THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GILBERT CLARK, et al.,

Grievants,

v. **DOCKET NO. 2012-0944-CONS**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On February 21, 2012, Gilbert Clark (”Grievant”) filed a grievance at Level One of the grievance procedure against his employer, the Putnam County Board of Education (“Respondent” or “PCBOE”), alleging a violation of W. Va. Code §§ 18A-4-16, 18A-4-16(2), 18A-4-5b, and 6C-2-2(d) in regard to driving a five day supplementary school bus run without a 200 day contract. Virtually identical grievances were filed against Respondent that same day by Deborah Lett, Marshall Hanger, Debra Shantie, Glenda Younger, and Wendy Craigo (“Grievants”). On March 9, 2012, Patty Melton (“Grievant”) filed a grievance containing substantially the same allegations. Each Grievant indicated that he or she was seeking a 200 day contract, plus back pay and benefits as a remedy.

Shortly thereafter, these grievances were consolidated and assigned Docket Number 2012-0944-CONS. Following a Level One conference on March 23, 2012, these grievances were granted, in part, and denied, in part, by the Superintendent’s designee, Barbara Brazeau, in a written decision dated April 11, 2012. Grievants proceeded through mediation at Level Two, and appealed to Level Three on January 22, 2013. A

Level Three hearing was held on April 25, 2013, in the Grievance Board's office in Charleston, West Virginia. Grievants were represented by Andrew J. Katz, Esquire, with the Katz Working Families' Law Firm. Respondent was represented by Rebecca Tinder, Esquire, with Bowles Rice. This matter became mature for decision on June 18, 2013, upon receipt of the last of the parties' written post-hearing proposals.

Synopsis

Grievants Clark, Shantie, Hanger, Younger and Davis prevailed at Level One of the grievance procedure when the Respondent determined that the extracurricular "supplemental" bus runs they drove during both semesters of the 2011-2012 school year made them similarly situated to the grievants who prevailed in a similar grievance against PCBOE, *Lanham v. Putnam County Bd. of Educ*., Docket No. 2008-1691-CONS (July 14, 2009), *aff'd*, Circuit Court of Kanawha County, No. 09-AA-146 (Dec. 21, 2012). Grievants contend that, in addition to the relief received at Level One in the form of back pay for the 2011-2012 school year, they should also receive back pay into the 2010-2011 school year for one year prior to the filing of their grievances, as well as statutory interest on all back pay, and a 200-day contract of employment. Grievants Lett and Melton contend that the supplemental runs they drove likewise make them similarly situated to the prevailing *Lanham* grievants, or, in the case of Grievant Melton, that she was entitled to a supplemental run that would have qualified her for similar relief.

Under this Grievance Board's precedent for granting "make whole" remedies to employees when certain compensation is wrongly withheld by their employer, and W. Va. Code § 6C-3(c)(2), which authorizes back pay for one year prior to filing a grievance,

Grievants Clark, Shantie, Hanger, Younger and Davis are authorized simple statutory interest on their back pay, and Grievants Shantie, Younger and Hanger are authorized additional back pay for up to one year prior to filing their grievances. Grievant Davis' employment situation in regard to her extracurricular assignments was not the same as the other prevailing Grievants so that she did not establish an entitlement to additional back pay. None of the Grievants established an entitlement to a regular 200-day contract covering these "as needed" extracurricular bus runs. Further, Grievant Lett failed to establish that her employment circumstances made her similarly situated to the prevailing grievants in the *Lanham* decision, and PCBOE established that Grievant Melton did not timely challenge an earlier employment decision that could have arguably placed her in a position where she would have become eligible for some relief. Accordingly, no further relief is warranted for Grievants Lett and Melton, and this consolidated grievance will be GRANTED, in part, and DENIED, in part.

The following Findings of Fact are made based upon the record developed at Level One and continuing through the Level Three hearing.

Findings of Fact

1. Grievants, Gilbert Clark, Debra Shantie, Deborah Lett, Marshall Hanger, Glenda Younger, Wendy Craigo Davis, and Patty Cossin Melton, are employed by Respondent Putnam County Board of Education ("PCBOE") as bus operators.

2. On July 14, 2009, the West Virginia Public Employees Grievance Board issued a Level Three decision in *Lanham v. Putnam County Board of Education*, Docket

No. 2008-1691-CONS (July 14, 2009) ("*Lanham* decision"). The *Lanham* decision was affirmed by the Circuit Court of Kanawha County on December 21, 2012. R Ex 2.

3. In the *Lanham* decision, the Grievance Board determined that certain PCBOE bus operators were being paid in a non-uniform manner for like assignments and duties when compared to at least one other PCBOE bus operator.

4. Grievants Clark, Shantie, Lett, Hanger, Younger, Davis and Melton are employed to perform extracurricular runs on an "as needed" basis. Ordinarily, bus operators who perform extracurricular runs on an "as needed" basis are paid only for the days when they actually transport students. Grievants Clark, Shantie, Lett, Hanger, Younger, and Davis drive extracurricular runs which are referred to by PCBOE as "college runs" which involve transporting students from one high school to another to facilitate participation in college level courses offered to PCBOE students only at certain locations.

5. During the 2010-2011 and 2011-2012 school years, PCBOE also employed one or more bus operators under 200-day extracurricular contracts. Bus operators holding such 200-day contracts were not only paid for the actual days worked, but were also paid their normal daily rate of pay for snow days, holidays, sick days or personal days, and for non-instructional professional days.

6. PCBOE bus operators who work under "as needed" contracts, including all Grievants, do not receive pay for snow days, holidays, sick days or personal days, or for non-instructional professional days.

7. All of the extracurricular runs at issue in this consolidated grievance were compensated at the rate of $10.00 per hour, for two hours each day, or a daily rate of $20.00 per day.

8. As a result of Respondent's Level One decision, Grievant Clark received back pay for the 2011-2012 school year, and is not claiming that he should receive back pay for the 2010-2011 school year.

9. As a result of Respondent's Level One decision, Grievants Shantie, Hanger, Younger and Davis likewise received back pay for the 2011-2012 school year.

10. No Grievant has received interest on his or her back pay award nor has any Grievant received back pay for the 2010-2011 school year.

11. Except as to Grievant Melton, PCBOE failed to assert a timeliness defense for events that occurred prior to the 2011-2012 school year. *See* PCBOE Level One decision, April 11, 2012.

12. Charles Tribble is employed by PCBOE as the Coordinator of Transportation.

13. Grievant Shantie began driving bus run SR 83 on or about May 10, 2011, and continued driving that same college run through the 2011-12 school year. *See* G Ex 3.

14. Grievant Hanger began driving bus run SR 67 in September 2010, and continued driving that same college run through the 2010-2011 and 2011-2012 school years. *See* G Ex 4.

15. Grievant Younger began driving bus run SR 52 on or about October 6, 2010, and continued driving that same college run through the remainder of the 2010-2011 and all of the 2011-2012 school years. *See* G Ex 5.

16. Grievant Davis began driving bus run SR 68 on or about February 8, 2011, and continued driving that same college run through the 2011-2012 school year. *See* G Ex 7.

17. SR 68 was not operated during the first semester of the 2010-2011 school year. Mark Arthur drove SR 68 beginning sometime in January 2011 on an interim basis until Grievant Davis was selected to fill that assignment.

18. Grievant Melton was assigned bus run SR 82 beginning in September 2010, and continued driving SR 82 through the end of the 2010-2011 school year. G Ex 8.

19. Grievant Melton did not drive SR 82 during the 2011-2012 school year. SR 82 was replaced by a new supplemental run at the beginning of the 2011-2012 school year, transporting the same category of students from the same school where SR 82 originated during the 2010-2011 school year, to attend the same class at a different school in a different location. This new supplemental run was posted and awarded to another bus operator. Grievant Melton did not bid on this new run, nor did she file a grievance challenging the filling of this position.

20. Grievant Lett began driving bus run SR 93 on or about February 8, 2011, and continued driving that college run through the end of the 2010-2011 school year. See G Ex 6.

21. At the beginning of the 2011-2012 school year, Grievant Lett's regular morning bus run ended at Poca High School. Grievant Lett assumed that under her "as needed" contract to drive SR 93, she was required to show up at Poca High School to pick up one student who was enrolled at Poca High School, and who was registered to attend a college class at Hurricane High School. However, this student had his own transportation, and never rode on Grievant's bus during the first semester of the 2011-2012 school year.

22. Grievant Lett did not turn in a time sheet for driving SR 93, and was not paid for any time driving SR 93 during the first semester of the 2011-2012 school year.

23. Grievant Lett did not inform Mr. Tribble of the fact that this one student was electing to drive himself to the college class in which he was enrolled, thereby failing to place PCBOE on notice that her services were no longer needed, or that she was available for other extracurricular assignments during the time period when SR 93 was ordinarily run.

24. During the second semester of the 2011-2012 school year, Grievant Lett transported several students on the SR 93 college run.

25. Heather Marcum, Carl Burdette and Charles Absten are employed by PCBOE as bus operators. Each of these bus operators holds a 200-day extracurricular contract to operate vocational runs. *See* G Ex 9.

26. At the beginning of the 2010-2011 school year, another PCBOE bus operator, Ed Turley, drove supplemental bus run SR 67. Mr. Turley is now retired from

PCBOE. Mr. Turley did not drive supplemental bus run 68 during the 2010-2011 school year. *See* G Ex 10.

27. Beth Smith is employed by PCBOE as a Payroll Supervisor. Extracurricular payments fall under her duties and responsibilities. According to Ms. Smith, Grievant Davis was paid for driving SR 68 in the second semester of the 2010-2011 school year only.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

Grievants' claim for relief is primarily founded upon the statutory requirement set forth in W. Va. Code § 18A-4-5b which provides, in pertinent part:

> 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: Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed

> values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

The leading case in West Virginia explaining what is meant by "performing like assignments and duties" is *Weimer-Godwin v. Bd. of Educ*., 179 W. Va. 423, 369 S.E.2d 726 (1988). Under *Weimer-Godwin*, assignments and duties need only be substantially similar in character, not identical. *Id*. at 427-28, 730-31. Although Weimer-Godwin involved duties assigned to teaching personnel, the statute applies equally to service personnel. *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

This Grievance Board has applied W. Va. Code § 18A-4-5b to require pay uniformity for bus operators performing like assignments and duties. *See e.g*., *Barlow v. Mercer County Bd. of Educ*., Docket No. 07-27-163 (Oct. 21, 2008); *Taylor v. Kanawha County Bd. of Educ*., Docket No. 02-20-075 (Sept. 11, 2003); *McBride et al. v. Summers County Bd. of Educ*., Docket No. 01-45-614 (Aug. 20, 2002). Grievants here are asserting that they are each similarly situated to the prevailing grievants in an earlier grievance involving their same employer, *Lanham v. Putnam County Bd. of Educ*., Docket No. 2008-1691-CONS (July 14, 2009). The prevailing grievants in *Lanham* were awarded pay for days on which their assigned bus runs did not occur due to weather and other circumstances beyond their control, because they performed similar duties to other service personnel employed as bus operators who performed extracurricular bus runs under a 200 day "supplemental contract" rather than an "as needed" contract. In its Level One decision on this consolidated grievance, PCBOE conceded that Grievants Clark, Shantie, Hanger, Younger and Davis "performed their runs five days per week during

both the first and second semester of the 2011-2012 school year and, as a result, their runs are like the assignments and duties of the prevailing bus operators in the *Lanham* case." PCBOE Level One decision at 3. As to those grievants, PCBOE made a proper determination on the merits, and that portion of the Level One decision which awarded relief to Grievants Clark, Shantie, Hanger, Younger and Davis is confirmed.

Grievants Lett and Melton contend that they are likewise similarly situated to PCBOE bus operators who drive extracurricular runs under a 200-day supplemental contract and are therefore entitled to relief under Lanham, or for other reasons. Accordingly, the duties performed by Grievants Lett and Melton require additional scrutiny.

Grievant Lett drove an extracurricular "college run" identified as "SR 93" during the second semester of the 2010-2011 school year. Grievant Lett's assignment to SR 93 carried over to the first semester of the 2011-2012 school year. However, there was only one student at Poca High School enrolled in a college class at Hurricane High School who might theoretically require transportation. As it turned out, this student had his own transportation, a personal automobile, and never required transportation at any time during the first semester of the 2011-2012 school year. Although Grievant Lett testified that she dutifully remained on her bus at Poca High School each morning where her regular bus route ended a few minutes earlier, "just in case" this one student needed bus transportation to Hurricane High, she never turned in a time sheet for performing an extracurricular assignment, nor was she ever paid for driving an extracurricular college run for a single day during the first semester of the 2011-2012 school year. Further, she

never informed PCBOE's Coordinator of Transportation, and her immediate supervisor, Charles Tribble, of this circumstance, so that a decision could be made whether she should be relieved from this presumed assignment, and allowed to compete for other extracurricular bus runs.

In these circumstances, PCBOE correctly determined that Grievant Lett was not similarly situated to any PCBOE bus operator holding a 200-day extracurricular contract under which such employee drove a supplemental bus run four or five days each week during both semesters of the school year, unlike the PCBOE bus operators who prevailed in the *Lanham* decision. *See Weimer-Godwin*, *supra*. Indeed, permitting Grievant to receive compensation for snow days, holidays and other days when her services were not required would represent a total windfall, given that she was not getting paid for any days during the first semester of the 2011-2012 school year.

Grievant Melton's duties were even less similar to the prevailing Grievants in the *Lanham* decision. Grievant Melton drove a supplemental run identified as SR 82 during the 2010-2011 school year. Although this was not a "college run" such as the other Grievants drove, that is not a distinguishing characteristic under the *Weimer-Godwin* test for identifying "like assignments and duties" for purposes of applying W. Va. Code § 18A-4-5b. In any event, PCBOE eliminated SR 82 for the 2011-2012 school year because the category of students Grievant Melton had transported from School A to School B during the 2010-2011 school year, would be attending a similar program at a new destination, School C, during the 2011-2012 school year. For that reason, PCBOE posted a new bus run over the summer for which another service employee was the

successful applicant when Grievant did not apply under the posting. Moreover, Grievant did not grieve that action until February 2012, well beyond the statutory 15-day time limit for filing a grievance. *See* W. Va. Code § 6C-2-4(a)(1). In these circumstances, Grievant Melton is not similarly situated to the prevailing Grievants in the *Lanham* decision, nor has she timely established any other legal basis for obtaining relief.

At Level One, Grievants requested relief in the form of "a two hundred day contract during runs, plus backpay (*sic*.) and benefits." At Level Two, the relief requested in regard to their consolidated grievance involved "a two hundred day contract, plus backpay (*sic*.), interest and benefits." Respondent objected to payment of interest because it was not requested in the original grievances, and no demand for interest was made until Level Two. However, clarifying the remedy sought in legal terms does not materially change the nature of the grievance. Moreover, PCBOE was on notice that Grievants were not satisfied with the relief they received at Level One, and were proceeding forward in an effort to obtain further monetary damages arising out of the events described in their original grievances.

Grievants further assert that they are entitled to back pay for one year prior to the date their grievances were filed, as authorized in W. Va. Code § 6C-2-3(c)(2) which states: "When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim of back pay, in which case an eighteen-month limitation on back pay applies."

In support of its position that interest on back pay should not be permitted, Respondent cites only to *Tibbs v. Hancock County Bd. of Educ*., Docket No. 2012-0102-HanED (June 21, 2012). However, in reading *Tibbs*, where the reference to excluding interest is contained in a one-sentence footnote, it does not appear that the grievant in that matter requested interest at *any* point during her pursuit of the grievance procedure. On the other hand, in *Weimer-Godwin*, *supra*, the West Virginia Supreme Court of Appeals stated the following holding in Syllabus Point 2: "Prejudgment interest on back pay is recoverable against a county board of education on appeal to the courts of an education employee's grievance claim that there has been a misinterpretation of a statute regarding compensation."

Consistent with *Weimer-Godwin*, this Grievance Board has recognized that back pay damages are essentially wages which the employee would have received had the employer not wrongfully deprived the employee of such wages and the opportunity to benefit from their use. Accordingly, a grievant is not made whole unless prejudgment interest is received. *Gillispie v. Kanawha County Bd. of Educ*., Docket No. 98-20-216 (Aug. 26, 1998); *Stickley v. Berkeley County Bd. of Educ*., Docket No. 95-02-573 (Feb. 20, 1998); *Yokum v. Randolph County Bd. of Educ*., Docket No. 97-42-299 (Jan. 14, 1998). Indeed, courts have recognized that the goal of back pay is "to place the prevailing parties in the same position as they would have been had they not been deprived of the sum owed them and had benefitted from the full use of the money during the period of deprivation." *Hensley v. W. Va. Dep't of Health & Human Res*., 203 W. Va.

456, 466, 508 S.E.2d 616, 626 (1998), *citing Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995).

It should be noted that in *Airhart*, *supra*, our Supreme Court of Appeals refused to grant back pay for the time period preceding a favorable Administrative Law Judge's decision, based upon a determination that only prospective application of the Court's ruling was warranted. *Id*. at 182-83, 429-430. However, the present matter is distinguishable from *Airhart* because PCBOE has had the benefit of the Grievance Board's ruling in the *Lanham* decision since July 2009, and has had every reasonable opportunity to conform its personnel practices to the mandates of that decision. *See Bradley v. Appalachian Power Co*., 163 W. Va. 332, 256 S.E.2d 879 (1979). Accordingly, the prevailing Grievants in this matter are entitled to prejudgment simple interest on the back pay they were previously awarded at the statutory rate currently set in W. Va. Code § 56-6-31. *See Doss v. Pocahontas County Bd. of Educ*., Docket No. 97-38-054R (Mar. 16, 2000). Such interest shall be computed on the time between the date when the prevailing Grievants would have received such pay in the ordinary course of business and the date they were paid in accordance with PCBOE's Level One decision in this matter, or the date when they are paid additional back pay as hereinafter provided by this decision.

Grievants Shantie, Hanger, Younger and Davis have requested back pay for one year prior to the filing of their grievances, as authorized in W. Va. Code § 6C-2-3(c)(2). PCBOE asserts that it raised a timeliness defense at Level One which precludes Grievants from asserting any entitlement to back pay for the 2010-2011 school year, a separate school year from the 2011-2012 school year during which these grievances

were filed. Whether or not this defense is viable under W. Va. Code § 6C-2-3(c)(2) need not be decided at this time, because PCBOE only asserted a timeliness defense in its Level One decision as to Grievant Lett, who has not prevailed on the merits of her complaint. Therefore, in accordance with the mandate in W. Va. Code § 6C-2-3(c)(2), Grievants Shantie, Hanger, and Younger are to receive back pay at their normal daily rate of pay for snow days, holidays, sick days or personal days, and for non-instructional professional days during the 2010-2011 school year, for one year prior to the filing of their grievances on February 21, 2012. *See Toney v. Raleigh County Bd. of Educ*., Docket No. 07-41-365R1 (Sept. 9, 2011); *Powroznick-Hess v. Monongalia County Bd. of Educ*., Docket No. 07-30-108 (May 29, 2008).

PCBOE demonstrated that Grievant Davis did not drive a college run during both semesters of the 2010-2011 school year, and that the run she began driving in February 2011 (SR 68) did not exist during the first semester of the 2010-2011 school year. Accordingly, Grievant Davis is not entitled to additional days of back pay because she did not establish that she performed like assignments and duties to the prevailing grievants in the Lanham decision during the full 2010-2011 school year. *See Weimer-Godwin*, *supra*.

Grievants have requested that each of them who meet the *Lanham* criteria be awarded a 200 day contract by PCBOE. PCBOE responds that W. Va. Code § 18A-4-16 makes a distinction between a school employee's regular contract of employment and an extracurricular assignment agreement. Accordingly, those Grievants who are similarly situated to the prevailing grievants in the *Lanham* decision are entitled to receive the same compensation of an extracurricular contract with benefits, but not to have their

extracurricular contracts converted to 200-day regular employment contracts. PCBOE's position that the *Lanham* decision entitles a similarly situated employee to the benefits of a 200-day contract but not an actual regular contract covering 200 days of employment represents the more persuasive interpretation of the requirements of *Weimer-Godwin* as applied by this Grievance Board in *Lanham*. Accordingly, Grievants Clark, Shantie, Hanger, Younger and Davis are only entitled to 200 day extracurricular contracts with benefits, and not regular contracts to perform extracurricular assignments on an "as needed" basis.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ*., Docket No. 93-29-481 (Apr. 4, 1993).

2. Ordinarily, the relief provided to a grieving employee involves a "make-whole" remedy, intended to restore the employee to his or her rightful place as an employee. *Doss v. Pocahontas County Bd. of Educ*., Docket No. 97-38-054R (Mar. 16, 2000); *Gillispie v. Kanawha County Bd. of Educ*., Docket No. 98-20-216 (Aug. 26, 1998).

3. Back pay damages are essentially wages which the employee would have received had the employer not wrongfully deprived the employee of such wages and the opportunity to benefit from their use. In such circumstances, a grievant is not made

whole unless prejudgment interest is received. *Gillispie*, *supra*; *Stickley v. Berkeley County Bd. of Educ*., Docket No. 95-02-573 (Feb. 20, 1998); *Yokum v. Randolph County Bd. of Educ*., Docket No. 97-42-299 (Jan. 14, 1998). *See Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995).

4. Grievants Clark, Shantie, Hanger, Younger and Davis are entitled to prejudgment simple interest at the statutory rate currently set in W. Va. Code § 56-6-31 on the back pay they were previously awarded by PCBOE, as well as any additional back pay which Grievants Shantie, Hanger and Younger may receive as a result of this decision. *See Doss*, *supra*; *Gillispie*, *supra*. *See generally Hensley v. W. Va. Dep't of Health & Human Res*., 203 W. Va. 456, 508 S.E.2d 616 (1998).

5. When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the Grievants show, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies. W. Va. Code § 6C-2-3(c)(2); *Nolan v. Wood County Bd. of Educ*., Docket No. 2008-0470-WooED (Sept. 2, 2008).

6. Grievants Shantie, Hanger, and Younger are entitled to receive back pay at their normal daily rate of pay for snow days, holidays, sick days or personal days, and non-instructional professional days during the 2010-2011 school year for up to one year prior to filing their grievances. *See Nolan*, *supra*. Grievant Davis failed to establish any entitlement to additional back pay in the circumstances presented.

7. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once an employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ*., Docket No. 2012-0188-RalED (Mar. 28, 2012). *See Lewis v. Kanawha County Bd. of Educ*., Docket No. 97-20-554 (May 27, 1998).

8. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Rose, supra*. *See Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

9. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> 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 . . . .

10. Under W. Va. Code § 6C-2-3(c)(1), "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." Respondent timely asserted this affirmative defense as to Grievant Melton.

11. Respondent proved by a preponderance of the evidence that Grievant Melton did not file her grievance concerning PCBOE's selection of another bus operator

to drive a successor supplemental run to the extracurricular supplemental run Grievant Melton drove during the 2010-2011 school year within the time limits established by statute. Grievant Melton did not demonstrate a proper basis to excuse her failure to file in a timely manner.

12. County boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have like classification, ranks, assignments, duties and actual working days. *Toney v. Raleigh County Bd. of Educ*., Docket No. 07-41-365R1 (Sept. 9, 2011); *Covert v. Putnam County Bd. of Educ*., Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ*., Docket No. 95-15-217 (Sept. 29, 1995).

13. Grievants Lett and Melton failed to establish that their assignments and duties were sufficiently "like" the assignments and duties of the prevailing grievants in the *Lanham* decision to qualify for relief under the provisions of W. Va. Code § 18A-4-5b. *See Weimer-Godwin v. Bd. of Educ*., 179 W. Va. 423, 369 S.E.2d 726 (1988).

Therefore, this grievance is hereby **GRANTED, IN PART,** and **DENIED, IN PART**. As previously discussed above, Grievants Shantie, Hanger and Younger are **GRANTED** additional back pay and benefits for snow days, holidays, sick days or personal days, and non-instructional professional days, during the 2010-2011 school year, for up to one year prior to February 21, 2012 when they filed their grievances. Grievant Davis is **DENIED** any further back pay and benefits for the 2010-2011 school year. Grievant Clark did not seek additional back pay and benefits for the 2010-2011 school year. Grievants Clark,

Shantie, Hanger, Younger, and Davis are **GRANTED** prejudgment simple interest on the back pay they were previously awarded by PCBOE, such interest to be paid at the statutory rate currently set in W. Va. Code § 56-6-31. Further, Grievants Shantie, Hanger, and Younger are likewise **GRANTED** prejudgment simple interest on any additional back pay they may receive for the 2010-2011 school year as a result of this decision. The grievances of Grievants Lett and Melton are hereby **DENIED**. The prevailing Grievants are not entitled to a 200-day regular contract for performing these extracurricular supplemental assignments and that relief is therefore **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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: June 28, 2013

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LEWIS G. BREWER
Administrative Law Judge