THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GILBERT R. CLARK AND
JUANITA DANETTE TUCKER,

Grievants,

v. **DOCKET NO. 2009-0597-CONS**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Gilbert R. Clark and Juanita Danette Tucker ("Grievants") filed Level One grievances against their employer, Respondent Putnam County Board of Education ("BOE") alleging uniformity violations and discrimination regarding pay for what they describe as "shuttle runs."[1] Prior to the Level One hearing, the two grievances were consolidated under one docket number as indicated above. *See* October 30, 2008, Consolidation Letter. Following a brief postponement of the matter pursuant to the Grievants' counsel's request, a Level One hearing was conducted on November 19, 2008, and a decision denying relief was issued on January 9, 2009. A Level Two mediation was conducted on March 16, 2009.

A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on August 14, 2009, at the Grievance Board's office in Charleston, West Virginia. Grievants appeared by and through their counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent BOE appeared by and through its counsel Rebecca Tinder, with the law firm of Bowles Rice McDavid Graff &

---

[1] Grievant Tucker filed her grievance on October 22, 2008. Grievant Clark filed his grievance on October 27, 2008.

Love LLP. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about September 8, 2009.

Synopsis

Grievants are employed as bus operators by the BOE. They allege that the BOE's refusal to award them separate contracts for two "shuttle runs" constitutes discrimination and violates the uniformity requirement of WEST VIRGINIA CODE § 18A-4-5b. Respondent BOE maintains that the Grievants' claims are untimely and, assuming timeliness, the employee to which Grievants compare themselves is "grandfathered" in by WEST VIRGINIA CODE § 18A-4-5b. Lastly, the BOE argues that even if comparison is made, Grievants have still not established they are performing like assignments and duties.

Grievants' claims were timely filed. Nevertheless, Grievants have not established, by a preponderance of the evidence, that the BOE acted in a discriminatory or non-uniform manner because the person to whom they compare themselves is not a comparable employee. Our Legislature intended the uniformity requirement to apply in a prospective fashion. Even when comparison is made, Grievants still have not proven their claims by preponderant evidence. Accordingly, this grievance is **DENIED**.

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

Findings of Fact

1. Grievant Tucker has been employed by the BOE as a regular bus operator since November of 1995 and has been driving Bus Run 2303 since October 18, 2005. Level Three, Respondent's Exhibits 1 and 2.

2. Grievant Clark has been employed by the BOE as a regular bus operator for seven and one half years and has been driving Bus Run 2001 since November 8, 2005. Level Three, Respondent's Exhibits 3 and 4.

3. As used herein, a "shuttle run" simply refers to picking up students at one school and transporting them to another school.

4. Grievant Tucker has certain runs imbedded in her normal run wherein she shuttles students from one school to another. She has never held an extracurricular shuttle run contract.[2] Grievant Tucker's regular run consist of approximately 54 bus stops. She transports 40-50 students. In the morning, she does not shuttle students and her run typically takes from 6:45 a.m. to 7:30 a.m. to complete. In the afternoon, she shuttles students from George Washington Middle School to Buffalo High School. The afternoon run typically takes from 3:15 p.m. to 4:45 p.m. to complete.

5. Grievant Clark does not have "shuttle" type runs imbedded in his normal route. However, he does sometimes pick up students in emergency-type situations and/or in situations that are not part of his normal, required routes. Level Three, Testimony of Charles Tribble.[3] Grievant Clark has not been assigned to shuttle students. *Id*. Nor has

---

[2] 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."

[3] At Level One, Grievant Clark testified that he performed shuttle runs, though he did not specify that he was actually required or instructed to do so as part of his assignment. He did not appear at the Level Three hearing. Charles Tribble, BOE

he ever been trained to shuttle students. Even if Mr. Clark picked up students as part of a "shuttle" it would not alter the route he takes as part of his regular run. *Id*. Grievant Clark's regular run consist of approximately 46 bus stops. He transports 25-40 students. His morning run usually takes from 6:60 a.m. to 7:32 a.m. to complete. The afternoon run typically takes from 3:00 p.m. to 4:45 p.m.

6. Grievants compare their assignments and duties to those of James Henson (a.k.a. "Bunny"). Mr. Henson has been employed by the BOE as a bus operator since at least 1982 and, like Grievants, was assigned to the Buffalo/G.W. area and lounge.[4]

7. During the entire 2005-2006 school year, Mr. Henson drove a "shuttle" run under a separate contract[5] and was paid $10.00 per day for each day that he completed both the morning and afternoon portions of the "shuttle" run. Mr. Henson performed a total of 65 bus stops. In both the morning and afternoon, he shuttled students from Buffalo High School to George Washington Middle School and from George Washington Middle School to Buffalo High School. Mr. Henson also held a vocational run contract.

8. Mr. Henson's separate "shuttle" contract was awarded in 1982 when, in the middle of the school year, there was a need to increase the length of Henson's run,

---

Coordinator of Transportation, testified that Grievant Clark was never instructed to shuttle any student as part of his regular run.

[4] Mr. Henson did not appear as a witness in this grievance. Mr. Henson resigned employment with the BOE, due to his retirement, effective June 30, 2009, which action was approved by the BOE at its meeting on January 20, 2009. Level Three, Respondent's Exhibit 6. By BOE action on April 6, 2009, so-called "shuttle" run contracts were abolished. Level Three, Respondent's Exhibit 7. After June 30, 2009, there are no bus operators employed by the BOE under contract for a "shuttle" run.

[5] Mr. Henson's shuttle contract is seemingly an extracurricular contract pursuant to WEST VIRGINIA CODE § 18A-4-16(1).

causing it to start and end at different locations. As the postings and contracts in 1982 were specific to routes, i.e. the routes were contained within the contracts, it was not possible to simply adjust the driver's assignment. A new posting and contract were required and, in Henson's case, this same "shuttle" contract remained in effect during the 2005-2006 school year.

9. In 2006, the BOE attempted to eliminate all extracurricular "shuttle run" contracts. Mr. Henson filed a grievance and ultimately prevailed. *See Casto & Henson v. Putnam Co. Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007), *aff'd* Cir. Ct. Kanawha County, Civil Action No. 07-AA-33 (Feb. 14, 2008).

10. Upon his prevailing in his grievance, Mr. Henson was awarded back pay and a continuing "shuttle run" contract. After signing his new shuttle run contract, Mr. Henson took it around and showed it to other bus operators.

11. Grievant Tucker learned that Mr. Henson held an extracurricular contract for his "shuttle" run when Mr. Henson showed his contract to Mrs. Tucker during the week of October 13-17, 2008. Level One, Testimony of Juanita D. Tucker, 41; Level Three, Testimony of Juanita D. Tucker. Grievant Tucker filed her grievance on October 22, 2008.

12. Grievant Clark learned that Mr. Henson held a separate contract for his shuttle run in late-October, 2008. Level One, Testimony of Gilbert Clark, 18-19. Grievant Clark filed his grievance on October 27, 2008.

13. WEST VIRGINIA CODE § 18A-4-5b was passed by the West Virginia Legislature in 1984.

Discussion

There are two issues in this grievance: (1) whether the Grievants' claims were timely filed and (2) whether Grievants have met their burden of proving non-uniformity/ discrimination by a preponderance of the evidence. Taking these issues in turn, the Grievants' claims were timely filed. However, Grievants have not proven their claims by a preponderance of the evidence.

I. Timeliness

The burden of proof is on the Respondent to prove this grievance was not timely filed by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the BOE meets this burden, the Grievants may then attempt to demonstrate that they should be excused from filing within the statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). As to when a grievance must be filed, WEST VIRGINIA CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board.

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).

The Respondent alleges that the Grievants knew when they accepted their current positions that shuttle runs were part of their regular runs and, therefore, the claims are untimely as the Grievants merely state a continuing, latent damage.[6] The BOE's position is not persuasive and misconstrues the nature of the Grievants' claims. Grievants' claims are for discrimination and uniformity. This discrimination and non-uniformity occurs each and every time the Grievants are allegedly treated non-uniformly when compared to a similarly situated employee. Grievants are not alleging a discrete act caused damage. The BOE has a continuing legal obligation to treat employees in a uniform and non-discriminatory manner. *See generally Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007)(discussing the continuing torts doctrine and the statute of limitations).

The BOE's conduct is properly characterized as a continuing violation. If an alleged 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

---

[6] It is noted that Grievant Tucker's assignment includes a shuttle-type run. Grievant Clark's assignment does not.

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 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 Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004), 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*; *White*, *supra*; *Lilly & Akers v. Raleigh Co. Bd. of Educ.*, Docket No. 02-41-037 (June 5, 2002); *Flint et al. v. The Board of Education County of Harrison*, 207 W.Va. 251, 531 S.E.2d 76 (1999)(per curiam), *overruled on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). There is no dispute that the alleged discrimination and/or non-uniformity was occurring when the Grievants filed their claims. Hence, each of the Grievants' claims are timely.[7]

---

[7] Moreover, Grievants became unequivocally notified that Mr. Henson was being awarded an extra contract for his shuttle run at the end of October, 2008. Both grievances

Respondent BOE has not established, by a preponderance of the evidence, that the Grievants filed their claims in an untimely manner. The merits of the Grievants' claims 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. *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).

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 pay to employees performing like assignments and duties. 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 under the grievance statute, Grievants must prove,

---

were filed within fifteen days of Mr. Henson showing his contract to the Grievants.

by a preponderance of the evidence:

> (a) that the employees have been treated differently from one or more similarly[8]-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). *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 and implemented by the Legislature in 1984. WEST VIRGINIA CODE § 18A-4-5b provides that:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
>
> These 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: Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so

---

[8] 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).

> by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.
>
> Counties may provide, in a uniform manner, benefits for service personnel which require an appropriation from local funds including, but not limited to, dental, optical, health and income protection insurance, vacation time and retirement plans excluding the State Teachers' Retirement System. Nothing herein shall prohibit the maintenance nor result in the reduction of any benefits in effect on the first day of January, one thousand nine hundred eighty-four, by any county board of education.

Employees performing like[9] 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

---

[9] 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).

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.

Analysis under the uniformity and discrimination statutes requires the Grievants to compare themselves with another employee. That "other" employee must be similarly situated and subject to the same requirements as the Grievants. In this case, the Grievants compare themselves with Mr. James Henson. Mr. Henson is a long-time employee who has held his "shuttle run" since 1982.

Grievant's have not identified a similarly situated, comparable employee who is performing like assignments and duties because Mr. Henson is not similarly-situated or comparable. In *Crock v. Harrison County Board of Education*, 211 W.Va. 40, 560 S.E.2d 515 (2002)(per curiam), the employees alleged violations of the non-relegation clause of WEST VIRGINIA CODE § 18A-4-8(m) and the uniformity requirement of WEST VIRGINIA CODE § 18A-4-5b. When considering the uniformity provision, the *Crock* Court recognized that the uniformity requirement contained within WEST VIRGINIA CODE § 18A-4-5b was limited by the grandfather provisions and the time at which the employee accrued the benefit.[10] The Court recognized that benefits were subject to the grandfather provision which provides that "[n]othing herein shall prohibit the maintenance nor result in the reduction of any benefits in effect on the first day of January, one thousand nine hundred eighty-four, by any county board of education." W.VA. CODE § 18A-4-5b.

From this specific grandfather provision, the Court went on to state the principle that

---

[10] The "benefit" in *Crock* was "experience credit," which the Court seems to classify as a "salary supplement." *Id.* at Footnote 11.

"[t]he intent of the Legislature to implement the uniformity provisions in a prospective fashion is clear. Accordingly, the uniformity provisions enacted in 1984, that apply to the paying of salary and benefits to personnel who are employed in similar position[s] within the county, do not affect Mrs. Washington." *Crock*, 211 W.Va. 40, 45, 560 S.E.2d 515, 520. Hence, the Court found that experience credit awarded to Mrs. Washington, an employee, could not be reduced because she received the credit prior to 1984.

In this grievance, the comparable employee, Mr. James Henson, was awarded his "shuttle run" in 1982. Hence, this situation is the factual converse of the scenario in *Crock*. That is, in this grievance, the application of the statute acts not to limit previously obtained benefits from a pre-1984 employee, but to limit a post-1984 employee's comparison to a pre-1984 employee. Regardless of the factual posture, the same pure prospective application principle applies. Given that the legislature intended the uniformity provisions to apply prospectively, Mr. Henson is not a comparable employee for the purpose of analysis under WEST VIRGINIA CODE § 6C-2-2(d) and is not, by statutory design, performing like assignments and duties for the purpose of uniformity analysis under WEST VIRGINIA CODE § 18A-4-5b. *See Tucker v. Harrison Co. Bd. of Educ.*, Docket No. 05-17-121 (Sept. 7, 2005)(recognizing that employees who are "grand fathered in" are not comparable for the purpose of uniformity or discrimination analysis).

Even if the pure prospective application instruction from *Crock* is ignored, the Grievants still have not met their claims because they have not established, by a preponderance of the evidence, that they are performing "like assignments and duties" when compared to Mr. Henson. W.VA. CODE § 18A-4-5b. First, Grievant Clark has not even established that his position or run has a shuttle component. As the BOE

Coordinator of Transportation testified, Mr. Clark was never instructed or trained to perform a shuttle run. Level Three, Testimony of Charles Tribble. A shuttle run was not part of his regular assignment. *Id*. Grievant Clark's claims must be denied.

Similar to Grievant Clark, Grievant Tucker has not established, by preponderant evidence, that she was discriminated against or treated in a non-uniform manner. Grievant Clark only performs "shuttle" duties in the afternoon. These duties are part of her regular run and have been ever since she accepted the position. When comparing her assignments and duties to those of Mr. Henson, it must be recognized that the specifics of Mr. Henson's assignments and duties are not clear from the record. Though the record indicates that has Mr. Henson has 65 bus stops, the record does not reflect if any or all of these stops were part of his "regular" runs, his "shuttle" run(s), or his "vocational" run(s). When considering the evidence concerning Mr. Henson's runs, it has been established that, unlike Grievant Tucker, Mr. Henson performs shuttles in both the morning and evening runs. Likewise, it is clear that these assignments are not part of his regular run.

In light of the totality of the evidence presented, Grievant Tucker has not proven, by a preponderance of the evidence, that her assignments and duties are "substantially similar" to Mr. Henson's assignments and duties. *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). Nor has Grievant Tucker proven by preponderant evidence that she has been treated in a dissimilar manner, when compared to Mr. Henson, for a reason that is not related to the actual job responsibilities of the employees. *Frymier*, *supra*. The quantum of evidence does not permit a contrary finding.

Grievants have not established that it is "more likely true than not" that they have

been discriminated against or treated in a non-uniform manner that is contrary to law. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). This grievance must be denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996).

2. Grievances must by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). *Dodgins v. Dep't of Educ./School for the Deaf & Blind*, Docket No. 2009-0407-DOE (June 15, 2009). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

3. If the Respondent meets its burden, the Grievants may then attempt to demonstrate that they should be excused from filing within the statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

4. For the purpose of the timeliness, an act of discrimination is a continuing practice so long as the alleged 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 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); *Flint et al. v. The Board of Education County of Harrison*, 207 W.Va. 251, 531 S.E.2d 76 (1999)(per curiam), *overruled on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

5. This grievance was timely filed as violation of the uniformity and discrimination statutes are continuing practices. Moreover, Grievants were not "unequivocally notified" that Mr. Henson was awarded a contract for shuttle runs until late-October, 2008.

6. 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).

7. WEST VIRGINIA CODE § 18A-4-5b, as passed in 1984, is applicable in a purely prospective manner. *Crock v. Harrison County Board of Education*, 211 W.Va. 40, 560 S.E.2d 515 (2002)(per curiam). *See Tucker v. Harrison Co. Bd. of Educ.*, Docket No. 05-17-121 (Sept. 7, 2005).

8. 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 . . . ."

9. Grievants have not established a violation of the uniformity provision of WEST VIRGINIA CODE § 18A-4-5b because they have not proven, by a preponderance of the evidence, that they are being treated differently when compared to another comparable employee performing like assignments and duties.

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 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. Grievants have not established discrimination by a preponderance of the evidence because they have not been treated differently from at least one similarly situated employee.

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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also*

156 C.S.R. 1 § 6.20 (2008).

Date: December 1, 2009

Mark Barney
Administrative Law Judge