

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DEBORAH BARNETTE, ET AL.,**  
**Grievant,**

**v.**

**Docket No. 2022-0867-CONS**

**PUTNAM COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DECISION**

Grievants,<sup>1</sup> filed this now consolidated grievance against their employer, Putnam County Board of Education ("PCBOE"), Respondent. The original grievances were filed on June 10, 2022, where in the Grievants maintain that they have been discriminated against by being wrongfully denied benefit pay related to their supplemental bus assignments and also allege that they are owed supervisory aide pay.

A hearing was held at level one on June 10, 2022, and the grievance was denied at that level on August 30, 2022. Grievants appealed to level two on September 14, 2022, and a mediation session was held on November 4, 2022. This matter was placed in abeyance for a period and Grievants appealed to level three on January 4, 2023. A level three hearing was held before the undersigned Administrative Law Judge on March 22, 2023, in the Grievance Board's Charleston office. Grievants appeared in person and were represented by Rebecca A. Roush, General Counsel, WV School Service Personnel Association. Respondent was represented by Mary Catherine Tuckwiller, Esquire Dinsimore & Shohl LLP. At the conclusion of the level three hearing, the parties were invited to submit written "Proposed Findings of Fact and Conclusions of Law." This matter

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<sup>1</sup> Deborah Barnette, Paula Asbury, Lora A. Bailey, Mona Starcher, Phillip Watson, and Deborah Yeigh, all special needs bus aides.

became mature for decision subsequent to the established deadline for the submission of the parties' fact/law proposals on or about April 24, 2023. Only Respondent submitted a post hearing fact/law proposal.

### **Synopsis**

Grievants are each employed by Respondent, Putnam County Board of Education, as full-time special needs bus aides, who have supplemental contracts. Supplemental contracts are for work in addition to an individual's regular full-time employment. There exists a difference in the bus aides' supplemental contracts and the supplemental contractual terms and responsibilities of bus operators who carry out supplemental bus runs. Grievants allege that the failure of Respondent to compensate the supplemental contracts equally constitutes discrimination. Grievants also contend each is entitled to supervisory aide pay for the supplemental contract assignments.

County boards of education may post and enter into supplemental contracts with professional and service employees outside of employees' regular contract terms. W. Va. Code §18A-4-16. Bus operators and bus aides are classified differently and perform different functions. Grievants did not prove by a preponderance of the evidence that their supplemental assignments were anything other than "as needed." Grievants have not established that Respondent was obligated to pay them if no runs occurred, or that the Board of Education was arbitrary and capricious in not paying bus aides under the same terms as bus operators. Grievants have not established discrimination or non-uniformity by a preponderance of the evidence. Further Grievants are not entitled to supervisory

aide pay for the identified supplemental contract assignments. Accordingly, this grievance is DENIED.

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

### **Findings of Fact**

1. Grievants are each employed by Putnam County Board of Education, Respondent as full-time special needs bus aides.

2. Each Grievant has a 200-day contract of employment with Respondent, which affords him or her standard benefits, including health insurance and paid holidays. Two-hundred day contract employees also receive the benefit of pay for snow days, holidays, sick days, or non-instructional professional days.

3. Putnam County Board of Education posts supplemental contracts for both professional and service employees. Supplemental contracts are for work in addition to an individual's regular full-time employment. Supplemental contracts are separate and distinct from an employee's 200-day contract of employment.<sup>2</sup>

4. Respondent posted supplemental contracts for the positions of bus aide assigned to Pre-K routes. The positions were posted as "4 days a week, as needed." See Exhibits.

5. As bus aides assigned to Pre-K routes, Grievants are expected to ride the Pre-K buses and be available to assist the student bus riders. The aides are paid twenty

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<sup>2</sup> Supplemental contracts/positions (a/k/a extracurricular assignments) are governed by W. Va. Code §18A-4-16.

dollars (\$20.00) per day to perform their supplemental contracts. They are required to work only when students are present, and transportation is required.

6. Each of the Grievants voluntarily applied for and were awarded the supplemental contract positions of bus aide assigned to a Pre-K route by Respondent. Each Grievant entered into a *Putnam County Schools Contract of Employment for Extra-Duty Supplemental Assignment (Service Personnel)*.

7. The supplemental contracts entered into by Grievants were on an “as needed” basis. Grievants are not compensated for their supplemental contracts during holidays, snow days, sick days, professional and non-instructional days, when the students are not present, and the bus runs are not made.

8. As bus aides, Grievants have no responsibilities or duties when the students are not present. Grievants do not perform their as needed bus runs unless students are present.

9. Respondent posts supplemental contracts for bus operators. Bus operators are contracted to work even if buses are not taking students to school. Thus, Bus operators who were awarded supplemental contracts for the Pre-K routes are compensated for their supplemental contracts during holidays, snow days, sick days, professional and non-instructional days, when the students are not present and the bus runs are not made.

10. Assistant Superintendent of Putnam County Board of Education, Dan Rinick, testified at the level three hearing of this grievance.

11. Bus operators are regularly asked to undertake bus maintenance and driving preparation responsibilities on days students are not present.

12. Separately, Grievants seek to be classified as Supervisory Aides who qualify for additional pay as provided in W. Va. Code §18A-5-8 for purposes of their work on their supplemental Pre-K bus runs.

13. Supervisory Aides are designated by the principal of a school. See WEST VIRGINIA CODE §18A-5-8(a).

14. None of the instant Grievants have been designated by the principal of a school to perform the functions of a supervisory aide.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*

Grievants are each employed by Putnam County Board of Education, Respondent as full-time special needs bus aides, who have supplemental contracts. Supplemental contracts are for work in addition to an individual's regular full-time employment. There exists a difference in the bus aides' supplemental contracts and the supplemental

contractual terms and responsibilities of bus operators who carry out supplemental bus runs. Grievants contend this constitutes discrimination and/or a violation of uniformity. Grievants base their claim of discrimination on the fact that the bus operators “received additional ‘benefit pay’ for their supplemental run for holidays, snow days, sick days, professional and non-instructional days. The Bus Operator is paid regardless of whether the bus runs any given day. Grievants claim that by failing to compensate them on days with unexecuted bus runs, like bus operators, Respondent, is discriminating against them.

W. Va. Code §18A-4-8 prescribes the employment term and class titles of service personnel and defines each class title. Class title is the name of the position or job held by a service person. Aides are separately classified from bus drivers. Specifically, aides are persons selected and trained for a teacher aide classification such as monitor aide, clerical aide, classroom aide or general aide. *Id.* at (i)(8)-(10). Comparatively, a bus operator means, “a person employed to operate school buses and other school transportation vehicles as provided by the state board.” *Id.* at (i)(16). Depending on educational experience, aides in class I are paid at the A pay grade, at class II the B pay grade, and class III the C pay grade. Bus operators are paid at the D pay grade. This is statutorily prescribed at W. Va. Code §18A-4-8a. Ultimately, there is a recognized and very real distinction between the classifications, titles, and responsibilities of bus operator and bus aides. Both are important in their respective roles, but the actual job responsibilities and salary ranges of bus operators and bus aides are not the same or necessarily similar.

West Virginia Code § 6C-2-2(d) defines “Discrimination” 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.”<sup>3</sup>

Grievants did not establish discrimination in the facts of this case. The job classification of bus driver and bus aide are not recognized as similarly situated employees.

County boards of education may post and enter into supplemental contracts with professional and service employees outside of employees’ regular contract terms. W. Va. Code §18A-4-16. Supplemental contracts do not necessarily follow salary schedule pay rates. The job responsibilities of bus operators and bus aides are not one and the same, each has recognizable and distinct duties. It is found that Grievants reliance upon the uniformity provision to obtain the same benefits as bus drivers who hold a different classification title and perform different duties is misplaced.

The postings and terms of the bus operators’ supplemental contracts are different than the supplemental contracts for the bus aides. Although uniformity in salaries and benefits is required for employees who are performing like assignments and duties, employees who do not have the same classifications “are not performing like assignments

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<sup>3</sup> This Grievance Board is authorized by statute to provide relief to employees for discrimination, and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. “Discrimination” is defined by statute 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). “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee” unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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

*Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007); *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

and duties and the discrimination and favoritism provisions in §18-29-2 (repealed) do not bar a school board from employing such employees on different terms.” *Flint v. Board of Educ.*, 207 W. Va. 251 (W. Va. 1999). Any different treatment between the aides and bus operators can lawfully be because of actual job responsibilities of the employees, which Grievants agreed to in writing. “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.” *Lanham v. Putnam County Bd. of Educ.*, Docket No. 2008-1691-CONS (July 14, 2009) (referencing *Flint*).

The language of the supplemental contracts is clear and unambiguous. The bus aide positions plainly stated that they were “as needed”. See exhibits. The West Virginia Public Employees Grievance Board has explained that “[t]he 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.” *Robert L. Lanham, et al. v. Putnam County Board of Education*, Docket No. 2008-1691-CONS (July 14, 2009). Thus, pursuant to the plain language of the contract, Grievants did not contract to receive the benefit of pay for snow days, holidays, sick days, or non-instructional professional days. It is not established that the terms of supplemental contracts for bus drivers and bus aides must have identical provisions of compensation and/or benefits.

Grievants at one time or another argued that the *Putnam County Schools Contract of Employment for Extra-Duty Supplemental Assignment (Service Personnel)* at issue was a form or adhesion contract. However, as the West Virginia Supreme Court provided in *State ex rel. Dunlap v. Berger*, 211 W.Va. at 557, 567 S.E.2d at 273 (citing



*American Food Management, Inc., v. Henson*, 105 Ill.App.3d 141, 145, 434 N.E.2d 59, 62-63, 61 Ill. Dec. 122, 126 (1982)) simply because a contract is a form or adhesion contract does not invalidate the contract. In order for a contract to be rendered null and void, it must be determined to be an unconscionable contract of adhesion. The *Putnam County Schools Contract[s] of Employment for Extra-Duty Supplemental Assignment (Service Personnel)* are not unconscionable. The West Virginia Supreme Court of Appeals has stated that:

‘[u]nconscionability means overall and gross imbalance, one-sidedness or lopsidedness, that justifies a court’s refusal to enforce a contract as written.” *McGinnis v. Clayton*, 173 W.Va. 102, 113, 312 S.E.2d 765, 776 (1984). ‘Unconscionability may be divided into two categories: procedural and substantive. Procedural unconscionability is concerned with the inequities and unfairness in the bargaining process. Substantive unconscionability is involved with determining unfairness in the contract itself.’ *Id.*, 173 W.Va. at 114, 312 S.E.2d at 777.

*Drake v. West Virginia Self-Storage, Inc.*, 203 W.Va. 497, 500, 509 S.E.2d 21, 24 (1998). Our Supreme Court has further explained that “[u]nconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court.’ Syllabus Point 1, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986).” Syl. Pt. 1, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002).

In the present instance, Respondent posted the positions and the terms of employment. The position was posted “as needed”. Grievants freely and voluntarily applied for the positions. The exemplified contract is clear that the employee is being paid for days the job is performed. It is impossible to conclude that agreeing to pay an employee for work actually performed and not paying them for work not performed meets

the definition of unconscionable. Employees are not forced to bid on or accept any extra supplemental positions. The contract provided that Grievants were employed “as needed.” Grievants are needed when the students are present. Grievants admitted that they had no duties or responsibilities when the students were not present. Within the fact pattern of this grievance matter, Grievants have not established discrimination or unlawful non-uniformity by a preponderance of the evidence.

Further, Grievants expressed that they believe they should be awarded “Supervisory Aide Pay” for their work on their supplemental Pre-K bus runs because they are controlling, monitoring, and escorting children. Grievants seek to be classified as Supervisory Aides who qualify for additional pay as provided in W. Va. Code §18A-5-8.

W. Va. Code §18A-5-8(a) provides that, “[w]ithin the limitations provided in this section, any aide who agrees to do so shall stand in the place of the parent or guardian and shall exercise such authority and control over students as is required of a teacher provided in section one of this article. The principal shall designate aides in the school who agree to exercise that authority on the basis of seniority as an aide and shall enumerate the instances in which the authority shall be exercised by an aide when requested by the principal, assistant principal, or professional employee to whom the aide is assigned.”

W. Va. Code §18A-4-8A(m) states, “[f]or the purpose of qualifying for additional pay as provided in §18A-5-8 of this code, an aide is considered to be exercising the authority of a supervisory aide and control over pupils if the aide is required to supervise, control, direct, monitor, escort, or render service to a child or children when not under the direct supervision of a certified professional person within the classroom, library, hallway,

lunchroom, gymnasium, school building, school grounds, or wherever supervision is required. For purposes of this section, “under the direct supervision of a certified professional person” means that certified professional person is present, with and accompanying the aide.” In the fact pattern of this matter, Grievants do not perform their supplemental contracts as Pre-K bus aides in classrooms, libraries, hallways, lunchrooms, gymnasiums, school buildings, school grounds, or wherever supervision is required that students would otherwise be under the direct supervision of a certified professional person. Bus operators are not certified professional persons, and because Grievants are not performing their supervision exclusively, they are not eligible for supervisory aide pay.

Grievants have not demonstrated that they fall within the limitations and requirements set out in W. Va. Code §18A-5-8. Grievants are not alone with these students but are with a bus driver, who has been delegated the authority and control over children while they are ‘in transit to and from school’ by W. Va. Code §18A-5-8. *Black v. Cabell County Bd. of Educ.*, Docket No. 93-06-426 (Feb. 28, 1994).

County boards of education may post and enter into supplemental contracts with professional and service employees outside of employees’ regular contract terms. W. Va. Code §18A-4-16. Bus operators and bus aides are classified differently and perform different functions. Grievants did not prove by a preponderance of the evidence that their supplemental assignments were anything other than “as needed.” Grievants have not established that Respondent was obligated to pay them if no runs occurred, or that the Board of Education was arbitrary and capricious in not paying bus aides under the same terms as bus operators. Grievants have not established discrimination or non-uniformity

by a preponderance of the evidence. Further Grievants are not entitled to supervisory aide pay for the identified supplemental contract assignments.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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) Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. W. Va. Code §18A-4-8 prescribes the employment term and class titles of service personnel and defines each class title. Class title is the name of the position or job held by a service person. Aides are separately classified from bus drivers. Specifically, aides are persons selected and trained for a teacher aide classification such as monitor aide, clerical aide, classroom aide or general aide. *Id.* at (i)(8)-(10). Comparatively, a bus operator means, "a person employed to operate school buses and other school transportation vehicles as provided by the state board." *Id.* at (i)(16).

3. County boards of education may post and enter into supplemental contracts with professional and service employees outside of employees' regular contract terms. W. Va. Code §18A-4-16.

4. Although uniformity in salaries and benefits is required for employees who are performing like assignments and duties, employees who do not have the same

classifications “are not performing like assignments and duties and the discrimination and favoritism provisions in §18-29-2 (repealed) do not bar a school board from employing such employees on different terms.” *Flint v. Board of Educ.*, 207 W. Va. 251 (W. Va. 1999).

5. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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

*Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007); *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

6. Grievants failed to demonstrate that they collectively or individually were a victim of discrimination or favoritism. It is not established by a preponderance of the evidence that Respondent discriminated against Grievants.

7. W. Va. Code §18A-4-8 prescribes the employment term and class titles of service personnel and defines each class title. Class title is the name of the position or job held by a service person. Aides are separately classified from bus drivers. Specifically, aides are persons selected and trained for a teacher aide classification such as monitor aide, clerical aide, classroom aide or general aide. *Id.* at (i)(8)-(10). Comparatively, a bus operator means, “a person employed to operate school buses and other school transportation vehicles as provided by the state board.” *Id.* at (i)(16).

8. Grievants, as bus aides, are not similarly situated to bus operators.

9. Grievants did not prove by a preponderance of the evidence that their supplemental assignments were anything other than “as needed,” or that Respondent was obligated to pay them if no bus run occurred.

10. Grievants did not prove by a preponderance of the evidence that it was arbitrary and capricious to pay bus drivers and not pay bus aides if runs are not made.

11. Grievants have not established, by a preponderance of the evidence, that they are being treated differently from a similarly situated employee.

12. Grievants have not established discrimination or unlawful non-uniformity by a preponderance of the evidence.

13. Grievants have not established by a preponderance of the evidence that they are entitled to supervisory aide pay for the instant supplemental contract assignments.

14. Grievants have not demonstrated that they fall within the limitations and requirements set out in W. Va. Code §18A-5-8.” *Black v. Cabell County Bd. of Educ.*, Docket No. 93-06-426 (Feb. 28, 1994).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.<sup>4</sup> Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

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<sup>4</sup> On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to 29A-5-4 or

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: JUNE 2, 2023**

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**Landon R. Brown**  
**Administrative Law Judge**

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any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.