

15-1207

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHN STRALEY,

Petitioner,

v.

Civil Action No. 14-AA-91  
Judge Jennifer F. Bailey

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

ORDER

Pending before the Court is a Petition for Appeal filed by, John Straley ("Petitioner"), on September 8, 2014, by counsel, Andrew J. Katz. The Petitioner requests that this Court reverse the Dismissal Order ("Decision") by the West Virginia Public Employees Grievance Board ("Board"), entered on July 28, 2014, reinstate his grievance, and award him attorney fees and costs.

The Petitioner avers that the Board erred by not finding that the grievance was timely filed. Petitioner claims that there was a continuing violation or practice, extending the timeline for filing a grievance, and that his grievance was filed within 15 days of an alleged denial of an extra-duty bus run opportunity. Having considered the parties' filings, the record, and the applicable law, the Court finds and concludes as follows:

**FINDINGS OF FACT**

1. Petitioner has been employed by Respondent as a regular full-time Bus Operator for approximately four years.
2. Petitioner's current run is Bus #2803, for which he applied for in September 2012, and was awarded by Respondent on October 1, 2012.

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3. The portion of the regular bus run that the Petitioner asserts is extra-curricular is a stop at Hurricane Middle School, at the end of the school day, to pick up students participating in cross-country and to deliver them to either Hurricane High School or Valley Park. This portion of the regular run is necessary during the cross-country season from August through mid-to-late October.

4. Petitioner began driving the run, including the cross-country stop as described above, on October 2, 2012. The run included the cross country stop for at least two weeks following October 2, 2012. The Petitioner was aware that the cross-country stop was included in his run in October 2012.

5. Petitioner did not file his grievance until September 11, 2013, almost a year after the position was posted and Petitioner started driving the run.

6. Petitioner claims that he was not permitted to bid on an extra-duty run, the following school year on August 29, 2013, due to its conflicting with his regular run.

7. When the grievance was filed, the Petitioner alleged that he, "as a Bus Operator, has been driving an extracurricular run, which [Petitioner] did not mutually agree to and is being denied payment/benefits. On August 29<sup>th</sup>, [Petitioner] could not take an extra-duty run because of the extracurricular run."

8. The Petitioner did not allege any facts in his grievance filing relating to discrimination.

9. The Petitioner filed his grievance on September 11, 2013, before the Grievance Board. The lower tribunal dismissed the Petitioner's matter without reaching the merits because his grievance was filed untimely.

## STANDARD OF REVIEW

Review of the Decision of the Grievance Board is governed by *W.Va. Code* § 6C-2-5(b), which provides the grounds upon which a decision may be reviewed for error. Specifically, *W.Va. Code* § 6C-2-5(b) states as follows:

A party may appeal the decision of the administrative law judge on the grounds that the decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law judge's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

More particularly, review of grievance rulings involves a combination of deferential and plenary review. A reviewing court is obligated to give deference to factual findings rendered by the Grievance Board, while conclusions of law and application of law to the facts are reviewed de novo. Syl. pt. 1, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

Further, the “clearly wrong” and “arbitrary and capricious” standards of review are deferential ones, which presume that an administrative agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002) (Per Curiam) (internal quotation marks and citations omitted).

## CONCLUSIONS OF LAW

1. The Court notes that the instant matter does not involve a disciplinary matter, so the burden is on the Petitioner to prove his grievance by a preponderance of the evidence. W. Va. St. R. § 156-1-3. Generally, preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence offered in opposition to it—that is, evidence which as a whole shows the fact sought to be provided is more probable than not. *See Black's Law Dictionary*, 5th ed. at 1064. The Petitioner had the burden of showing grounds for the reversal or modification of the Decision. Petitioner failed to meet this burden.

2. Petitioner asserts that the grievance was timely filed because there was a continuing violation or practice, extending the timeline for filing a grievance, and that his grievance was filed within 15 days of an alleged denial of an extra-duty run assignment. As was outlined in the Decision, both of the issues raised by the Petitioner would be continuing damages (if there are any) from the previous act by the Board to post and fill the complained of run as one regular run, rather than separately as a regular run and an extracurricular run.

3. Under *W. Va. Code* § 6C-2-4(a)(1), a grievance must be filed within 15 days following the occurrence of the event upon which the grievance is based. In particular, *W. Va. Code* § 6C-2-4(a)(1) states that:

Within fifteen days following the occurrence of the event upon which the grievance was 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.

4. A timeliness defense is an affirmative defense which the moving party must establish, and did establish, by a preponderance of the evidence. *Higginbotham v. W. Va. Dep't of Public Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, *Circuit Court of Mason County*, No. 96-C-02 (June 17, 1996).

5. The posting and assignment of the run was in September and October of 2012. By the Petitioner's own admission, he knew that transporting cross country students was part of his posted run, at the latest, by October 2, 2012, when he began driving the run the day after the Board voted to place him in that assignment. However, the Petitioner did not file his grievance until September 11, 2013, almost a year after the position was posted and he started driving the run.

6. The denial of two separate contracts and pay, regular and extracurricular, and the alleged denial of an extra-duty run on August 29, 2013, almost a year later, were but effects of the Board's decision to post, fill and assign the route, as described herein, as one regular run. This is a discreet event with lasting effects and, as a result, does not extend the timeline during which the grievance must be filed. This is not a continuing practice.

7. In differentiating a continuing practice from continuing damage, the courts have consistently held that a discrete event with lasting effects does not constitute a continuing practice. *See also Burns, et al. v. Division of Natural Resources*, Docket No. 05-DNR-430 (Mar. 17, 2006); *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R- 416R (Sept. 6, 2005), and *Young v. Div. of Corrections and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001). *Mills v. Wayne County Board of Education*, Docket No. 05-50-451 (May 12, 2006), held that "continuing 'damage' flowing from a past decision of the

employer” is separate and distinct from a “continuing practice” as set forth in the grievance statute.

8. In *Hammond, et al. v. Dept. of Transp., et al.*, Kanawha County Circuit Court Civil Action No. 08-AA-19 (Dec. 22, 2009); *aff'd* 727 S.E.2d 652 (May 9, 2012), the issue was succinctly addressed as follows:

“[C]ontinuing ‘damage’ flowing from a past decision of the employer” is separate and distinct from a “continuing practice” as set forth in the grievance statute. In that case, this Grievance Board held that the employer’s decision to place a particular job classification in a particular pay grade, while continuing to affect grievants’ salaries, was “a salary determination that was made in the past, a discrete event with lasting effects,” which did not constitute a continuing practice. “[W]hen a grievant challenges a salary determination which was made in the past, . . . this ‘can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, *Spahr v. Preston Co. Ed. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).’ *Nutter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995).” *Young v. Div. of Corr. and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

9. The singular decision to place a job classification in a pay grade is the same as the singular decision to post and fill the regular run to include the cross-country stop. Both are discreet events and both have lasting effects. Neither converted an untimely grievance filing into a timely grievance filing.

10. The effects of the Board posting and filling the Petitioner’s run as one regular run, instead of a regular and an extracurricular run include (1) his not receiving a separate contract and additional pay for an extracurricular run, and (2) his regular run with the complained of stop conflicting (if so proved) with an extra duty run. Thus, these are but the

alleged damages from the single discreet decision of Respondent to post and fill the bus run as one run and not two.

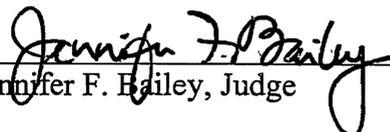
11. Because the Petitioner did not timely grieve, and because Respondent complied with West Virginia Code § 6C-2-3(c)(1) by timely raising the timeliness issue, the Decision correctly concluded that Respondent proved by a preponderance of the evidence that the grievance was untimely and that the Petitioner was too late in challenging the actions of the Board.

12. Additionally, as noted in the Decision, the Petitioner presented no evidence demonstrating a proper basis to excuse his failure to file in a timely manner. Finally, there was no argument in the Petition that such an excuse was tendered, much less proven. Thus, the Petitioner failed in his burden to in demonstrating a basis to excuse the untimely filing.

For the reasons set forth above, and all those apparent in the record, this Court ORDERS that the Decision, dated July 28, 2014, be and is hereby AFFIRMED. The Court further ORDERS that this action be DISMISSED and STRICKEN from the docket of the Circuit Court of Kanawha County. The objections of the parties to this Order are hereby noted and preserved.

It is further ORDERED that the Clerk of this Court send a certified copy of this Order to all parties and all counsel of record.

ENTERED this 16<sup>th</sup> day of November, 2015.

  
Jennifer F. Bailey, Judge

Date: 11-23-15  
Certified copies sent to:  
 counsel of record  
 parties AK BS  
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By: \_\_\_\_\_  
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Other Circuits accomplished:  
AK BS  
Deputy Circuit Clerk

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 16  
DAY OF Dec 2015  
  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA lmj