

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DAVID SIMANSKI,**

**Grievant,**

**v.**

**Docket No. 2019-0572-HamED**

**HAMPSHIRE COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, David Simanski, is employed by Respondent, Hampshire County Board of Education. On November 5, 2018, Grievant filed this grievance against Respondent stating as follows:

“West Virginia Code, West Virginia State Board of Education, and Hampshire County Schools’ policies have been violated via a continuing practice in regard to Mr. David Simanski, Director of Special Education. Specifically, Mr. Simanski is being treated unfairly in regard to the supplemental pay inequality among central office supervisors in Hampshire County. The Transportation Supervisor, Mr. Calvin Davis, is being financially compensated in a manner that is significantly different than Mr. Simanski. This lack of uniformity in regard to salary supplementation has resulted in the disparate treatment of Mr. Simanski. West Virginia Code § 18A-4-5a clearly states, in part, ‘Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county.’”

Specific laws and policies which Hampshire County Schools is in violation of include:

- 1) State Board Policy 5902: Employee Code of Conduct;
- 2) Hampshire County Schools Policy 3120 - Employment of Professional Personnel and 4120 – Employment of Service Personnel
- 3) West Virginia Code § 18A-4-5a – County salary supplements for teachers.

For relief, Grievant “requests that Hampshire County Schools be directed to fairly and uniformly provide supplemental compensation for county directors and supervisors. Furthermore, Mr. Simanski requests any and all compensation due him, including back pay, be paid to him forthwith.”

A level one conference was held on November 13, 2018. A level one decision was rendered on December 19, 2018, denying the grievance and deeming it untimely. Grievant appealed to level two on January 14, 2019, and a mediation session was held on May 7, 2019. Grievant appealed to level three of the grievance process on July 25, 2019. On October 1, 2019, a level three hearing was held before the undersigned at the Grievance Board’s Westover, West Virginia office. Grievant appeared in person and by representative, Don Bucher, West Virginia Professional Educators. Respondent appeared by its Superintendent, Jeffrey Pancione, and by counsel, Kimberly Croyle, Bowles Rice, LLP. This matter became mature for decision on November 8, 2019. The parties submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL). Respondent contends in its PFFCL that the grievance was untimely filed.

### **Synopsis**

Respondent employs Grievant in a professional position as Central Office Administrator: Director of Special Education/Testing Coordinator. Respondent employs Calvin Davis in a service position as Supervisor of Transportation. Grievant receives significantly less in supplemental pay than Mr. Davis. Grievant contends that State code requires uniformity in supplemental pay between employees performing “like assignments and duties.” Respondent counters that uniformity requirements do not apply to a pay comparison between a professional position and a service position.

Nevertheless, Respondent maintains that even if pay uniformity applies, Grievant and Mr. Davis do not perform the requisite “like assignments and duties.” Grievant did not prove that uniformity requirements apply to a supplemental pay comparison between he and Mr. Davis or that they performed “like assignments and duties.” Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant, a professional educator, is employed by Hampshire County Board of Education under a 240-day contract as the “Central Office Administrator: Director of Special Education/Testing Coordinator.” (Grievant’s testimony & Grievant’s Exhibit 3)
2. Grievant receives a county funded salary supplement of \$5,500 per year in addition to his base salary. (Grievant’s Exhibit 1)
3. Calvin Davis is employed as the “Supervisor of Transportation” (aka Transportation Supervisor) under a 240-day contract. (Grievant’s Exhibit 5)
4. Mr. Davis receives a county funded salary supplement of \$24,060 per year in addition to his base salary. (Grievant’s Exhibit 1)
5. Grievant and Mr. Davis have been receiving their current salary supplements since Grievant was hired in his current position in 2016.
6. Grievant became aware of the disparity in their supplemental pay in early 2018 when he saw the supplemental pay scale. (Grievant’s testimony)
7. Grievant’s Central Office Director position is a professional position. (Grievant’s Exhibit 3)

8. Mr. Davis' Transportation Supervisor position is a service position.  
(Grievant's Exhibit 5)

9. The "Central Office Administrator" job description provides the following definition from the State code: "a superintendent, associate superintendent, assistant superintendent and other professional educators (sic) who are charged with administering and supervising the whole or some assigned part of the total program of the countywide school system." (Grievant's Exhibit 3)

10. The "Supervisor of Transportation" job description provides the following definition from the State code: "a qualified person employed to direct school transportation activities properly and safely, and to supervise the maintenance and repair of vehicles, buses, and other mechanical and mobile equipment used by the county school system." (Grievant's Exhibit 5)

11. Grievant's job responsibilities include, but are not limited to, providing direct supervision of the County Special Education Program; facilitating Annual County Plan for State and Federal Entitlement Funds for the Education of Students with Exceptionalities; monitoring all aspects of special education mandated by IDEA, Policy 2419, Section 504, and county policies; conducting annual needs assessments; facilitating and monitoring the special education budget; developing interagency agreements; serving as County Test Coordinator; attending Individualized Education Program (IEP) meetings; facilitating and monitoring IEP documents; facilitating extended school year services, WVEIS state reporting, Medicaid billing, State Alternative Assessments Process, and Homebound Services; working with Special Education staff and aides and providing training; coordinating training for the administration of all assessments related to WV Measure of

Academic Progress; serving as liaison between county educators and the Office of Student Services and Assessment; maintaining inventory of all statewide assessment material stored in county; Title 9 Coordinator; and Title 3 Coordinator. (Grievant's testimony & Grievant's Exhibit 3)

12. Mr. Davis' job responsibilities include, but are not limited to, instructing and certifying prospective bus operators under guidelines as prescribed by the WVDE and Hampshire County Board of Education policies; arranging for certification of school bus operators, school bus trainers, and equipment; managing the use of substitute bus operators and mechanics; verifying information submitted by bus operators, mechanics, and office staff members on attendance and time sheets; completing field trip assignments; conducting route observations to check bus operator compliance with State laws and regulations; observing vehicle operations, operators' schedules, road and traffic conditions, and safety practices; investigating and responding to requests for additional bus stops and bus stop changes; coordinating annual transportation training for all bus operators, mechanics, and office staff members; making route changes as necessary in the event of adverse road conditions or emergencies; investigating hazardous road conditions and reporting to the Superintendent; acting as primary radio dispatch communicator; driving school bus as necessary in emergency situations; preparing all required reports and maintaining all appropriate records; ascertaining that all buses are inspected twice a year by the Department of Education Safety Inspector and that all buses are kept in safe running conditions; resolving parent and employee complaints and requests; authorizing purchases in the transportation department; investigating accidents; taking appropriate corrective action and filing reports; monitoring enrollment at schools in

order to realign boundaries for bus routes; and performing other duties and responsibilities as assigned by the Superintendent. (Grievant's Exhibit 5)

13. Grievant's typical workday is from 8:00 a.m. to 4:00 p.m., though he sometimes works later to attend IEP meetings. (Grievant's testimony)

14. Mr. Davis' typical workday starts at 4:30 a.m. From 4:30 a.m. to 6:00 a.m., Mr. Davis ensures that the 52 bus routes are properly staffed and calls substitute drivers as needed. If Mr. Davis is unable to get a substitute, he drives the run himself. From 6:00 a.m. to 4:30 p.m., Mr. Davis oversees bus operations, arranges routes, and assists with bus maintenance. From 7:30 p.m. to 9:30 p.m., Mr. Davis again checks the bus runs for the following morning to ensure there are sufficient drivers. In winter, Mr. Davis frequently wakes earlier than usual to check on and communicate about road conditions. Mr. Davis is also responsible for arranging transportation for all field trips and sporting events, including on weekends. Mr. Davis is on call 24 hours a day. (Mr. Davis' testimony)

15. Grievant oversees and evaluates up to 8 employees. (Grievant's testimony)

16. Mr. Davis oversees and evaluates about 77 employees. (Mr. Davis' testimony)

17. Grievant works out of the central office. (Grievant's testimony)

18. Mr. Davis works out of the bus garage. (Mr. Davis' testimony)

19. Grievant's position requires a teaching license. (Grievant's Exhibit 3)

20. Mr. Davis' position requires a high school diploma, a CDL, and three years of driving experience. (Grievant's Exhibit 5)

21. On September 29, 2014, as Mr. Davis was preparing to leave for a better paying job, Respondent awarded Mr. Davis a \$24,060 salary supplement after

determining he was receiving significantly less compensation than other employees with supervisory duties, even though he had more responsibility. (Superintendent Pancione and HR Director Saville's testimony)

22. Although there have been job postings for other professional positions that receive supplements exceeding \$5,500 and hold great responsibility, Grievant has not applied for any of these positions.

23. After accounting for their supplements, Grievant is compensated \$2,000 more per year than Mr. Davis. Mr. Davis receives less overall compensation than any of Respondent's directors or supervisors. (Superintendent Pancione's testimony)

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Respondent contends that this grievance was untimely filed and requests the issuance of a dismissal order. "Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two." W. VA. CODE § 6C-2-3(c)(1). Respondent raised this defense at level one and renewed it at level three in its submission of proposed findings of fact and conclusions of law. Asserting a timeliness defense at level one preserved Respondent's right to raise the defense at level three but did not

relieve Respondent of the requirement to timely raise that defense at level three. As demonstrated by the level one record, Respondent knew well before the level three hearing that it had grounds to argue Grievant filed untimely. Yet Respondent waited until submitting its PFFCL to raise a timeliness defense at level three. Respondent's motion to dismiss is therefore untimely.

Even assuming Respondent properly raised its timeliness defense, it must be rejected due to continuing nature of the violation grieved. "This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. See *Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996)." *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999).

As for the merits of this grievance, Grievant contends that Respondent is required under the uniformity provisions of West Virginia Code § 18A-4-5a to provide him the same supplemental pay as Transportation Supervisor Calvin Davis, because they perform "like assignments and duties." Grievant argues that the assignments and duties need only be substantially similar, not identical. Grievant maintains that Respondent acted arbitrarily and capriciously in not ensuring that the supplemental pay was uniform. While Grievant contends that Respondent violated State Board Policy 5902 and Hampshire County Schools Policies 3120 and 4120, he failed to provide the content of these policies. Neither

did he make any arguments alluding to the content. The undersigned will therefore not address these policies.

Respondent counters that the uniform pay mandate does not apply to pay differences between a professional position and a service position, such as those held by Grievant and Mr. Davis. Respondent maintains that even if this uniform pay mandate is applicable, Grievant did not prove that he and Mr. Davis perform “like assignments and duties” as required by State code.

West Virginia Code § 18A-4-5a provides, in pertinent part:

County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.

Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county.

In support of his uniform supplemental pay argument, Grievant cites West Virginia Code § 18A-4-5a. This section only applies only to teachers (i.e., professional personnel), not to service personnel. West Virginia Code § 18A-1-1(c) states that “professional educator” has the same meaning as “teacher,” and classifies “professional educator” as either a “classroom teacher,” a “principal,” a “supervisor,” or a “central office administrator.” As a “central office administrator,” Grievant is a “professional educator” and therefore in a professional classification. Mr. Davis’ title of “supervisor of transportation” is found under West Virginia Code § 18A-4-8, which only defines class titles in the service personnel category. Mr. Davis is therefore in a service classification.

West Virginia Code § 18A-4-5b addresses uniformity in pay for service personnel. Even though Grievant does not cite § 18A-4-5b, its uniform pay provisions are similar to § 18A-4-5a.

While there are separate code sections addressing uniformity in pay between professional personnel and between service personnel, there are no code sections addressing uniformity in pay between professional personnel and service personnel. The Grievance Board has held that the “uniformity provisions of W. Va. Code § 18A-4-5a do not apply when the comparison attempted is between professional and service personnel.” *Miller, et al. v. Boone County Board of Education*, Docket No. 99-03-410 (Feb. 17, 2000). The same would appear to hold true for W. Va. Code § 18A-4-5b. The facts in this matter are nearly identical to those in *Miller*. In *Miller*, three administrators, all professional personnel, claimed that they should receive the same salary supplement as the Director of Maintenance, a service position, pursuant W. Va. Code § 18A-4-5a. As in *Miller*, neither of these uniformity statutes apply to a pay comparison between Grievant and Transportation Supervisor Davis, because Grievant holds a professional position whereas Mr. Davis holds a service position.

However, even if the uniformity provisions of § 18A-4-5a or 5b are applicable to a pay comparison between Grievant and Mr. Davis, Grievant failed to prove that he and Mr. Davis were performing “like assignments and duties” as required by statute. It has long been the position of the Grievance Board that merely showing that employees share the same job classification or title is insufficient to establish a uniformity violation. See *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-105 (Sept. 24, 1997). “Although the employees’ duties need not be identical, a grievant must show that their duties are

substantially similar to other employees in order to prevail in a non-uniformity claim. See *Weimer-Godwin v. Bd. of Educ.*, 179 W.Va. 423, 369 S.E.2d 726 (1988).” *Allison v. Hancock County Board of Education*, Docket No. 97-15-454 (Mar. 31, 1998), *Miller, et al. v. Boone County Board of Education*, Docket No. 99-03-410 (Feb. 17, 2000).

“The West Virginia Supreme Court of Appeals defined the term ‘like’ when it discussed the uniformity of pay issue in *Weimer-Godwin, supra*.

‘Like’ refers to having a distinctive character, no matter how widely different in nonessentials. *State v. Gaughan*, 55 W. Va. 692, 700, 48 S.E. 210, 213 (1904). ‘Like’ has also been defined as having the same or nearly the same qualities or characteristics; resembling another; or substantially similar.

BLACK’S LAW DICTIONARY 834 (5th ed. 1979).”

*Miller, et al. v. Boone County Bd. of Educ.*, Docket No. 99-03-410 (Feb. 17, 2000).

Grievant contends that his substantial similarity in duties with Mr. Davis include that both supervise county-wide programs, are lateral on the organizational chart in reporting to Superintendent Pancione, have the responsibility of attending and participating in the county directors’ meetings, communicate and work with every county school and countywide staff, are perceived as county-wide leaders, promote good relationships, supervise and evaluate employees, conduct investigations, train staff, maintain budgets, prepare reports and maintain records, are responsible for their assigned area, are expect to work beyond normal hours to fulfill their responsibilities, and are paid based on education and experience. However, it is apparent that Grievant and Mr. Davis do not perform “like assignments and duties,” as illustrated by the lack of overlap in the specific duties set forth for each in the undersigned’s findings of fact.

The “like assignments and duties” outlined by Grievant are generalized and even superficial similarities that can be found in many supervisory positions across government and private industry. An apt example of “like assignments and duties” is found in *Weimer-Godwin* where the West Virginia Supreme Court found a substantial similarity in duties between a choral director and a band director due to “the distinctive character of preparing for and directing program performances.” Applying *Miller* to the current matter, “it is clear that all the duties of concern here are necessary and important to the functioning of the school system.” As in *Miller*, the fact that both Grievant and Mr. Davis perform necessary duties is insufficient to create a substantial similarity in duties. The lack of substantial similarity is seen in the variation of the essential nature of each’s duties. Mr. Davis’ responsibilities center on ensuring students get to and from school in a timely manner. Grievant’s responsibilities focus on safeguarding the right of covered students to receive a free and appropriate education under the law in accordance with their disability.

In addition to the vast differences in their job responsibilities, Grievant and Mr. Davis have different job classifications; work schedules; and required qualifications, training, and experience. Besides finding actual duties to be relevant, *Miller* found that the number of employees under a supervisor, as well as a supervisor’s work hours, could be factors in determining “like assignments and duties.” Grievant supervises and evaluates 8 employees and generally works from 8:00 a.m. to 4:00 p.m., though Grievant sometimes works later to attend IEP meetings. Mr. Davis supervises and evaluates 77 employees. Mr. Davis’ typical workday begins at 4:30 a.m. From 4:30 a.m. to 6:00 a.m., Mr. Davis ensures that the 52 bus routes are properly staffed and calls substitute drivers as needed. If Mr. Davis is unable to get a substitute, he drives the run himself. From

6:00 a.m. to 4:30 p.m., Mr. Davis oversees bus operations, arranges routes, and assists with bus maintenance. From 7:30 p.m. to 9:30 p.m., Mr. Davis again checks the bus runs for the following morning to ensure there are sufficient drivers. In winter, Mr. Davis frequently wakes earlier than usual to check on and communicate about road conditions. Mr. Davis is also responsible for arranging transportation for all field trips and sporting events, including on weekends. Mr. Davis is on call 24 hours a day. Grievant's position requires substantial advanced education beyond high school. Mr. Davis' position simply requires a high school diploma. Grievant's position requires a teaching license. Mr. Davis' position requires a CDL and three years of driving experience. Grievant works in the Central Office. Mr. Davis works in the bus garage.

In spite of the difference in their supplemental pay, Grievant receives more overall compensation than Mr. Davis. Grievant is eager to obtain the same supplemental pay as Mr. Davis, but not his base pay, even though base pay is not exempt from the pay uniformity provisions. Ultimately, Grievant did not prove by a preponderance of evidence that he was entitled to a pay supplement uniform with that provided to Mr. Davis or that they performed "like assignments and duties." As such, Grievant did not prove that Respondent acted arbitrarily and capriciously in failing to provide Grievant the same supplemental pay as Mr. Davis. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16,

1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). This grievance must therefore be DENIED.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. West Virginia Code § 18A-4-5a provides, in pertinent part:

County boards of education in fixing the salaries of teachers shall use at least the state minimum salaries established under the provisions of this article. The board may establish salary schedules which shall be in excess of the state minimums fixed by this article, such county schedules to be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.

Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county.

3. “The uniformity provisions of W. Va. Code § 18A-4-5a do not apply when the comparison attempted is between professional and service personnel.” *Miller, et al. v. Boone County Board of Education*, Docket No. 99-03-410 (Feb. 17, 2000). The same would appear to hold true for W. Va. Code § 18A-4-5b.

4. West Virginia Code § 18A-1-1(c) states that “professional educator” has the same meaning as “teacher.” It classifies “professional educator” as either a “classroom teacher,” a “principal,” a “supervisor,” or a “central office administrator.”

5. The title of “supervisor of transportation” is found under West Virginia Code § 18A-4-8, which defines only class titles in the “service personnel” category.

6. While West Virginia Code § 18A-4-5a only addresses uniformity in pay between professional personnel, West Virginia Code § 18A-4-5b only addresses uniformity in pay between service personnel. See *Miller, et al. v. Boone County Board of Education*, Docket No. 99-03-410 (Feb. 17, 2000).

7. “Although the employees’ duties need not be identical, a grievant must show that their duties are substantially similar to other employees in order to prevail in a non-uniformity claim. See *Weimer-Godwin v. Bd. of Educ.*, 179 W.Va. 423, 369 S.E.2d 726 (1988).” *Allison v. Hancock County Board of Education*, Docket No. 97-15-454 (Mar. 31, 1998), *Miller, et al. v. Boone County Board of Education*, Docket No. 99-03-410 (Feb. 17, 2000).

8. Grievant did not prove by a preponderance of evidence that he was entitled to a pay supplement that was uniform with that given to Mr. Davis or that he and Mr. Davis performed “like duties and assignments.”

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See also W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: December 27, 2019**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**