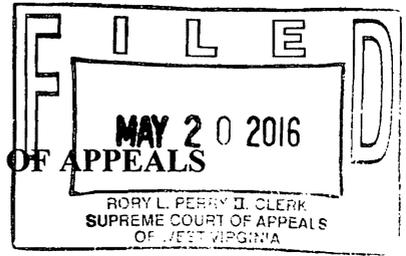


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



CASE NO.: 15-1207

(Kanawha County Circuit Court Docket No.: 14-AA-91)

**JOHN STRALEY,**  
**Petitioner-Appellant,**

v.

**PUTNUM COUNTY BOARD OF EDUCATION**  
**Respondent-Appellee.**

**APPELLANTS REPLY BRIEF**

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### III. INTRODUCTION

The decision below upheld the dismissal of Mr. Straley's grievance for not being timely filed. In Appellant's Brief, Mr. Straley demonstrated how his grievance was filed on time, both because Respondent's ongoing statutory violation constitutes a "continuing violation" and because he filed his grievance within 15 days of a grievable event. Appellee filed its Response to Appellant's Brief. Therein, Appellee argues, consistently with the lower court's order now on appeal, that Mr. Straley's grievance below was not timely because it was not filed within 15 days of when he learned that his regular run was combined with an extracurricular run. Appellee claims that anything that happened after that is merely continuing damage, which, it asserts, does not renew the filing period to file a grievance. However, Appellee is wrong. Appellee was still violating Mr. Straley's statutory rights by requiring him to do extracurricular work as part of his regular run. Requiring Mr. Straley to do this is a repeating statutory offense which prolongs the period by which time a grievance can be filed after every repetition. Thus, this Appeal should be granted<sup>1</sup>.

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<sup>1</sup> While this memorandum will not discuss the second allegation of error, that the lower court erred in not recognizing that Mr. Straley filed a grievance within 15 days of a grievable event, there is nothing to add to what was said in Appellant's Brief.

#### IV. ARGUMENT

**APPELLEE'S POSITION THAT IT SHOULD BE ABLE TO VIOLATE  
THEIR EMPLOYEE'S STATUTORY RIGHTS IN PERPETUITY IF  
AN EMPLOYEE DOES NOT FILE A GRIEVANCE WITHIN 15 DAYS  
OF THE FIRST MANIFESTATION OF SUCH VIOLATION  
SHOULD NOT BE ADOPTED BY THIS COURT**

Importantly, Respondent did not deny in its Appellee's Brief that it violated the provisions of West Virginia Code Section 18A-4-16 by combining an extracurricular cross country run with a regular bus run; it avoided that question<sup>2</sup>. Rather, it argues that its statutory violation occurred, if at all, when it posted such position, or at the latest when Mr. Straley accepted the same, and that any grievance filed after 15 days of this occurrence is untimely. There are several reasons why this honorable Court should not accept Appellee's position.

First, as stated in Appellant's Brief, in the very least, Mr. Straley's statutory right to have a bus run independent of an extra curricular run is violated every time he is required to make his cross country run. This occurs, essentially, every school day for the several weeks every fall that the cross country season takes place. Since Mr. Straley was in the midst of cross country season when he filed his grievance, it is timely filed.

Additionally, an important way to view the issue of whether a certain violation is "continuing" or a one time event is to consider the interest being protected. Thus, if the interest being protected by a certain statute has a specific ending time, then there is no "continuing violation." An example of that would be a tort, such as battery. The interest being protected by allowing a recovery to a victim of battery is the right of ones body to be free from unwanted

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<sup>2</sup> Even if Appellee would argue that it did not violate the Code in this instance, its position is still that such violation, no matter how clear, can not be opposed by its employees unless a grievance is filed within 15 days of some singular act.

touching. A battery is a one time violation of that interest. Thus, a single battery is not a “continuing violation,” even when the pain and injury from the battery endures over time. However, when the interest being protected is on-going, such as working in the proper classification, as in the case of Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W. Va. 1995) or the right to work in a discrimination free environment, as in the cases of Board of Education of Wood County v. Airhart, 569 S.E.2d 422 (W. Va. 2002); and Board of Education of Tyler County v. White, 605 S.E.2d 814 (W. Va. 2004), the wrong is continuing. Because of the continuing nature of these wrongs, a misclassified employee is not required to bring a case within 15 days of the classification decision, nor is an individual who is being discriminated against in terms of pay required to file a grievance within fifteen days of the employer’s discriminatory decision. Similarly, because the interest being protected by West Virginia Code Section 18A-4-16 is on-going, the violation of an employee’s rights are continuous once they occur.

Appellant’s argument is supported by this Court’s opinion in Smith v. The Board of Education of the County of Logan, et al., 176 W. Va. 65, 341 S.E.2d 685 (1986). True, the issue in Smith is dissimilar to the one we have here: whether an employee working under an extracurricular contract pursuant to 18A-4-16 is afforded the due process protections of 18A-2-8 upon termination. Id. at 686-87. However, the Smith holding is quite relevant to the case *sub judice* in that the Smith Court explained the purpose of 18A-4-16. As this Court stated: “[t]he statutes intended purpose was to grant [employees doing extracurricular work] additional protection by mandating that school boards could not assign teachers to coaching duties without their express consent, and **more importantly, could not condition their teaching employment**

**upon acceptance or continuation of coaching duties.”** (Emphasis added). Thus, Mr. Straley has an on-going protected interest in being able to perform his regular bus run without being required to perform extracurricular duties as a condition thereof. Indeed, Mr. Straley is required to perform extracurricular work every year, or risk termination of his regular bus assignment if he fails to comply.

Appellee argues that the only key event for the beginning of the 15 day filing period was its posting of the illegal run. As soon as Mr. Straley learned of that event, according to Respondent, the time period began. However, as Smith noted, the primary purpose of 18A-4-16 is not to assure a certain type of job posting. We are not dealing with a “job posting” statute. Rather, the primary purpose was to insure that a bus operator’s primary job is not conditioned upon his being forced to accept extra curricular work. Thus, on every occasion that this forcing is required, a statutory violation has occurred.

Finally, this Court should consider the value of upholding the rule of law in ruling on this matter. Again, Appellee’s position is, essentially, that no matter how egregious the statutory violation, the period by which a grievance begins to run is when the first manifestation of the act occurs. Here, Respondent claims that it should be permitted to violate Mr. Straley’s statutory rights so as long as Appellant is under contract to drive his present bus runs. An employer should not be violate the law simply because the employee did not recognize that his or her rights were violated and file a grievance until after 15 days from the first manifestation of such violation.

Because Appellee continually violates Mr. Straley’s statutory rights every time that he has to make an extra curricular run as a condition of maintaining his regular bus run and because the

interest that West Virginia Code Section 18A-4-16 is meant to protect is ongoing, such acts by Respondent constitute a continuing violation of his rights and, thus, the time to contest such violations are renewed after every occurrence.

## V. CONCLUSION

Mr. Straley should prevail for the reasons contained herein and set for in his Appellant's Brief. This matter should be remanded back to the West Virginia Public Employee's Grievance Board for the reasons set forth herein.

JOHN STRALEY  
By Counsel



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**CERTIFICATE OF SERVICE**

I, Andrew J. Katz, counsel for Petitioner-Appellant John Straley, do hereby certify that I have on the 20<sup>th</sup> day of May, 2016 caused to be served a true copy of **APPELLANT'S REPLY BRIEF** via United States Postal Service regular mail to the following individual:

Rebecca Tinder, Esquire  
Bowles, Rice, McDavitt, Graff & Love  
PO Box 1386  
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