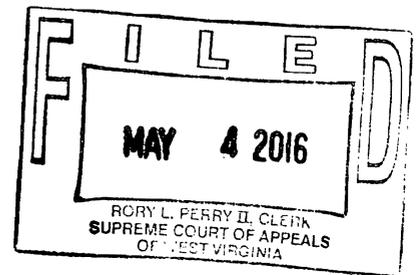


No. 15-1207



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN STRALEY,

Plaintiff Below / Petitioner,

v.

PUTNAM COUNTY BOARD OF EDUCATION

Defendant Below / Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities 3

Counter-Statement of the Case 4

Summary of Argument 5

Statement Regarding Oral Argument and Decision 6

Argument 6

 I. Standard of Review 7

 II. The event giving rise to Petitioner’s grievance was a solitary act,
 not a continuing practice. As such, Petitioner was required
 to file his grievance within fifteen days of his learning of that
 act. He failed to do so, and his grievance was therefore properly
 dismissed as untimely. 7

 III. The denial of Petitioner’s ability to accept an extra-duty bus run
 was, if anything, a continuing damage arising from Respondent’s
 inclusion of the cross-country stop as a part of a regular bus run.
 It did not, therefore, extend Petitioner’s time to file a grievance. 12

Conclusion 14

TABLE OF AUTHORITIES

Cases

Board of Education of County of Wood v. Airhart,
212 W. Va. 175, 569 S.E.2d 422 (2002) 11

Board of Education of The County of Tyler v. White,
216 W. Va. 242, 605 S.E.2d 814 (2004) 11, 12

Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc.,
220 W. Va. 39, 640 S.E.2d 102 (2006) 8

DeRocchis v. Matlack, Inc.,
194 W. Va. 417, 460 S.E.2d 663 (1995) 8

Hammond v. West Virginia Department of Transportation, Division of Highways.,
229 W. Va. 108, 727 S.E.2d 652 (2012) 7, 13

Hammond v. West Virginia Department of Transportation, Division of Highways.,
Kanawha County Circuit Court Civil Action No. 08-AA-19 (Dec. 22, 2009) 13

Martin v. Randolph County Board of Education,
195 W. Va. 297, 465 S.E.2d 399 (1995) 7, 10

Roberts v. West Virginia American Water Company,
221 W. Va. 373, 655 S.E.2d 119 (2007) 9

Spahr v. Preston County Board of Education,
182 W. Va. 726, 391 S.E.2d 739 (1990) 9, 10, 12, 13, 14

State v. Epperly,
135 W. Va. 877, 65 S.E.2d 488 (1951) 12

Statutes

WEST VIRGINIA CODE § 6C-2-1 11, 12

WEST VIRGINIA CODE § 6C-2-4(a)(1) 5, 6, 7, 8, 9, 11, 12, 14

WEST VIRGINIA CODE § 18-29-1 12

COUNTER-STATEMENT OF THE CASE

The facts of this matter are not in dispute. Petitioner has been employed by Respondent as a regular full-time Bus Operator for more than four years. *See* App. pp. 1, 70. Petitioner applied for his current bus run in September of 2012 and was subsequently awarded it by Respondent on October 1, 2012. *See id.* at 2, 70–72. During cross-country season, which runs from August through mid-to-late October, this run requires Petitioner to stop at Hurricane Middle School at the end of the school day to pick up students participating in cross-country and deliver them to either Hurricane High School or Valley Park just beyond the high school (hereinafter referred to as “the cross-country stop”). *See id.* at 2. On September 11, 2013, Petitioner filed a grievance alleging that the cross-country stop is an extracurricular bus run and, that by including it as a part of a regular run, Respondent denied him of “payment/benefits” in violation of West Virginia law. *See id.* at 2, 16. Specifically, Petitioner alleges that he should be specifically and separately paid for moving students from one school to another or from the school to the park, the cross-country stop, while on the afternoon portion of his assigned bus run. He claims that having to make that stop has denied him of the opportunity to accept extra-duty runs, namely one offered on August 29, 2013. *See id.* at 16, 78–79. Petitioner has not raised allegations of discrimination or misclassification or accused Respondent of violating any uniformity provisions. *See id.* at 16.

Petitioner began driving the run, including the cross-country stop, on October 2, 2012. *See id.* at 2, 84. It is undisputed that on that date, Petitioner was aware that his run included the cross-country stop. *Id.* It is also clear that Petitioner continued to make that stop as a part of his run until the cross-country season ended in mid to late October, 2012. *Id.* Notwithstanding this

plain knowledge, Petitioner did not file his grievance until almost a year after he clearly knew that his run contained the cross-county stop. *See id.* at 16.

Petitioner's grievance was heard by the West Virginia Public Employees Grievance Board (the "Grievance Board"), which dismissed it as untimely under West Virginia Code § 6C-2-4(a)(1). *See id.* at 9–15. Petitioner appealed the Grievance Board's decision to the Circuit Court of Kanawha County (the "Circuit Court"), which, on November 16, 2015, appropriately affirmed the Grievance Board's decision and dismissed Petitioner's claim. *See id.* at 1–7. It is from this dismissal that Petitioner currently appeals.

SUMMARY OF ARGUMENT

Petitioner acknowledged that he learned of the events giving rise to his grievance, Respondent's singular act of posting the bus run held by Petitioner, to include the extracurricular cross-country stop, as a part of a regular bus run, by October 2, 2012. Nonetheless, he did not actually file his grievance until almost a year later, on September 11, 2013, well past the fifteen days he was permitted under West Virginia Code § 6C-2-4(a)(1). To overcome his late filing, Petitioner attempts to convert Respondent's solitary act into a "continuing practice." However, the application of well-settled West Virginia statutes, case law, and legislative intent clearly result in finding that Respondent's singular action, of posting the run as it did, was not a continuing practice. Rather, when applied, these precedents confirm that, by appropriately including the cross-country stop as part of a regular run when the position was posted and filled, Respondent engaged in a single act. It is, instead, the damages that Petitioner claims to have suffered, which are continuing. "Continuing damages," do not extend the time to file a grievance.

Petitioner now asks this Court to ignore well-established law and, instead, conclude that a public employee should be able to indefinitely bring a grievance if he is alleging continuing

damage from any act by his employer, but he fails to provide any meaningful support or rationale for this substantial request. As such, Petitioner's arguments were properly rejected and dismissed by the Grievance Board and the Circuit Court of Kanawha County. This Honorable Court should similarly reject Petitioner's requests and deny the relief that he now seeks.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that oral argument is unnecessary, as the dispositive issue in this matter has already been authoritatively decided and because the facts and legal arguments are adequately presented in the briefs and record on appeal. The decisional process would not be significantly aided by oral argument.

ARGUMENT

The Circuit Court correctly upheld the Grievance Board's order dismissing Petitioner's grievance as being untimely filed. Under West Virginia Code § 6C-2-4(a)(1), Petitioner was required to file his grievance within fifteen days of: 1) the "occurrence of the event upon which the grievance is based," 2) the "date upon which the event became known to the employee," or 3) the "most recent occurrence of a continuing practice giving rise to a grievance." Petitioner's grievance arose from Respondent's singular act of including the cross-country stop as a part of a regular run, not from any continuing practice, and the damages that Petitioner suffered, if any, were simply the continuing results of this isolated act. As such, Petitioner was required to file his grievance within fifteen days of the date he learned of the alleged violation, which he acknowledges was October 2, 2012. *See* App. pp. 2, 16, 82-85. Instead, Petitioner did not file his grievance for almost a year. The Grievance Board found, and the Circuit Court affirmed, that Petitioner's grievance was untimely. The lower tribunals' decisions should be affirmed.

I. Standard of Review

“When reviewing the appeal of a public employees grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the administrative law judge.” Syl. Pt. 1, *Hammond v. West Virginia Dep’t. of Transp., Div. of Highways*, 229 W.Va. 108, 727 S.E.2d 652 (2012) (quoting Syl. Pt. 1, *Martin v. Barbour County Board of Education*, 228 W.Va. 238, 719 S.E.2d 406 (2011)). A reviewing circuit court applies “a combination of both deferential and plenary review,” giving deference “to factual findings rendered by an administrative law judge” and to “[c]redibility determinations made by an administrative law judge,” but reviewing de novo all “conclusions of law and application of law to the facts.” See *id.* (quoting Syl. Pt. 1, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000)). Thus, in adopting this same standard, this Honorable Court must also give deference to the Circuit Court’s factual findings and credibility determinations while it conducts a de novo review of that court’s conclusions of law and application of law to the facts.

II. **The event giving rise to Petitioner’s grievance was a solitary act, not a continuing practice. As such, Petitioner was required to file his grievance within fifteen days of his learning of that act. He failed to do so, and his grievance was therefore properly dismissed as untimely.**

The basis of Petitioner’s grievance is Respondent’s posting and inclusion of the cross-country stop as a part of a regular bus run, which he claims is, and should have been posted as, a separate extracurricular bus run. West Virginia Code § 6C-2-4(a)(1) requires a public employee to bring a grievance within fifteen days of one of three dates: 1) “the occurrence of the event upon which the grievance is based,” 2) “the date upon which the event became known to the employee,” or 3) “the most recent occurrence of a continuing practice giving rise to a grievance.” Respondent posted the contested run on or about September 20, 2012, and Petitioner

acknowledges that he knew of, and even drove the run, including the contested cross-country stop, when he started the run on October 2, 2012. *See* App. p. 18; *see also id.* at pp. 2, 82–85. Thus, under either of West Virginia Code § 6C-2-4(a)(1)'s first two provisions, Petitioner was required to file his grievance by approximately October 17, 2012. He failed to do so, and he now seeks to excuse his late filing by asking this Court to find that Respondent's solitary act of including the contested cross-country stop as a part of a regular bus run constituted a continuing practice such that a new fifteen day filing period was initiated each time Petitioner made the cross-country stop. In doing so, Petitioner asks this Court to modify years of well-settled law to now find that the fifteen day filing window simply does not apply to a public employee who alleges that he suffered ongoing damages as a result of a singular act. Petitioner's request must be denied.

While the concept that a continuing practice or violation can toll a claimant's time to bring action is recognized in West Virginia, that notion is very narrowly tailored and applied. *See* Syl. Pt. 3, *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995) ("When, in the course of employment, a person receives a number of similar, but separate, injuries, each injury gives rise to a separate and distinct cause of action. Further, the statute of limitations for each cause of action begins to run from the date of the injury giving rise thereto, without regard to any previous injury or injuries."); *see also Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc.*, 220 W. Va. 39, 45, 640 S.E.2d 102, 108 (2006) (noting that "a continuing cause of action is found in a situation where events, which for all practical purposes are identical, occur repeatedly, at short intervals, in a consistent, connected, rhythmic manner and that similar, but separate injuries each give rise to a separate and distinct cause of action" (internal quotation omitted) (citing *DeRocchis*, 194 W. Va. at 423 n. 4, 460 S.E.2d at 669 n. 4)). The primary, and

most significant, difference between the event giving rise to Petitioner's claim here and those that led this Court to previously extend statute of limitations is the presence of an actual *continuing violation*. Here, there was but a single action taken by Respondent. That single act was posting the bus run, including the cross-country stop, as one regular run.

As this Court noted in *Roberts v. West Virginia American Water Company*, 221 W. Va. 373, 378, 655 S.E.2d 119, 124 (2007), "the distinguishing aspect of a continuing tort . . . is continuing tortious conduct, that is, a continuing violation of a duty owed the person alleging injury, rather than continuing damages emanating from a discrete tortious act. It is the continuing misconduct which serves to toll the statute of limitations under the continuing tort doctrine. Absent continuing misconduct . . . the statute of limitations begins to run from the date of the alleged tortious act."

Here, Respondent committed but one contested act, and, as a result, Petitioner's fifteen day window in which to file his grievance began to run from the time that he learned of that act. This was properly recognized by the Circuit Court, which held that Respondent's action was "a discreet event with lasting effects and, as a result, does not extend the timeline during with the grievance must be filed. This is not a continuing practice." App. p. 5.

The distinction between continuing practices, which reset West Virginia Code § 6C-2-4(a)(1)'s fifteen day window with each occurrence, and continuing damages, which do not, was succinctly explained by this Court in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990). There, five teachers brought grievances seeking, among other things, back pay. Following a Level II hearing, they were denied back pay on the grounds that their grievances were not timely filed. *Id.* at 728, 741. This ruling was ultimately appealed to the Circuit Court, which reversed, finding, in part, that their grievance had been timely filed

“because it was filed . . . ‘within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance.’” *Id.* (citations omitted). The school board then appealed to this Court, which reversed the circuit court on this issue, ruling that it “[did] not believe that the legislature intended this language to cover the present situation,” and that “[u]nder the circuit court’s interpretation, each new pay check would constitute ‘the most recent occurrence of a continuing practice,’ and would permit a grievant to obtain an indefinite accrual of back pay by delaying the filing.” *Id.* at 728, 742. This Court explained that the situation before it did not constitute a continuing practice because it “involve[d] a single *act*-the inadvertent failure to include the teachers on a list-that caused continuing *damage*, i.e., the wage deficit” and that “[c]ontinuing damage ordinarily does not convert an otherwise isolated act into a continuing practice.” *Id.* (emphasis in original). It therefore held that because the teachers had suffered a continuing damage, and not a continuing practice, “[o]nce [they] learned about the pay discrepancy, they had an obligation to initiate the grievance procedure.” *Id.* The same is true here. The damage that Petitioner claims to have suffered is simply a continued consequence of Respondent’s singular decision to include the cross-country stop as a part of a regular run. Thus, once Petitioner learned of the inclusion of that contested stop, he had an obligation to file his grievance. He failed to do so, and he has no valid excuse for his delay. His untimely grievance was therefore properly dismissed.

Examples of the Court’s recognition of unlawful continuing practices or continuing violations, sufficient to toll limitations periods, include employees’ claims of uniformity and discrimination. In *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), this Court recognized that employment discrimination in compensation disparity, achieved through misclassifications based upon unlawful and prohibited factors, is a continuing

violation that arises for as long as the disparity exists. In *Board of Education of County of Wood v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002), the Court noted that uniformity violations are a “continuing practice, and the filing of a grievance concerning these alleged violations will not be dismissed as untimely filed simply because the individual had accepted the contract and had begun working under the contract.” The Court confirmed its treatment of these “uniformity violations and discriminatory practices” as continuing violations in *Board of Education of The County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

Petitioner has not alleged that his claim falls under either. Petitioner’s situation does not involve discrimination or uniformity violations; his only allegation is that Respondent’s action violated governing statutes resulting in ongoing harm. Nonetheless, he contends that his situation should also constitute a continuing practice because it is “not very different” from the ongoing violations as evidenced in the uniformity and discrimination cases, cited above. This is simply not so.

Those recognized violations were extremely narrow and only allowed very specific offenses to be considered continuing practices, because the violative acts of pay discrimination and non-uniformity, resulting from treating the grieving employees less favorably than similarly situated employees, were deemed to be repeated with each non-uniform paycheck. However, Petitioner’s appeal asks this Court to greatly expand its treatment of continuing practices to reach the untenable conclusion that any unsavory term “within an employment contract is [de facto] a continuing violation” resulting in ongoing harm to Petitioner. *See* Notice of Appeal, § 17. If granted, Petitioner’s request would extend West Virginia Code § 6C-2-4(a)(1)’s continuing practice exception to give all public employees unlimited timelines to initiate any contract term grievance. This would be an affront to the legislative intent of the public employee grievance

procedures, which were enacted to resolve grievances “in a fair, efficient, cost-effective and consistent manner.”¹ See W.Va. Code § 6C-2-1(b). This intent should be given “full force and effect” by this Court. See *White*, 216 W. Va. at 248, 605 S.E.2d at 820 (quoting Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)).

Both the Grievance Board and the Circuit Court determined that Respondent’s inclusion of the cross-country stop as a part of a regular bus run was an isolated act, not a continuing practice. See App. p. 5, 12. Petitioner failed to meet his burden of proof, to establish to the Circuit Court, that the Grievance Board erred. He has similarly failed to prove that the Circuit Court erred here. Rather, he simply asks this Court, without providing any precedent or rationale for doing so, to ignore clear and controlling law and legislative intent and vastly extend the narrow, and long-standing, definition of a continuing practice to include any act which results in continuing damage. Such a request must be denied.

III. The denial of Petitioner’s ability to accept an extra-duty bus run was, if anything, a continuing damage arising from Respondent’s inclusion of the cross-country stop as a part of a regular bus run. It did not, therefore, extend Petitioner’s deadline to file a grievance.

As explained above, there was but a single action taken here—Respondent included a cross-country stop when it posted a regular bus run. Petitioner argues that the stop should have been posted as a separate extracurricular run, that Respondent’s posting of the run denied him of the ability to accept extra duty runs, and that this alleged lost opportunity is a distinct grievable event. He argues that the fifteen day filing deadline set forth in West Virginia Code § 6C-2-4(a)(1) should have run from the date of his last missed opportunity, August 29, 2013, and that

¹ This Court similarly noted that the intent of the former version of the public grievance procedure statutes was “to provide a simple, expeditious and fair process for resolving problems.” See Syl. Pt. 3, *Spahr*, 182 W. Va. at 726, 391 S.E.2d at 739 (citing W. Va. Code § 18-29-1). Although these prior procedures were repealed and replaced with those found in § 6C-2-1, et. seq., because the filing timelines in both versions are substantively similar, the legislative intent of each should be recognized as being harmonious.

his September 11, 2013, grievance was therefore timely filed. Assuming, *arguendo*, that Petitioner was denied the opportunity to accept extra duty runs because Respondent improperly included the cross-country stop as a part of a regular bus run, any related damages that Petitioner suffered would be continued damages from Respondent's action, not damages that resulted from separate and distinct actions of Respondent.

As discussed above, this Court has clearly recognized that continuing damages arising from an employer's singular and isolated action are distinct from continuing practices that toll an employee's time to file a grievance. As such, an employee who suffers from a continuing damage has "an obligation to initiate the grievance procedure" once he learns of the allegedly damaging action. *Spahr*, 182 W. Va. at 728, 391 S.E.2d at 742. The Circuit Court properly applied this holding when it recognized that when a grievant challenges a "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." See App. p. 6, ¶ 8 (quoting *Hammond v. W. Virginia Dep't of Transp., Div. of Highways*, Kanawha County Circuit Court Civil Action No. 08-AA-19 (Dec. 22, 2009); *aff'd* 229 W. Va. 108, 727 S.E.2d 652 (2012) (citing *Spahr*, 182 W. Va. 726, 391 S.E.2d 739 (1990)) (internal quotations removed)).

Here, Petitioner complains that a single decision that Respondent made in September of 2012 was still adversely affecting him almost a year later on August 29, 2013. Petitioner is therefore, by definition, alleging a continuing damage and not a continuing practice. As such, Petitioner's time to file a grievance over this damage began to run at the time he learned of the event giving rise to his claim, and not from the time of the most recent continuing damage he suffered. It is undisputed that Petitioner knew of the contested cross-country stop on October 2,

2012. His time to file had therefore long expired by the time he submitted his September 11, 2013 grievance, and the Grievance Board and the Circuit Court properly dismissed his claim.

CONCLUSION

Both of the damages that Petitioner allegedly suffered, his not receiving a separate contract and his inability to accept extra duty runs that occurred while he was dropping off students after school at the stop so that they could attend cross-country practice, resulted from Respondent's single decision to include the contested stop as a part of a regular run. Although Petitioner was fully aware of the contested cross-country stop, he did not file a grievance until he had already been making his run for almost an entire year. He attempts to overcome his late, and impermissible, filing by arguing that Respondent engaged in a continuing practice of violating Petitioner's rights. First, he asks this Court to overturn years of precedent, and clear legislative intent, and essentially eliminate West Virginia Code § 6C-2-4(a)(1)'s filing deadlines, by finding that a public employee has an indefinite time period to bring a grievance if he alleges ongoing damages from a single wrongful act. Second, he asks this Court to take a clear continuing damage and transform it into a continuing practice. Both requests are unfounded in West Virginia law.

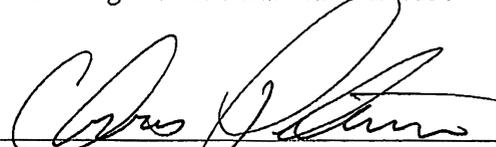
The facts of this case make it clear that Petitioner was fully aware of, and had the opportunity to file a grievance contesting, Respondent's singular act of including the contested cross-country stop as a part of a regular bus run well within the time limit permitted by West Virginia Code § 6C-2-4(a)(1). This Court has long recognized that once an employee learns about a potential violation, he "[has] an obligation to initiate the grievance procedure." *Spahr*, 182 W. Va. at 728, 391 S.E.2d at 742. Petitioner has failed to present adequate facts or legal basis to prove that this rule should not apply in his situation. As such, this Honorable Court

should uphold the Circuit Court's decision dismissing Petitioner's grievance as untimely and similarly dismiss this matter.

Respectfully submitted,



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Supreme Court Docket No. 15-1207
(Kanawha County No. 14-AA-91)

PUTNAM COUNTY BOARD OF EDUCATION

Defendant Below / Respondent.

CERTIFICATE OF SERVICE

I, Christopher Dulany Petersen, counsel for Respondent Putnam County Board of Education, do hereby certify that on this 4th day of May, 2016, I have served a true copy of the foregoing "Brief of Respondent" by electronic mail and via U.S. Mail, postage prepaid, upon:

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