JOHN MUNSON,

Grievant,

v. DOCKET NO. 97-32-038

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

John Munson, Grievant, a regularly employed bus operator, filed this grievance against the Morgan County Board of Education, Respondent, alleging that he "has been assigned an additional route and additional duties (he utilizes two buses) without compensation in violation of West Virginia Code §§18A-4-8 and 18A-4-5b." As relief, Grievant seeks "compensation for [the] additional route and additional duties retroactive to the beginning of the 1996-1997 school year."

Grievant is not contesting his transfer as it relates to notice, due process, etc. Grievant is contesting only the fact that he is not being paid for part of his run that he makes using a school van. Last year, Respondent paid a teacher fifteen dollars a day to perform the run.

The grievance was denied at Levels I and II. Grievant bypassed Level III, pursuant to W. Va. Code § 18-29-4(c), and appealed directly to Level IV. At Level IV, the parties agreed to submit the case on the record developed at the lower levels of the grievance procedure, with addition of a January 30, 1996 posting, and the opportunity to file proposed findings of fact andconclusions of law. The case became mature on April 21, 1997, with receipt of Respondent's proposed findings of fact and conclusions of law. (See footnote 1) The following findings of fact were derived from the record, and are not in dispute.

FINDINGS OF FACT

1. Grievant is a school bus operator who has been employed by Respondent for the past 18 years.

2. During the 1995-1996 school year, a teacher drove a special education vehicle, and picked up a portion of those students now transported by Grievant.

3. Because safety considerations (the road being too narrow and winding to accommodate a regular school bus) necessitated the use of a van to pick up the students who live beyond Mountain Dale Orchard Road, Grievant's bus run was changed.

4. Grievant begins his run at 5:35 a.m. using a van instead of a regular school bus, and travels down Magnolia Road approximately five miles further than the Mountain Dale Orchard Road where he turned last year to pick up three students.

5. Grievant returns to Paw Paw School at approximately 7:00 a.m. and parks the van, and then gets into his regular school bus and makes the second portion of his run which is virtually identical to the run he performed during the 1996-1997 school year. 6. Grievant is required to pick up three more children for the 1996-1997 school year than he picked up during the 1995-1996school year.

7. Grievant is paid for an additional hour per week for the cleaning of the second vehicle.

8. It takes approximately 28 hours per week for Grievant to complete his run as modified for the 1996-1997 school year, for which he is fully compensated.

9. The average number of hours logged per week by other bus operators in Morgan County is 23 to 25 hours, however, there are drivers with greater time logged than Grievant.

10. The total mileage for Grievant's 1996-1997 run is 63.9 miles per day.

11. During the 1996-1997 school year, other bus operators have runs of 62, 76.9, 79.6, 81.4, and 94.8 miles.

12. During the 1996-1997 school year, no other bus operator was required to drive two separate vehicles.

13. On January 9, 1997, a Level II decision in this case was issued.

14. On January 22, 1997, Grievant appealed the Level II decision to Level IV.

DISCUSSION

The first issue to be addressed is timeliness. Timelines is an affirmative defense. Therefore, the burden of proof is upon the party asserting that a grievance was not timely filed. See Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No.96-BOD-369 (Dec. 9, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

W. Va. Code §18-29-4(c), in pertinent part, provides that "[w]ithin five days of receiving the decision of the chief administrator the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four." Emphasis added.

Grievance Board Procedural Rule 2.1.1, provides:

> "File or "filing means to place an appropriate grievance form or letter evidencing an intent to appeal or lover level grievance decision in an officail depostitory of the United States Postal Service, postage prepaid, and addressed to the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, or by facsimile transmission to the Board's offices. A hard copy of any grievance filed by facsimile must be recieved by the Board office within a reasonable time following the facsimile transmission.

In this case, the grievance form indicates that the Level II decision was not received by Grievant's counsel until January 15, 1997. Attached to the grievance form was a copy of the Level II decision which was stamped by the West Virginia School Service Personnel Association as being received January 15, 1997.

The original grievance form is dated January 22, 1997, and was faxed to the Grievance Board on the same date. The orginial was recieved by the Grievance Board on January 23, 1997. Therefore, Respondent failed that it was not timely filed.

The second, and final, issue to be addressed is whether Respondent violated the pay uniformity provisions found in W. Va. Code §18-4-5b, which, in pertinent part, provides:

> 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 with the county . . . .

(Emphasis added.)

Grievant has not shown that his compensation is not "uniform" to other bus operators as required by the provisions of W. Va. Code §18A-4-5b. As noted in Fowler v. Mason County Board of Education, Docket No. 94-26-037 (Oct. 6, 1994), W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay. Grievant has not identified any other employee of Respondent who is currently

operating a similar bus run and is receiving a greater amount of pay. Gleason v. Mason County Bd. of Educ., Docket No. 94-26-282 (Dec. 22, 1994). See, Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). Therefore, Grievant's comparison to a bus run driven last year does not place him under the protection of W. Va. Code §18A-4- 5b.

As noted in Harper, all bus runs cannot be the same, and can differ in driving time and mileage. However, in this case, Grievant's driving time and mileage of his bus run are in conformity with other runs performed by Respondent's bus operators. The mere fact that he is now required to operate a differentvehicle for part of his run does not entitle him to more compensation, nor does it trigger W. Va. Code §18A-4-5b. Moreover, the addition of more students to a bus operators route does not warrant additional compensation. See, Hart v. Randolph County Bd. of Educ., Docket No. 95-42-583 (May 30, 1996).

In addition to the foregoing formal findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994).

3. W. Va. Code §18A-4-5b requires boards of education to provide uniform compensation and benefits to similarly-situated service employees, that is, to employees with like classifications, ranks, assignments, duties and actual working hours. Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-217 (Sept. 29, 1995); Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990). 4. Grievant failed to prove by a preponderance of the evidence any violation, misapplication or misinterpretation of W. Va. Code §18A-4-5b.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Morgan County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED: 9/24/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Grievant elected not to file proposed findings of fact and conclusions of law in this matter.