**ROBERT TAYLOR,**

**Grievant,**

**v.**

**Docket No. 05-40-225**

**PUTNAM COUNTY BOARD**

**OF EDUCATION,**

**Respondent.**

**DECISION**

The grievant, Robert Taylor ("Taylor"), is a bus operator employed by the respondent Putnam County Board of Education ("BOE"). This grievance arises out of an assignment transporting disabled pre-school children who attend a special half-day program at Winfield Elementary School. Taylor alleges violations of various statutes as a result of "the additional hours and out-of-area transporting of two students on his pre-K bus run." For relief, Taylor requests that the students "be placed on proper area pre-k buses" and that he receive "compensation for extended time at hourly rate with any benefits due."

Taylor initiated this grievance on April 4, 2005. It was denied at Level I. On May 23, 2005, a Level II evidentiary hearing was held. (See footnote 1) The Level II decision, which was issued on June 8, 2005, also denied Taylor's grievance. Level III was waived. On June 28, 2005, the West Virginia Education and State Employee Grievance Board ("the Grievance Board")received the Level IV statement of grievance that was executed on behalf of Taylor on June 27, 2005.

The Level IV evidentiary hearing was held on July 27, 2005, in the Grievance Board's Charleston office. At Level IV, Taylor was represented by Susan E. Hubbard of the West Virginia Education Association. BOE was represented by attorney Gregory W. Bailey of Bowles Rice McDavid Graff & Love. This grievance matured for decision on September 6, 2005, upon BOE's submission of proposed findings of fact and conclusions of law. There was no post-hearing submission on behalf of Taylor.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

**Findings of Fact**

1 1. Taylor has been employed by BOE as a regular bus operator for nine years, after having served three years as a substitute.

2 2. School bus transportation in Putnam County is traditionally divided into four geographic areas.

3 3. There is a pre-school program for special needs children that is located at Winfield Elementary School. (See footnote 2) This is a half-day program.

4 4. Two positions were posted for supplemental bus runs during the 2004-2005 school year to transport children to or from Winfield Elementary for this program. (See footnote 3)

5 5. Taylor was awarded a supplemental bus run to take students to Winfield Elementary. That run is not at issue in this grievance. He was also awarded a supplemental bus run to take students home from the program for disabled students at Winfield Elementary. This is the supplemental run at issue herein. Taylor's Testimony at Level IV.

6 6. The posting for one of Taylor's supplemental runs, which was dated September 9, 2004, described the position as “SUPPLEMENTAL ASSIGNMENT” and “Pre-School Bus Run As Needed.” The location was identified as “WINFIELD AREA.” The condensed job description indicated that the “applicant must be a regularly employed bus operator in Putnam County schools and within the Winfield area. Must be able to depart @ 10:30 a.m. to pick-up [sic] pre-school handicapped students and deliver to Winfield Elementary School.” (See footnote 4) Joint Exhibit 1 at Level III.

7 7. From the outset of receiving the supplemental run on or about September 22, 2004, Taylor was required to transport one student who resided in Red House [Tr.30], which is in the Poca

bus area [Tr.32].

8 8. The time it initially took Taylor to complete his supplemental run could have been reduced by one hour and ten minutes if he had not been responsible for transporting the Red House student. Taylor's Testimony at Level IV.

9 9. Shortly after he began driving the supplemental run in September 2004, Taylor complained about being required to transport the Red House student. Tr.32, 42. He complained to his supervisor four to six times about being required to go outside the Winfield bus area to transport the Red House student but his supervisor informed Taylor that it was his job to do so. Taylor's Testimony at Level IV,

10 10. Taylor did not grieve being required to transport a student from outside of the Winfield bus area until he filed the instant grievance on April 4, 2005. Tr.41.

11 11. As of March 3, 2005, a student from Buffalo was added to Taylor's supplemental run. This student lived in the Buffalo bus area.

12 12. The addition of the Buffalo student extended by approximately thirty minutes the time it took Taylor to complete his supplemental run. Tr.31.

13 13. At some point after Taylor filed this grievance, another child who attended the program at Winfield Elementary moved into the Pliny area. The addition of this student could not be accommodated by the existing bus runs. Tr.46. Therefore, another supplemental bus run was added. Tr.46.

14 14. The new bus run took care of the students who were on the north side of the Kanawha River. Tr.47. These included the student from Buffalo and the student from Red House, both of whom had been riding Taylor's bus. Tr.47.

15 15. The new student from Pliny was added to Taylor's run because, once he was no longer responsible for transporting the Buffalo and Red House students, there was sufficient time for Taylor to pick up the Pliny student and complete his run on time. Tr.47.

**Discussion**

This is a non-disciplinary grievance. Accordingly, Taylor bears the burden of proving the elements of his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21(2004); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). “The generally accepted meaning of

preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 619 S.E.2d 274, 290 n.26 (2005).

However, BOE has raised the affirmative defense that this grievance was not timely with respect to any claim that Taylor should not have been required to transport students outside of the Winfield bus area. An employer who asserts that a grievance was not timely bears the burden of proving this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996). If this burden is met, the grievant may then attempt to demonstrate "a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96- DOH-445 (July 28, 1997)." *Branch v. West Virginia University*, Docket No. 05-HE-261 (Oct. 4, 2005). Pursuant to West Virginia Code section 18-29-4(a), the aggrieved employee is required to schedule a conference with the employee's supervisor "within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." If the conference does not resolve the issue, a written grievance may be filed within ten days of the unsatisfactory conference.

It is well-settled that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). As BOE has correctly pointed out, Taylor knew from the date he formally began driving the supplemental run that it was not confined to what has traditionally been called the Winfield bus area. Because he knew of the facts giving rise to this aspect of his grievance in September 2004 but did not file his grievance until April 2005, it is clear that Taylor did not initiate the grievance process within the statutory time frame. Nor has Taylor demonstrated any legitimate basis for failing to comply with the statutory time frame. Therefore, to the extent that Taylor seeks to challenge the requirement that he drive outside of the Winfield bus area during performance of his supplemental run, this grievance is untimely and will not be addressed on the merits.

This does not, however, end the matter. Taylor also claims that the addition of the student from Buffalo, which added approximately thirty minutes to his supplemental run, constituted a change in his work schedule to which he did not consent. Taylor argues that such change violates West Virginia

Code section 18A-4-8a(8), which provides, in pertinentpart, that “[n]o service employee may have his or her daily work schedule changed during the school year without the employee's written consent[.]”

Taylor has also attempted to include the Red House student in this argument about a change to his schedule. His representative asserted that one hour and forty minutes does not constitute a “slight” change of schedule. However, the one hour and ten minutes attributable to transporting the Red House student was already included in Taylor's schedule from the time that he was formally assigned to cover the supplemental run in question. Before both the Red House and Buffalo students were removed from his route, the only change to the supplemental run had been the addition of the Buffalo student. This addition is the only change to which Taylor's argument on this point could relate.

BOE argues that the addition of the Buffalo student to Taylor's supplemental run is not the sort of change that violates West Virginia Code section 18A-4-8a(8). In support of this argument, BOE cites *Napier v. Board of Education*, 214 W. Va. 548, 591 S.E.2d 106 (2003)(per curiam). Napier was a special education aide who was to assist the special needs students who were transported on a particular bus to which she was assigned. In October of the school year in question new special needs students moved into the area. The addition of these students caused various adjustments that, ultimately, extended Napier's work day by approximately fifteen minutes. Napier did not object to this change. However, in December, the addition of another new student resulted in a further extension of her work day by approximately twenty minutes. As compared to the beginning of the school year, a total of thirty-five minutes had been added to Napier's work day once theDecember change was implemented, as well. Napier filed a grievance, claiming that the December change violated West Virginia Code section 18A-4-8a(7). (See footnote 5)

The *Napier* Court determined that

> [i]nsofar as Ms. Napier's position requires her to be assigned to a specific bus to assist the special needs students riding said bus, it may be said that her daily schedule corresponds to, or is commensurate with, the daily route of the bus to which she is assigned. As such, the duration of Ms. Napier's workday is defined by the daily schedule

of the bus to which she was assigned. *Napier*, 214 W. Va. at 554, 591 S.E.2d at 112. The *Napier* Court also stated that it was plausible that Napier's schedule “would not be static throughout the school year but might be adjusted,” along with the bus's route, “to accommodate fewer or greater numbers of students as their needs dictate.” *Id*.

In this case, Taylor's supplemental bus route was altered to accommodate an additional student from Buffalo. As in *Napier*, changes are to be anticipated as students move into or out of the area served by Taylor's supplemental run. The later change, to which Taylor voices no objection, removed the Red House and Buffalo students while adding another student from the Pliny area.

The posting for the supplemental bus run stated that the applicant had to be able to leave at 10:30 in the morning "to pick-up [sic] pre-school handicapped students and deliver [them] to Winfield Elementary School." (See footnote 6) No time limitation is indicated. No specific number of students is indicated. The language of the posting, as well as application of the reasoning found in the *Napier* decision, lends approval to the minor change to Taylor's work day that resulted from the addition of the Buffalo student to his supplemental run. Requiring Taylor to transport the Buffalo student did not violate the provisions of West Virginia Code section 18A-4- 8a(8). (See footnote 7)

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

**Conclusions of Law**

1 1. Because this is a non-disciplinary grievance, Taylor bears the burden of proving the elements of his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21(2004); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 619 S.E.2d 274, 290 n.26 (2005).

2 2. However, BOE bears the burden of proving, by a preponderance of the evidence, the affirmative defense that this grievance was not timely filed with respect to any claim that Taylor should not have been required to transport students outside of the Winfield bus area. *Hale and Brown v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996).

3 3. It is well-settled that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

4 4. Because Taylor knew in September 2004 that he was transporting students from outside

of the Winfield area but failed to file his grievance until April 2005, BOE has met its burden of proving the geographic limitation aspect of this grievance is not timely.

5 5. “Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997).” *Branch v. W. Va. Univ.*, Docket No. 05-HE-261 (Oct. 4, 2005). Taylor failed to establish any legitimate basis for failing to timely bring a grievance with respect to the geographic limitations argument he has attempted to raise herein.

6 6. Because this aspect of his grievance is untimely, the geographic limitation argument will not be addressed on the merits. *Lemaster v. Putnam County Bd. of Educ*., Docket No. 05-40-169 (Nov. 4, 2005)(citing *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997)).

7 7. The Supreme Court of Appeals of West Virginia has recognized that bus schedules are not likely to be static but will need to fluctuate “to accommodate fewer or greater numbers of students as their needs dictate.” *Napier*, 214 W. Va. at 554, 591 S.E.2d at 112. The addition of the Buffalo student to Taylor's supplemental bus run was analogous to the changes in Napier's work day and, as such, does not constitute a violation of West Virginia Code section 18A-4-8a(8).

8 8. Taylor has failed to meet the burden of proving his grievance by a preponderance of the evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County. Any 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. However, the appealing party is required by West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**Date:**

**December 22, 2005**

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**JACQUELYN I. CUSTER**

**Administrative Law Judge**

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Footnote: 1

*References to pages in the Level II transcript shall appear herein as "Tr.__".*

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Footnote: 2

*In post-hearing correspondence, counsel for BOE informed the Grievance Board and the opposing party that testimony to the effect that the program for disabled pre-school children at Winfield Elementary School was the only such program in the county was in error. He explained that further investigation revealed that a second such program existed at Poca Elementary School but that, based on distance, the disabled students in Buffalo and Red House were traditionally transported to Winfield rather than Poca.*

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Footnote: 3

*The posting in the record that appears as part of Joint Exhibit 1 from Level III seems to relate to delivering students to Winfield Elementary, whereas the run at issue herein is taking students home before beginning the regular evening run. No explanation for this inconsistency was offered but it is presumed that there would be little, if any, substantive variance between the postings for the two runs.*

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Footnote: 4

*Converted from all capital letters for ease of reading.*

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Footnote: 5

*This was the precursor to West Virginia Code section 18A-4-8a(8), "however, the pertinent language of this statute remains unchanged from the prior version thereof." Napier, 214 W. Va. at 551 n.5, 591 S.E.2d at 109 n.5.*

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Footnote: 6

*Emphasis added. Capitalization altered for readability.*

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Footnote: 7

*This is the recodification of the statute at issue in Napier.*