

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**AUDRA STEPHENS, et al.,
Grievants,**

v.

Docket No. 2014-1662-CONS

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

DECISION

The Grievants, Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Dianna Raines, Arlene Maynard, Karen Maynard and Patty Dyer, are regularly employed as bus operators by the Respondent, Wayne County Board of Education. Each of the Grievants filed individual grievances against Respondent, Patty Dyer on 3/24/14; Augustus Porter, Jr. and Audra Stephens on 3/27/14; Walter Adkins, James R. Frasher, Paul McComas, Richard Napier and Dianna Raines on 3/28/14; and Arlene Maynard and Karen Maynard on 3/31/14. Each Grievant alleges: Grievant is performing like assignments and duties as Janie May, Kevin Roberts, and Nancy Thompson. Grievants seek uniform pay. Grievants observed violation of Code 18A-4-5b. The relief that each Grievant seeks is: "Grievant requests equal pay and backpay as far as law permits with interest."

A Level I conference was conducted jointly on May 8, 2014, concerning all of the above individual grievances and thereafter separate Level I decisions denying the relief sought by each of the Grievants. Each of the Grievants appealed to Level II on June 12, 2014. The West Virginia Public Employees Grievance Board, by Order entered on June

17, 2014, by Chief Administrative Law Judge William B. McGinley, consolidated all ten of the above grievances into one grievance. All Grievants appealed to Level III. A Level III hearing concerning the above-consolidated grievances was held on February 4, 2015, in Wayne, West Virginia, before Administrative Law Judge (hereinafter "ALJ") Susan L. Basile. WVSSPA counsel, John E. Roush, Esq., represented the Grievants and David Lycan, Esq., represented Respondent. Grievants Arlene Maynard and Karen Maynard did not appear for said hearing and Respondent's counsel moved for dismissal of their grievances for failure to appear and pursue their claims. The decision on said motion was reserved by ALJ Basile until after the conclusion of the Level III hearing and submission of briefs by counsel. At the conclusion of the hearing, the parties agreed to submit post-hearing arguments, the last of which was received on March 13, 2015, upon which date this matter became mature for decision.

Synopsis

Grievants are regularly employed as bus operators by the Respondent, Wayne County Board of Education ("the Board").¹ Each Grievant had an individual extracurricular daytime bus driving assignment. Grievants allege Respondent violated the uniformity in pay provisions at W. Va. Code 18A-4-5b when Respondent elected to pay select extracurricular bus operators, who performed numerous shuttle runs, more

¹ Respondent moved to dismiss Grievant Dianna Raines' grievance for failure to timely file. After the Level III hearing, and post-hearing briefs, her grievance was dismissed for failure to timely file or to offer an excuse for same.

than Grievants. Select Grievants² appeared at the Level III hearing and testified, describing their individual extracurricular daytime bus operator assignments.

Grievants further assert that Respondent violated its Memorandum of Agreement/contract, in particular its "minimum" pay requirements, when it paid the extracurricular "shuttle run" bus operators in excess of the prescribed minimum of twenty dollars, based in part on the number of hours required to perform the "shuttle run" bus assignment, while continuing to pay Grievants the minimum allowable amount. Grievants did not prove that Respondent violated the terms of its contractual agreement with Grievant bus operators when it continued to pay them the "minimum" required amount of twenty dollars per day or that the contract prohibited Respondent from paying the other bus operators forty dollars. The additional pay was based, in large part, upon the extra duties of the "shuttle run" bus operators, and the accompanying time required to perform their assignments. Grievants failed to prove that the disparity in pay between themselves and the "shuttle run bus" operators violated the uniformity provisions of W. Va. Code 18A-4-5b. Grievants did not demonstrate that they had been performing duties and assignments "like" those of the identified bus drivers who were assigned numerous, unscheduled "shuttle runs."

Accordingly this grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

² Arlene Maynard and Karen Maynard failed to appear, but sufficient evidence was introduced to allow a decision and their grievances were denied upon the same basis as the other grievances.

Findings of Fact

1. The Grievants, Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Dianna Raines, Arlene Maynard, Karen Maynard and Patty Dyer, are regularly employed as bus operators by the Respondent, Wayne County Board of Education ("the Board").

2. Each of the Grievants had an individual extracurricular daytime bus driving assignment for Respondent. The eight Grievants who appeared at the Level III hearing all testified, describing their individual extracurricular daytime bus driving assignment.

3. Grievant Walter Adkins' extracurricular assignment for the 2013-2014 school year required him to transport an aide, so that the aide was available to assist a special needs student who was a passenger on Mr. Adkins' regular morning and afternoon bus run. Mr. Adkins picked up the aide at her residence in the morning along the direct route from his home to his first "pick up" of a student. The aide then accompanied the special needs student to the end of Mr. Adkins's regular bus run at Tolsia High School where the student exited the bus. Mr. Adkins then transported the aide from Tolsia High School back to Crum Middle School, a trip of approximately 10 minutes, where he dropped off the aide and then continued on in the same direction to his home in the Crum area. Mr. Adkins was not required to remain on site at any location during the school day. In the afternoon, Mr. Adkins left his residence and picked up the same aide at approximately 2:30 p.m. each school day and transported the aide from Crum Middle School to Tolsia High School, which again took about 10 minutes, and at Tolsia High School, Mr. Adkins began his regular afternoon bus run. After he dropped off all of his student passengers, he dropped off the aide at her residence

directly along his regular return route to his home. The total amount of time it took for Mr. Adkins to actually perform his extracurricular assignment was approximately 25 minutes and Mr. Adkins was compensated twenty dollars for the performance of each such daytime extracurricular assignment. Mr. Adkins resigned this assignment before the beginning of the 2014-2015 school year.

4. Grievant Patty Dyer's extracurricular daytime assignment, that she performed/performs for the 2013-2014 and 2014-2015 school years, requires her to transport Wayne High School students in the school's critical skills program to work sites in the Wayne area, where the students shadow and observe professionals in the workplace. Ms. Dyer stated that her extracurricular assignment begins at Wayne High School at 7:45 a.m., when she picks up eighteen to twenty-one WHS students and drops the students off in the town of Wayne, at either Wayne Rehabilitation Center, Johnson-Tiller Funeral Home, or Tri-State Chiropractor. She completes the first part of this assignment at approximately 8:25 to 8:30 a.m. and then begins picking up these same students at 10:50 a.m. and returns the students to Wayne High School by 11:15 a.m. Ms. Dyer is not required to remain on site during the period of time that the student passengers are participating in their work shadow assignments. The amount of time it takes Ms. Dyer to actually perform her extracurricular daytime assignment is approximately 70 minutes. Ms. Dyer has two hours and 20 minutes between her assigned morning drop-off and pickup times.

5. Grievant James Frasher's extracurricular daytime assignment for the 2013-2014 and 2014-2015 school years, was/is to transport students in the critical needs program at Tolsia High School ("THS") to and from work sites located in Louisa,

Kentucky. Mr. Frasher picks up sixteen students at Tolsia High School at 7:55 to 8:00 a.m. when the program is in session, and transports the students to Louisa, Kentucky, to a hospital and a nearby rehabilitation center. All students are dropped off at one of these two locations by 8:20 a.m. Mr. Frasher is not required to remain on site after dropping off these students and is free until 10:55 a.m., when he picks up these students and returns the students to Tolsia High School by 11:15 a.m. Mr. Frasher acknowledged on cross-examination that his residence is located just across the river from Louisa, Kentucky, in Fort Gay, West Virginia. The total amount of time it requires Mr. Frasher to actually perform his extracurricular assignment is approximately forty to forty-five minutes. Mr. Frasher has, approximately, two hours and 25 minutes between his assigned morning drop-off and pickup times.

6. Grievant Paul McComas stated that his extracurricular daytime assignment, upon completion of his regular morning bus run assignment at East Lynn Elementary at 7:00 a.m., requires him to pick up an aide at East Lynn Elementary at about 7:10 to 7:15 and then pick up a special needs student at the student's residence and transport the two of them to Wayne High School by 7:35 to 7:40 a.m. He later returns to Wayne High School and picks up the aide and student at approximately 3:05 p.m. and transports the student to his residence and then the aide to East Lynn Elementary, by 3:25 or so, where he begins his regular afternoon bus run at 3:30 p.m. The amount of time it takes Mr. McComas to actually perform his extracurricular assignment is approximately forty to fifty minutes. Mr. McComas is not required to remain on site during the school day and actually returns to his residence in the East

Lynn area. He has approximately 7 1/2 hours between his morning and afternoon runs for his extracurricular assignment.

7. Grievant Richard Napier stated that his extracurricular daytime assignment, during the first semester of each school year only, requires him to pick up approximately thirty students at Crum Middle School at 2:00 p.m. and transport them to Tolsia High School, where his assignment ends at 2:30 p.m. There is no return trip to this assignment and the total amount of time required to perform this assignment is approximately thirty minutes.

8. Grievant Augustus Porter stated that his extracurricular daytime assignment requires him to transport Pre-K students from Crum Elementary to the Crum Pre-K Center up the street. Mr. Porter's regular morning bus run ends at Crum Middle School, which is adjacent to Crum Elementary, at 7:35 p.m., and he remains in the same parking spot and Pre-K students board his bus at 7:42 a.m. and he transports them about three-tenths of a mile and completes this assignment by 7:50 a.m. In the time between his morning and afternoon extracurricular runs, Mr. Porter leaves, parks his bus and has other employment at Crum Public Service District during the day, until he returns at 2:50 p.m. for the remaining part of his extracurricular assignment, which consists of picking up the Pre-K students at the Pre-K center and returning them to Crum Elementary where he drops them off at 3:00 p.m. As a courtesy that is not required by his extracurricular assignment, Mr. Porter allows some of the Pre-K students to remain on his bus, instead of going back to Crum Elementary with other Pre-K students, until 3:18 p.m. when they are picked up by their parents directly from his bus. Mr. Porter remains at this same drop off location until he begins his regular

afternoon run at 3:30 p.m. The total amount of time it takes Mr. Porter to actually perform his extracurricular daytime assignment is approximately twenty minutes. He has approximately 7 1/2 hours between his morning and afternoon runs for his extracurricular assignment.

9. Grievant Dianna Raines, at the time she filed her grievance on March 28, 2014, no longer had an extracurricular daytime assignment, having resigned it on February 12, 2014. Ms. Raines' extracurricular assignment required her to pick up two students at Wayne High School at 8:15 a.m. and transport them to their shadow work site at Wayne Pre-K Center, dropping them off by 8:30 a.m. Ms. Raines then picked up the students at 10:30 a.m. and returned the two students to Wayne High School by 10:40 to 10:45 a.m. Ms. Raines was not required to remain on site while the students were at Wayne Pre-K and liked to stop by Respondent's bus garage located a couple of minutes from the Pre-K site to eat and "hang out" there until she was required pick up students at 10:30 a.m. The total amount of time for Ms. Raines to actually perform her extracurricular assignment was approximately thirty minutes. Ms. Raines had two hours between the first and second "runs" of her extracurricular assignment.

10. Grievant Audra Stephens stated that her extracurricular daytime assignment required her to pick up JROTC students at Spring Valley High School (sometimes hereinafter "SVHS") at 3:20 p.m. and transport these students across the main highway to Spring Valley High School's Vocational/Technical Center, with no return trip required. The total amount of time for Ms. Stephens to perform this extracurricular assignment is approximately ten minutes.

11. Grievant Karen Maynard failed to appear for the Level III hearing or contact her counsel or the Grievance Board to provide a reason for her absence. Ms. Maynard's former extracurricular daytime assignment, which she no longer performs, consisted of picking up an aide at Wayne Pre-K School at 10:00 a.m., picking up two special needs students at their residences and then transporting these three individuals back to Wayne Pre-K School by 10:50 a.m. This assignment had no return trip and took about 50 minutes.

12. Grievant Arlene Maynard failed to appear for the Level III hearing or contact her counsel or the Grievance Board to provide a reason for her absence. Ms. Maynard's former extracurricular daytime assignment, which she no longer performs, was the same extracurricular assignment as performed by Dianna Raines before Ms. Raines resigned this assignment on February 12, 2014. Ms. Maynard picked up two Wayne High School students at Wayne High School at 8:30 a.m. and transported the two students to their work shadow site at Wayne Pre-K School and dropped them off at about 8:35 a.m. Ms. Maynard then returned and picked up the two Wayne High students at 10:35 a.m., and returned them to Wayne High School by 10:40 to 10:45 a.m. Ms. Maynard was not required to remain on site during the students' work shadow assignment, and her residence was in the immediate vicinity of the Wayne Pre-K School location. The total amount of time it actually took for Ms. Maynard to perform this assignment was approximately 20 minutes, with approximately 2 hours between her assigned trips.

13. The "Agreement Between Wayne County, West Virginia Board of Education and West Virginia Education Support Personnel, West Virginia Education

Association, West Virginia School Service Personnel Association,” subtitled “Memorandum of Agreement” (hereinafter sometimes the “Agreement”) was entered into by Respondent Board and WVEA Support Personnel, WVEA and WVSSPA on June 23 1997. Subsection “K” of the “Extra Trips” section of the Memorandum of Agreement, at page six, states in part: “The School Board shall pay a minimum of twenty dollars per run for all extracurricular runs, including vo-tech.” (Joint Exhibit No. 1.)

14. The only bus operators within the Respondent’s employment who receive forty dollars per daytime extracurricular assignment are the bus operators who perform assignments at SVHS. These bus operators are required to make “shuttle runs” between the school’s two campuses, which are separated by a busy public highway. Prior to the 2013-2014 school year, these bus operators had been receiving twenty dollars for each such assignment performed. However, at the beginning of the 2013-2014 school year, Mr. Kevin Roberts, Ms. Janie May, and Ms. Nancy Thompson (three of the four bus operators assigned to perform the SVHS shuttle extracurricular assignments) filed separate grievances, alleging that each of their daytime extracurricular assignments had increased dramatically through the years to the point where their present assignments/duties no longer resembled the assignments as originally posted years before, when they bid upon and were awarded the assignments. These bus operators contended they were performing extra duties without any additional compensation. As a result of the Level I conference held concerning these three grievances, the parties thereafter reached an agreement whereby the Respondent

agreed to increase the pay for all the shuttle bus extracurricular runs assignments at SVHS to forty dollars per performance.

15. Prior to the beginning of the 2013-2014 school year, all of Respondent's bus operators had been paid the contractual minimum of twenty dollars for each daytime extracurricular assignment performed, with the exception of bus drivers performing extracurricular tutoring bus runs, who are paid twenty-five dollars per assignment performed. (Level III testimony - Transportation Department Supervisor David Thompson).

16. The extracurricular assignment duties of the shuttle bus operators at SVHS had increased dramatically through the years. Supervisor Thompson stated that the "shuttle run" assignments were first implemented when SVHS opened, when the main requirement of the assignment was to transport students back and forth between the High School and the vocational center between classes. At the time, SVHS had ninety minute, "block period" classes that only required shuttles a couple of times during any extracurricular assignment period.

17. Thereafter, class periods were shortened to forty-five minutes. Therefore, the SVHS shuttle drivers are now required to make an increased number of shuttle runs between class periods. Additionally, during their extracurricular assignments, these shuttle drivers are now required to transport individual students across the highway for various other reasons, such as: to go to the nurses' station on the main campus; meet their parents/custodians who are picking them up for doctors'/other appointments; retrieve books or go to the office for disciplinary purposes. SVHS shuttle drivers are also sometimes required to drive groups of students between the campuses for photos,

blood drives, Special Olympics, plays, pep rallies, etc. These many additional trips/new duties were not mentioned in the original extracurricular job postings for SVHS “shuttle run” assignments. The bus operators performing these “shuttle run” assignments at SVHS are required to be present to perform these duties during the entire morning, from 7:35 a.m. to 11:30 a.m., or entire afternoon, from 11:30 a.m. to 1:45 p.m.

18. These extracurricular shuttle bus run assignments are peculiar to SVHS and there is no comparable extracurricular assignment in other Wayne County schools.

19. Supervisor Thompson also stated that two other bus operators perform shuttle runs between the two campuses at SVHS in the afternoon, as part of their regular bus run assignments that then extend on after SVHS dismisses, into the performance of regular afternoon bus route runs, and that these two particular bus operators are paid for full days of work because their work hours exceed half a day. (Level III testimony - Transportation Department Supervisor David Thompson).

20. SVHS Assistant Principal Kellerman Swann testified that during the 2013-2014 and the present 2014-2015 school year, SVHS has eight forty-five minute class periods per day. He stated that some of the classes conducted at the vocational/technical campus are considered "block classes," wherein students attend two consecutive class periods in the same classroom.

21. According to Mr. Kellerman's calculations, based upon school records for the 2014-2015 school year, the following number of students are transported from the main campus to the vocational/technology campus prior for each class period: 1st period—161 students; 2nd period—170 students; 3rd period—151 students; 4th period—162 students; 5th period—191 students; 6th period—197 students; 7th period—46

students; and 8th period—212 students, comprising a total of 1,290 students who are transported each school day from the main campus to the vocational/technology campus. The above figures do not include the number of students transported back from the vocational/technology campus to the main campus between each class period, or the extra runs performed for various other reasons.

22. All bus operators regularly employed by Respondent are paid a full day's salary ("regular bus drivers") for their individual morning and afternoon regular "run." They are not required to perform any other duties during the work day; their time is free, except they must be available upon reasonable notice to return to pick up students early, if necessary, e.g., in the event of an unexpected early dismissal.

23. Bus drivers awarded/performing daytime extracurricular assignments that involve dropping off students at a site and picking students up later and returning them to their respective schools are not required to remain at the drop off sites until the pickup time.

Discussion

Contract Violation

Grievants claim that Respondent violated the terms of the Memorandum of Agreement entered into by Respondent and various bus operators' unions in 1997. Under said Agreement, according to Grievants, all of the bus operators were to be paid a uniform amount of twenty dollars, per each daytime extracurricular assignment performed. Grievants assert that Respondent violated its Memorandum of Agreement/contract, in particular its "minimum" pay requirements, when it paid the extracurricular "shuttle run" bus operators in excess of the prescribed minimum of

twenty dollars, based in part on the number of hours required to perform the "shuttle run" bus assignment. Grievant contends that the memorandum of agreement between Respondent and its bus operators "provides a single, flat sum for all extracurricular assignments, with no mention of a graduated scale of compensation based upon the number of hours per day that the assignment requires." Therefore, it would seem that Grievants are contending that they are also entitled to payment of forty dollars, to continue to assure this the flat, uniform rate among all of the drivers.³

In response to this claim, Respondent maintains that Grievants' interpretation of the Agreement is faulty because Subsection "K," page six, states that "the School Board shall pay a *minimum* of twenty dollars per run for all extracurricular runs, including vo-tech." (*Emphasis added.*) Respondent contends that this language establishes a minimum floor for pay, but does not prevent Respondent from granting additional pay beyond twenty dollars. The word "minimum" in this phrase requires no construction. Its meaning is plain. Therefore, the phrase "shall pay a minimum" clearly mandates pay of at least twenty dollars per daily extracurricular assignment, but does not prevent payment beyond that amount. Respondent is paying Grievants the uniformly agreed minimum amount under the Memorandum Agreement (twenty dollars) for their extracurricular assignments and Respondent is not prohibited from electing to increase the SVHS "shuttle run" bus operators' compensation to forty dollars while continuing to pay Grievants twenty dollars. This raise was based upon their significantly

³ Curiously, Grievants do not make this affirmative statement in their post-hearing arguments, but Grievants' request for relief supports an assertion that they are entitled to the twenty dollars increment in pay, i.e., forty dollars for each assignment performed.

changed/increased extracurricular assignments.⁴ Therefore, Respondent was not in violation of the terms of the Memorandum of Agreement.

Violation of Uniformity in Pay Provision at W. Va. Code 18A-4-5b

Grievant further alleges that Respondent violated the uniformity in pay provision at W. Va. Code 18A-4-5b, which states:

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.

A grievant seeking to establish a violation of W. Va. Code 18A-4-5b must establish each essential element of his or her claim by a preponderance of the evidence. *Fowler v. Mason Co. Bd. of Educ.*, Docket No. 94-26-037 (Oct. 6, 1994). The West Virginia Supreme Court of Appeals has determined it is not necessary for employees to be performing identical duties in order to meet the "like assignments and duties" requirement for uniform pay. When the assignments and duties are "substantially similar," the uniformity requirement applies. *Weimer-Godwin v. Board of Education*, 369 S.E.2d 726 (W. Va. 1988). Also see, *Mersing et al., v. Preston County Bd. of Educ.*, Docket No. 89-39-513 (July 12, 1991); *Fowler v. Mason Co. Bd. of Educ.*, Docket No.

⁴ Respondent argued that, with this assertion, Grievants are attempting to introduce a new, additional grievance at Level III, in violation of W. Va. Code § 6C-2-4. However, the original Statements of Grievance are broadly written, so as to properly encompass this claim.

94-26-037 (Oct. 6, 1994). Each Grievant filed a separate grievance claiming violation of uniformity of pay for his/her extracurricular bus operator assignment because the extracurricular "shuttle" bus operators at SVHS are being compensated at forty dollars per assignment, whereas they are being compensated at twenty dollars. Given that this issue was common to all the grievances, the Grievance Board properly consolidated them. However, it is necessary for the Grievance Board to examine the facts relating to the assignments and duties of each Grievant's extracurricular assignments to determine whether they are sufficiently "like" the "shuttle bus" operators' assignments to require uniformity of pay between Grievants and the shuttle bus operators.

Grievants say that part of Respondent's admitted rationale for paying the shuttle bus drivers an additional twenty dollars is based upon the amount of time they work, as opposed to the amount of time Grievants work. Grievants contend, however, that Respondent has been inconsistent in awarding the forty dollar daily flat rate to all bus operators with "long" assignments. Grievants' counsel asserts that Grievants Dyer, Frazier, Raines, and Arlene Maynard performed assignments that "consumed the morning hours of the school day," yet the forty dollars rate was not extended to any of them.

Respondent replies that to fairly compare Grievants' extracurricular assignments with the "shuttle" run assignments at SVHS, the Grievance Board must not consider the amount of time it takes each Grievant to drive his/her bus from the end of his/her regular morning run to the beginning of his/her extracurricular run. In support of this contention, Respondent points out that Grievants are paid their regular salaries for the "regular" runs they make during the workday, and are performing their extracurricular

assignments for additional compensation. The undersigned is persuaded by this argument because if Grievants did not have these extracurricular assignments, they would be required to drive the bus back to the garage or other assigned area, which would take some additional time, which is otherwise taken up by the eventual drive to the extracurricular assignment.

Respondent also asserts that the time between Grievants' pre-scheduled "drop offs" and "pick ups" should not be taken into account in comparing the extracurricular runs because Grievants are not required to remain at the drop off or pickup sites, or anywhere else in particular, between runs. Rather, they are free to do as they like. In fact, one of the Grievants is employed elsewhere during the day between his runs, another goes home, another has breakfast and socializes with other bus drivers, etc. Though one of the Grievants believed he needed to remain on site, the facts did not demonstrate that Respondent required or instructed him to do so.

Grievants attempted to demonstrate through the testimony of Virgil Leroy Crockett, a bus operator whose regular workday duties included shuttle runs at the SVHS beginning at 11:30 a.m. (the start of his normal workday) until school lets out at 3:10 p.m. when he made a regular afternoon bus run, that bus operators did not have to remain on site at SVHS during the entire period of their assignment. Mr. Crockett stated on direct examination that he would sometimes leave the work site during his assignment and "go get a hamburger" or "lock up his bus doors" and go somewhere else during his assignment. On cross-examination however, Mr. Crockett acknowledged that his duties in this assignment, besides making scheduled transports in between class periods, also included being available at all times during the assignment period to

make unscheduled transports of students back and forth between the two campuses when the need arose. He also acknowledged that he had, some time ago, “bumped” into another regular bus run that only required him to make a basic morning and afternoon regular bus run and that in bumping into this assignment, he was free for the remainder of the workday, (which was actually a lot easier job than his regularly assigned position that included remaining on site at SVHS from 11:30 a.m. through the remainder of each school day and making scheduled transports, as well as frequent unscheduled transports, of students between the school’s campuses). Mr. Crockett’s testimony indicates that his unilateral actions in leaving the SVHS work site were not “in line” with the required duties of his regular bus driving position. As such, the undersigned finds that Mr. Crockett’s performance of his shuttle run duties at SVHS was atypical of the other drivers in that position and his personal decision to leave school grounds and/or stop making runs between the campuses during his assignment was apparently unsanctioned by Respondent. Despite Grievants’ insistence otherwise, an analysis of the facts demonstrates that none of the Grievants are required to work the approximate 3 1/2 or 4 hours that the shuttle bus drivers on the morning or afternoon SVHS “shuttle runs” are required to work. The undersigned finds that Respondent correctly distinguished between the duties of the “shuttle bus” operators and Grievants’ extracurricular assignments by calculating the time they were required to be at the worksite and/or making runs.

In addition, Respondent asserts it is justified in paying the SVHS “shuttle run” bus operators more than Grievants because their duties/assignments, as fully described above, have increased dramatically through the years, such that they are no longer

similar to the duties/assignments originally required, or to the Grievants' present extracurricular assignments. The undersigned finds that Respondent correctly maintains the change from block periods to 45 minute periods at SVHS has required the "shuttle" drivers to make more frequent runs than they originally made. In addition, Respondent now requires the SVHS, "shuttle" bus operators to be available at all times during the school day for these additional shuttle trips to ensure the safety of SVHS students who would otherwise have to cross a busy highway, which would surely be hazardous. Therefore, in addition to the usual transport of students between the two campuses between each class period, the shuttle drivers must now perform other related assignments on a daily basis, such as transporting students back to the main campus to go to nurses' station for illness or injury, sit for school photos, retrieve forgotten books, attend pep rallies/other school related events, etc. It is also noteworthy that, including all of the trips made by the "shuttle bus" operators during the day at SVHS, they transport hundreds of students in total. Shuttling large numbers of students, as compared to a few, arguably requires more diligence by the driver, and certainly more patience. The extracurricular "shuttle" assignment did not originally encompass these trips. In comparison, Grievants presently, and consistently throughout the past, have had only a few runs/pick-ups and drop-offs in connection with their extracurricular assignments, which are routinized and prescheduled. As such, Grievants' runs were not significantly increased over time and therefore are unlike the present assignments of the "shuttle bus" operators. Therefore, Grievants failed to prove that they were performing "like duties and assignments" to those of the SVHS "shuttle bus" operators.

Timeliness of Grievant Dianna Raines' Grievance

Respondent, through its counsel, raised the affirmative defense of timeliness during the Level I conference with regard to the grievance filed by Dianna Raines, since she had not performed an extracurricular assignment from the date of her resignation of this assignment, on February 12, 2014, until she filed her grievance on March 28, 2014, and the bus operators performing the shuttle bus assignments at SVHS reached an agreement with the Respondent regarding a compensation increase, on February 6, 2014. There was insufficient evidence introduced to provide an excuse for failure to timely file. Therefore, Ms. Raines' grievance must be dismissed. However, even assuming that Ms. Raines had provided a sufficient excuse for failure to timely file her grievance, the facts do not demonstrate that her extracurricular bus operator's assignment was sufficiently "like" the "shuttle bus" driver's assignment and her claim would have been denied.

Failure to Appear by Karen Maynard and Arlene Maynard

Two of the Grievants, Karen Maynard and Arlene Maynard, although represented by WVSSPA legal counsel and listed as witnesses by their counsel, as well as Respondent's counsel, failed to appear at the Level III hearing. Therefore, Respondent made a Motion to Dismiss their claims at the outset of that hearing. The undersigned elected to hold the Motion to Dismiss in abeyance until after the Level III hearing was concluded and counsel for the parties submitted briefs. Under the W. Va. Code of State Rules, at 156 C.S.R. 1 § 6.16, it was unnecessary for Grievants Karen and Arlene Maynard to appear, given that their counsel appeared at the hearing. In addition, Grievants' counsel correctly asserts that W. Va. Code §6C-2-3(e)(2) does not require a

grievant to appear at a Level III hearing in order to prosecute the grievance to adjudication on the merits and indicates that only one of a group of similarly situated employees need to attend a hearing or conference. In addition, the undersigned found that sufficient evidence was introduced at the hearing concerning the duties and assignments of these Grievants, as compared with the "shuttle bus" operators, to permit determination that their duties were not sufficiently "like" the SVHS "shuttle bus" operators to require Respondent to pay Grievants uniformly with SVHS "shuttle bus" operators.

Conclusions of Law

1. W. Va. Code 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay. *Fowler v. Mason Co. Bd. of Educ.*, Docket No. 94-26-037 (Oct. 6, 1994); *See, Harper v. Pendleton Co. Bd. of Educ.*, Docket No. 89-36-708 (Aug. 21, 1990).⁵

2. A grievant seeking to establish a violation of W. Va. Code 18A-4-5b must establish each essential element of his or her claim by a preponderance of the evidence. *Fowler v. Mason Co. Bd. of Educ.*, Docket No. 94-26-037 (Oct. 6, 1994).

3. The West Virginia Supreme Court of Appeals has determined it is not necessary for employees to be performing identical duties in order to meet the "like assignments and duties" requirement for uniform pay. When the assignments and duties are "substantially similar," the uniformity requirement applies. *Weimer-Godwin v. Board of Education*, 369 S.E.2d 726 (W. Va. 1988). *Also see, Mersing et al., v. Preston*

⁵ Conclusions of Law Nos. 4-12 relate to the remaining Grievants, Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Arlene Maynard, Karen Maynard and Patty Dyer.

County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); *Fowler v. Mason Co. Bd. of Educ.*, Docket No. 94-26-037 (Oct. 6, 1994). W. Va. Code 18A-4-5 requires uniformity of compensation for all persons performing like assignments and duties. *Mersing et al., v. Preston County Bd. of Educ.*, Docket No. 89-39-513 (July 12, 1991); *Deal v. Mason Co. Bd. of Educ.*, Docket No. 96-26-106 (Aug. 30, 1996).

4. Grievants Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Arlene Maynard, Karen Maynard and Patty Dyer, failed to demonstrate that they perform assignments and duties sufficiently “like” those performed by specific service personnel employed by Respondent Board of Education to allow them to be paid in uniformity with the specific service personality concerned.

5. Respondent has a contractual agreement with its bus operators to pay a “minimum” of twenty dollars per extracurricular day bus run assignment.

6. Grievants Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Arlene Maynard, Karen Maynard and Patty Dyer, did not prove that Respondent violated the terms of its contractual agreement with Grievant bus operators when Respondent paid other bus operator/service over the minimum required amount, while still compensating Grievants at the minimum allowable amount.

7. Grievants Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Arlene Maynard, Karen Maynard and Patty Dyer failed to prove that Respondent was prohibited by the terms of the aforesaid

contract from paying any of its employees over the "minimum" amount established therein.

8. A grievant who fails to appear in person at the grievant's Level III hearing and does not provide testimony addressing the grievant's specific duties as related to the grievance may be found by an administrative law judge to have failed to offer evidence sufficient to prove the grievant's claim. *See, Hill, et al., v. Barbour Co. Bd. of Educ.*, Docket No. 2009-1503-CONS (March 10, 2010).

9. Grievants Arlene Maynard and Karen Maynard failed to appear at the hearing, but satisfactory evidence was introduced to allow a determination that their extracurricular daytime bus assignments were not sufficiently "like" the bus drivers who were assigned the "shuttle runs" and, therefore, they were not entitled to uniform pay with the "shuttle run" drivers either.

10. W. Va. Code 6C-2-4(a)(1) provides that: "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 with the board."

11. A party asserting that a grievance was not timely filed must prove this affirmative defense by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. and State Employees Grievance Bd., 156 C.S.R. 1 § 4.21; *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 26, 1998). This affirmative defense

explicitly requires two things: 1) an assertion of the defense; and 2) proof of the issue. *Alexander v. Kanawha County Board of Education*, Docket No. 01-20-377 (Sept. 12, 2001). Any assertion by the employer that the grievance was untimely must be made by the employer on behalf of the employer at or before the Level II hearing. W. Va. Code § 18-29-3(a).

12. Respondent moved to dismiss Grievant Dianna Raines' grievance for failure to timely file.

13. Respondent proved that Grievant Dianna Raines failed to timely file her grievance and did not provide an excuse for said failure.

Accordingly, the grievances of Audra Stephens, Augustus Porter, Jr., Walter Adkins, James R. Frasher, Paul McComas, Richard Napier, Arlene Maynard, Karen Maynard and Patty Dyer are **DENIED** and the grievance of Dianna Raines is hereby **DISMISSED** for failure to timely file pursuant to W. Va. Code § 6C-2-4(a)(1).

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The 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: April 17, 2015

Susan L. Basile
Administrative Law Judge