days Mr. Sargent performs assignments and duties.

Given the number of days the above-Grievants' runs are performed, their assignments and duties are not "like" Mr. Sargent's extracurricular runs. They do not have "the same or nearly the same qualities or characteristics . . . ." *Weider-Godwin v. Bd. of Educ. of the County of Upshur*, 179 W. Va. 423, 437, 369 S.E.2d 726, 731. First, the nature of the assignments are different. Mr. Sargent's runs occur approximately five days per week. These bus operators' runs occur on a less frequent basis. *C.f. Bd. of Educ. of Wood County v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422(2002)(recognizing that differences in the number of days actually worked is an indicator of whether employees are performing like duties). Secondly, in light of the nature of their assignments, it only follows that they are not performing the same quantum of duties: they perform the same tasks less than Mr. Sargent.

This ALJ recognizes that the BOE did not take the nature of the runs into consideration when determining whether to award "as needed" contracts or 200-day

contracts. In both *Sargent v. Putnam County Board of Education*, Docket No. 06-40-229 (Sept. 25, 2006), and *Casto & Henson v. Putnam County Board of Education*, Docket No. 06-40-245 (Feb. 28, 2007), the BOE took the position that *all* extracurricular bus operators were similarly situated and it needed uniform extracurricular contracts for all bus operators. The legal basis for its position that it had to reduce the salaries of Sargent, Casto and Henson, was that other operators had "as needed" contracts and all extracurricular contacts must be uniform. The Grievants direct this tribunal's attention to the BOE's prior legal position and argue that it is forbidden from now arguing a contrary position. This ALJ may not use the BOE's prior arguments to ignore the clear language of WEST VIRGINIA CODE § 18A-4-5b. This ALJ must adhere to the requirement of the law. Consideration must be given to the Grievants' assignments.

The above-bus operator Grievants have not established that it is "more likely than not" that they are similarly situated to Mr. Sargent or that their assignments and duties are like Mr. Sargent's. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Accordingly, their claims are **DENIED**.

2. Bus aides

Next, the bus aide Grievants are considered. The Grievant bus aides' claims must be denied because they have not identified any other bus aide who holds a 200-day extracurricular contract. As aforementioned, to prevail on a claim of discrimination or non-uniformity, a grievant must prove that he or she is being treated differently than a similarly situated employee who is performing like assignments and duties. Bus aide Grievants have not established that they have been treated differently than any other similarly

situated employee.

There is no evidence that any bus aide in Putnam County holds a 200-day contract. Nor is this ALJ persuaded by the argument that Grievant bus aides are similarly situated to bus operators. They do not operate a bus and perform different duties while on the extracurricular bus runs.

In *Flint et al. v. The Board of Education County of Harrison*, 207 W.Va. 251, 531 S.E.2d 76 (1999)(per curiam), the West Virginia Supreme Court of Appeals recognized that where an educational employee's contract was for 240 days and the employee sought uniformity with a 260 day contract, he or she must identify a comparable employee who holds the same classification and a 260 day contract. The Court stated that "employees who do not have the same classification are not performing 'like assignments and duties.'" *Flint*, 207 W.Va. 251, 257, 531 S.E.2d 76, 82.[25] Hence, in order to prevail, the bus aide Grievants must identify another bus aide who is receiving a 200-day contract. Bus aide Grievants may not rely upon the uniformity provision to obtain the same benefits as employees who hold different classification titles and perform different duties. *Flint*, *supra*. *See Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Allison v. Hancock County Bd. of Educ.*, Docket No. 97-15-454 (Mar. 31, 1998); *Pate v. Summers County Bd. of Educ.*, Docket No. 97-45-188 (Feb. 5, 1998); *Ricca v. Hancock County Bd. of Educ.*, Docket No. 95-15-101 (June 8, 1995); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995); *Ketz v. Raleigh Co. Bd. of Educ.*, Docket No. 07-

[25] The *Flint* case concerned multi-classified employees attempting to compare themselves with other multi-classified employees who did not hold the precise multi-classifications held by the *Flint* grievants.

41-374 (June 25, 2008).

The bus aide Grievants have not established discrimination or non-uniformity by a preponderance of the evidence. In recognition of their classification and the duties they perform, bus aides Joyce Holley, Ramona ("Kay") Dooley, Betty Thompson and Lora Bailey, are not similarly situated to Mr. Sargent and do not perform like assignments or duties. Accordingly, their claims are hereby **DENIED**.

Next, the timeliness of the claims are considered.

III. Timeliness

The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets its burden of proof, a grievant may then attempt to demonstrate that he or she should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH- 060 (July 16, 1997).

WEST VIRGINIA CODE § 18-29-3(a)(2003) states that:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based.

WEST VIRGINIA CODE § 18-29-4(a)(2003) goes on to provide, in part, that:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997). However, a grievant is excused for his or her delay in filing a grievance when the untimely filing was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge. *See Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Davisson v. Lewis County Bd. of Educ.*, Docket No. 05-21-112 (July 27, 2005).[26]

The timeliness requirement is subject to the "continuing violation" principle. If a violation continues repeatedly, the period in which to file a grievance is constantly being reactivated. In *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995), the Court ruled that a discriminatory pay disparity was not time barred because such pay disparity was a continuing practice. Citing a previous case decided under the West Virginia Human Rights Act, our Supreme Court ruled that "[u]nlawful employment discrimination in the form of compensation disparity . . . is a continuing violation so that

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[26] In this grievance, there was no deliberate design or *unmistakable* action by the BOE that led to a delay in filing.

there is a present violation of the antidiscrimination statute for so long as the disparity exists." *Martin*, 195 W. Va. at 307, 383 S.E.2d at 409. The Court then ruled that even though that precedent was from the West Virginia Human Rights Act, it would apply the same rule of law to grievances. *Id.*

Similarly, in *Board of Education of Wood County v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002)(overruled on other grounds by *Flint*, *supra*), the Court first noted that it had previously found a continuing violation even when a wronged party knew of the basis of a claim for over 10 years before filing one. Then, the *Airhart* Court ruled that any "uniformity" violation -such as discrimination or favoritism- is continuing such that the time period to file a claim is being constantly renewed.

An act of discrimination is a continuing violation so long as the discrimination (or violation of the uniformity provision) occurs within 15 days of filing a grievance. *Martin*, *supra*; *Airhart*, *supra*; *White*, *supra*; *Lilly & Akers v. Raleigh Co. Bd. of Educ.*, Docket No. 02-41-037 (June 5, 2002). There is no dispute that the discrimination and/or non-uniformity was still occurring when the grievance was taken out of abeyance in May of 2008. Hence, each of the Grievants' claims are timely. The next consideration is whether the prevailing bus operator Grievants are entitled to back pay.

IV. Back pay

The award of back pay is appropriate in light of the specific circumstance presented in this grievance. The prevailing bus operator Grievants are entitled to back pay; however, each individual back pay award must be tempered by the time at which the prevailing Grievant joined this action. When a continuing practice grievance is timely filed, WEST

VIRGINIA CODE § 18-29-3(v) permits the award of back pay for a period of time one year from the date the employee filed his or her grievance. The time in which an employee files or joins a grievance limits the actual amount of back pay an employee may recover. *See W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n*, 181 W. Va. 525, 383 S.E.2d 490 (1989); *Martin*, *supra; Flint, supra*.

In this case, the following prevailing bus operators were part of the initial filing of this grievance on May 16, 2006: Robert Lanham, Carl Burdette, Roger Casto, Debra Shantie, Charles Smith, Roger Doneff, Deborah Lett and Brenda Turley. These prevailing Grievants are entitled to back pay beginning one year prior to initial filing of this grievance, or from May 16, 2005.

Other prevailing Grievants were not part of the initial grievance filing and joined at a time thereafter. These Grievants joined in this matter on May 27, 2008. These Grievants include: Patricia Melton, Cora Combs, Larry Harper, Richard Douglas and Melinda Baily. As for these Grievants, the back pay must be limited to one year from May 27, 2008, or from May 27, 2007. Hence, the amount of back pay these Grievants should receive must be calculated from May 27, 2007, to the present.

It is clear that the above prevailing Grievants have been treated differently than at least one other similarly situated employee who preforms like assignments and duties. This unequal treatment was done as part of a unified and coherent decision on the part of the BOE to deprive several employees of 200-day contracts. This was not an accident on the part of the BOE or mere bookkeeping error. It is clear that at the time the extracurricular contracts in question were signed, many of the prevailing Grievants signed

their contracts "under protest." The particular facts of this grievance demand an award of back pay.

The above-prevailing Grievants have proven, by a preponderance of the evidence, that they are entitled to back pay. These Grievants should be paid the difference between the amount they were previously paid and the amount they would had received had they been performing their assignments and duties under a 200-day contract.

The following Conclusions of Law are appropriate:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. The doctrine of claim preclusion (or *res judicata*) may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." *Liller v. W. Va. Human Rights Comm'n,* 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988). "Before the prosecution of a lawsuit [grievance] may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties.

Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

3. "Collateral estoppel [or issue preclusion] will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

4. Grievant Bessie Casto's claims have merged with the previous decision issued in *Casto & Henson v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007), and are hereby barred.

5. WEST VIRGINIA CODE § 18A-4-5b provides that "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 the county . . . ."

6. The following Grievant bus operators have established, by a preponderance of the evidence, that they are being paid in a non-uniform manner for like assignments and duties when compared to at least one other bus operator in Putnam County: Robert Lanham, Carl Burdette, Debra Shantie, Roger Casto, Charles Smith and Patricia Melton

(vocational run assignment),[27] Cora Combs (community work-experience run assignment), Larry Harper, Roger Doneff, Richard Douglas, Melinda Bailey, Brenda Turley and Deborah Lett (pre-school run assignment).

7. The following Grievant bus operators have *not* established, by a preponderance of the evidence, that they are being treated in a non-uniform manner for like assignments and duties: Marsha Armstead, Anthony Clark, Cindy Vance, Karen Richardson, Patricia Melton (driving-range run assignment and PCTC run assignment), Larry Jackson, Linda Hardway, Richard Thompson, Cora Combs (gifted run assignment and middle school alternative run assignment), Deborah Lett (middle school alternative run assignment) and Sherry Tabor.

8. Grievant bus aides have not established, by a preponderance of the evidence, that they are being paid in a non-uniform manner.

9. WEST VIRGINIA CODE § 29-6A-2(d)(2003) 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."

10. In order to establish a discrimination claim under the grievance statute, Grievants must prove, by a preponderance of the evidence:

> (a) that the employees have been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities

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[27] Some bus operator Grievants have more than one extracurricular contract and prevailed on some contracts/runs and failed on others. The particular contracts/runs are discussed and recognized in Finding of Fact 24 *supra* and the footnotes therewith. Contracts/runs that fall into the same "type" are treated the same.

of the employees; and

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

See Frymier v. Higher Educ. Policy Comm'n, 221 W.Va. 306, 655 S.E.2d 52 (2007). *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

11. The following Grievant bus operators have proven, by a preponderance of the evidence, that they are being treated differently from similarly situated employees, and the difference in treatment was not agreed to by the employees: Robert Lanham, Carl Burdette, Debra Shantie, Roger Casto, Charles Smith, Patricia Melton (vocational run assignment), Cora Combs (community work-experience run assignment), Larry Harper, Roger Doneff, Richard Douglas, Melinda Bailey, Brenda Turley and Deborah Lett (pre-school run assignment).

12. The following Grievant bus operators have *not* proven discrimination, by a preponderance of the evidence: Marsha Armstead, Anthony Clark, Cindy Vance, Karen Richardson, Patricia Melton (driving-range run assignment and PCTC run assignment), Larry Jackson, Linda Hardway, Richard Thompson, Cora Combs (gifted run assignment and middle school alternative run assignment), Deborah Lett (middle school alternative run assignment) and Sherry Tabor.

13. Grievant bus aides have not proven, by a preponderance of the evidence, that they are being treated differently from a similarly situated employee.

14. WEST VIRGINIA CODE § 18-29-4(a)(2003) provides, in part, that:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the

> date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

15. For the purpose of the timeliness, an act of discrimination is a continuing practice so long as the discrimination (or violation of the uniformity provision) occurred within 15 days prior to the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Board of Education of Wood County v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002)(overruled on other grounds by *Flint*, *supra*); *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Lilly & Akers v. Raleigh Co. Bd. of Educ.*, Docket No. 02-41-037 (June 5, 2002).

16. This grievance was timely filed as violation of the uniformity and discrimination statutes are continuing practices.

17. When a continuing practice grievance is timely filed, WEST VIRGINIA CODE § 18-29-3(v) permits the award of back pay for a period of time one year from the date the employee filed his or her grievance. The time in which an employee files or joins a grievance limits the actual amount of back pay an employee may recover. *See W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n*, 181 W. Va. 525, 383 S.E.2d 490 (1989); *Martin*, *supra; Flint, supra*.

18. The prevailing bus operator Grievants are entitled to an award of back pay one year from they date of filing or one year from the date the Grievant joined this grievance, depending upon when a prevailing grievant became a party.

Accordingly, Grievant Bessie Casto is hereby **DISMISSED** based upon the doctrines of issue preclusion and claim preclusion. The bus operators Grievants' claims are **GRANTED** for certain bus operators and **DENIED** for other bus operators. An award of back pay is appropriate in light of the circumstances. The BOE shall pay the prevailing bus operator Grievants those wages and benefits they would have received had they been awarded a 200-day contract, minus any amount previously paid for work performed, plus interest. The amount of back pay shall be based upon when the particular prevailing Grievant became a party, in accordance with this Decision.

As to bus aide Grievants, their claims are **DENIED**. The Putnam County Board of Education is hereby **ORDERED** to provide the prevailing bus operator Grievants "200-day" extracurricular contracts instead of the current "as needed" extracurricular contracts.

Any party may appeal this Decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 29-6A-7(2003). *See* Footnote 2 *supra*. 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 14, 2009

_____
Mark Barney
Administrative Law Judge