

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Daphne Lemasters,
Respondent Below, Petitioner**

vs) No. 15-0339 (Kanawha County 14-AA-106)

**Jackson County Board of Education,
Petitioner Below, Respondent**

FILED

May 23, 2016

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Daphne Lemasters, by counsel Andrew J. Katz, appeals the Circuit Court of Kanawha County’s March 16, 2015, order reversing the West Virginia Public Employees Grievance Board’s (“WVPEGB”) decision that granted her grievance. Respondent Jackson County Board of Education (“JCBE”), by counsel Howard Seufer, filed a response in support of the circuit court’s order and a supplemental appendix. Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in reversing the administrative law judge’s (“ALJ”) decision and in relying on *Weimer-Godwin v. the Board of Education of Upshur County*, 179 W.Va. 423, 369 S.E.2d 726 (1988) to support its contention that a school board can assign teachers work beyond their regular work day, without compensation or an agreement.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In November of 2012, an employee filed a prior, separate grievance that did not involve petitioner, concerning an alleged imbalance in the assignment of supervising and monitoring students as they embarked and disembarked buses, commonly referred to as “bus duty.” In response to the grievance, the JCBE developed a revised bus duty schedule which went into effect in November of 2012. During the 2013-2014 school year, petitioner was employed by respondent as a kindergarten teacher at Gilmore Elementary School (“Gilmore”). Generally, teachers at Gilmore reported to work at 7:45 a.m. and remained until 3:45 p.m. All teachers at Gilmore shared morning and evening bus duty assignments on a rotating basis. Morning bus duty consisted of supervising and monitoring students as they disembarked from buses at Gilmore and evening bus duty consisted of supervising and monitoring students as they boarded buses to return home. Gilmore teachers assigned to morning bus duty reported for duty at 7:15 a.m. and teachers assigned to afternoon bus duty were required to remain on duty until 3:55 p.m. Petitioner completed an employee time report for each day she performed morning or afternoon bus duty during the 2013-2014 school year at Gilmore.

In October of 2013, petitioner filed a Level One Grievance against respondent contesting the bus duty requirement and requesting overtime, in the form of back pay with interest, for each of the days she performed bus duty. She also requested that she not be required to perform bus duty unless she voluntarily elects to do so by extracurricular contract. The JCBE superintendent denied the grievance by written decision dated September 30, 2013. In December of 2013, petitioner filed a Level Two Grievance and requested mediation. The parties' mediation was unsuccessful. In March of 2014, petitioner filed a Level Three Grievance and requested a hearing contesting the JCBE superintendent's decision that bus duty is a part of a JCBE teacher's regular work day. Ultimately, the ALJ decided in favor of petitioner, determining that teachers were not required to perform bus duty unless they agreed to do so voluntarily and were compensated with overtime payments.

In March of 2015, respondent appealed the ALJ's decision to the Circuit Court of Kanawha County. Following a review of the petition, briefs, and the entire record, the circuit court reversed the ALJ's decision by order entered on March 16, 2015. The circuit court ruled that, pursuant to this Court's prior holdings and West Virginia Code § 18A-4-16(1), petitioner's bus duty did not qualify as an "extracurricular activity." It is from this order that petitioner now appeals.

We have previously established the following standard of review:

"Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*." Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

Syl. Pt. 1, *Darby v. Kanawha Cty. Bd. of Educ.*, 227 W.Va. 525, 711 S.E.2d 595 (2011). Upon review of the record submitted on appeal, we find no error in the circuit court's decision below.

On appeal, petitioner argues, as she did below, that performing bus duty during the 2013-2014 school year constituted forced extracurricular work, for which the requirements of West Virginia Code § 18A-4-16(1) were not met and she was not compensated. Petitioner contends that the ALJ correctly determined that "bus duty" meets the statutory definition of extracurricular duties and awarded her back pay and interest for the performance of said duties. Petitioner also argues that the circuit court misconstrued this Court's prior holding in *Weimer-Godwin v. Bd. of Educ. of Upshur Cty.*, 179 W.Va. 423, 369 S.E.2d 726 (1988) and essentially "amended" West Virginia Code § 18A-4-16 by limiting its reach. Upon our review and consideration of the circuit court's order, the parties' arguments, and the record submitted on appeal, we find that the circuit court did not abuse its discretion in reversing the ALJ's ruling below.

Petitioner argues that the circuit court wrongly relied on *Weimer-Godwin* to support its contention that respondent can assign teachers work beyond their regular work day. We disagree. Petitioner attempts to dismiss *Weimer-Godwin*'s applicability by arguing that the issue in *Weimer-Godwin* was whether the grievant was unlawfully discriminated against and incorrectly reclassify her bus duty as an extracurricular activity, thereby triggering the requirements of West Virginia Code § 18A-4-16(1). However, unlawful discrimination was just one consideration in the decision and this Court also determined that a board of education must only pay additional compensation for non-instructional duties performed outside of the normal school day. The thrust of our analysis in *Weimer-Godwin*, as the circuit court correctly held, is its application of West Virginia Code § 18A-4-5a. As we held in *Weimer-Godwin*, if respondent finds that petitioner's bus duty assignment falls outside of the regular school day, it *may* pay additional compensation (emphasis added). This holding directly applies to petitioner's case. It is clear from the record that respondent established that it would not provide extra compensation for the performance of bus duty. As such, we find that the circuit court did not abuse its discretion in reversing the ALJ's ruling below.

Our review of the record supports the circuit court's decision to reverse the ALJ's ruling based upon the specific findings, its reliance on *Weimer-Godwin*, petitioner's arguments, and respondent's arguments which were also argued below. Indeed, the circuit court's order includes well-reasoned findings and conclusions as to the assignments of error raised by petitioner on appeal. Given our conclusion that the circuit court's order and the record before us reflect no error, we hereby adopt and incorporate the circuit court's findings and conclusions as they relate to petitioner's assignments of error raised herein and direct the Clerk to attach a copy of the circuit court's March 16, 2015, "Final Order" to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 23, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Allen H. Loughry II

DISQUALIFIED:

Justice Margaret L. Workman

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
2015 MAR 16 PM 1:53

JACKSON COUNTY BOARD OF EDUCATION,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Petitioner,

v.

Civil Action No. 14-AA-106
Judge James C. Stucky

DAPHNE LEMASTERS,

Respondent.

FINAL ORDER

Pursuant to West Virginia Code § 6C-2-5, Petitioner, the Jackson County Board of Education ("Petitioner"), now appeals the Level Three decision of the West Virginia Public Employees Grievance Board ("Board") granting Respondent's grievance. Respondent, Daphne Lemasters ("Respondent"), grieved being scheduled for bus duty, claiming this assignment required her to work beyond her regularly scheduled work day. The Court, upon a thorough review of the petition, entire record, briefs filed by the parties, and pertinent legal authorities, **REVERSES** the Board's decision.

FACTS AND PROCEDURAL HISTORY

Respondent is employed by Petitioner as a kindergarten teacher at Gilmore Elementary School ("Gilmore Elementary").

During the 2013-2014 school year, Gilmore Elementary typically required teachers to report to work at 7:45 a.m., and teachers were generally allowed to leave at 3:45 p.m. *See* ALJ FOF No. 6; Employee Handbook, Ex. 1.

During the relevant time period, Gilmore Elementary teachers were assigned morning bus duty or afternoon bus duty on a rotating basis. The bus duty assignment schedule was provided

in the staff handbook at the beginning of the school year. *See* Level III Hr'g Tr., p. 17 (19-21).

Neither Respondent nor any other Gilmore Elementary teacher entered into a separate contract or agreement to perform these bus duties, nor did they receive compensation.

Primarily, bus duty involved supervising and monitoring students outside the classroom setting, while incidentally assisting them with questions and problems. *See* ALJ FOF No. 10.

The morning bus duty required the teacher to monitor students at 7:15 a.m.; thus, arriving 30 minutes earlier than the normal time. The evening bus duty required the teacher to monitor students from the 3:30 p.m. dismissal until approximately 3:55 p.m.; thus, staying 10 minutes later than the normal time. *See* Employee Handbook, Ex. 2.

No morning duty teacher or evening duty teacher was required to work more than eight hours a day. As such, if a teacher performed morning duty, the teacher was allowed to leave at 3:15 p.m. instead of 3:45 p.m., while having another staff member cover the teacher's class. Likewise, the evening duty teacher was allowed to arrive at 7:55 a.m., rather than the normal 7:45 a.m. start time. However, on occasion, teachers assigned evening bus duty were required to stay past 3:55 p.m. if a bus was delayed due to inclement weather or a traffic accident. *See* ALJ FOF Nos. 8 & 9.

Respondent documented each occasion in which she performed bus duty. The information provided that Respondent performed bus duty approximately 1-3 days per month.

On October 23, 2013, Respondent filed a grievance against Petitioner requesting that she receive overtime, in the form of back pay, with interest, for each of the days she performed bus duty. A Level One conference and Level Two mediation proved unsuccessful. Following a Level Three hearing on July 23, 2014, the Board granted Respondent's grievance.

STANDARD OF REVIEW

Pursuant to West Virginia Code § 6C-2-5, a circuit court may reverse, vacate or modify the administrative law judge's decision if the circuit court determines the decision is any of the following:

- (1) is contrary to law or 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.

The West Virginia Supreme Court of Appeals has interpreted this standard as follows:

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.

Syl. pt. 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

Moreover, "[a] final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to W.Va. Code, § 18-29-1, *et seq.* (1985), and based upon findings of fact, should not be reversed unless clearly wrong." Syl. pt. 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989).

ANALYSIS

On appeal to the Court, Petitioner argues that the Board erred in finding that Petitioner violated West Virginia Code 18A-4-16, which contains the State's rules for assigning teachers to extracurricular assignments. Specifically, Petitioner contends that (1) Respondent's bus duty schedule did not force Respondent to work outside of her regularly scheduled working hours and (2) the proposed application of W. Va. Code §18A-4-16 would run contrary to established West Virginia law.

The Board concluded Respondent established by a preponderance of the evidence that Petitioner violated West Virginia Code § 18A-4-16 when she was required to perform

extracurricular bus duties on a rotating basis at times before and after her regularly scheduled working hours.

As this grievance does not involve a disciplinary matter, Respondent had the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W.Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W.Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In this case, the Court finds the primary issue is whether bus duty assignment constitutes an "extracurricular duty," so as to trigger the requirements of West Virginia Code § 18A-4-16.

West Virginia Code § 18A-4-16, in pertinent part, provides the following:

The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. . .

W. Va. Code § 18A-4-16(1).

"A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)." Syl. pt. 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997). Moreover, "[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syl. pt. 2, *Click v. Click*, 98 W.Va. 419, 127 S.E.2d 194 (1925).

During the relevant time period, Rhonda Jelich, Director of Elementary Education for Jackson County Schools ("Director Jelich"), developed a bus duty schedule that was submitted to and approved by the Assistant Superintendent of Jackson County Schools. At the beginning of the school year, teachers are notified of the adjustment to their schedule. *See* Level III Hr'g Tr., p. 17 (19-21). Respondent argues bus duty constitutes an extracurricular duty, and in effect, should trigger the statutory requirements of W. Va. Code § 18A-4-16(1). Conversely, Petitioner contends that the adjustment in Respondent's schedule does not warrant the creation of an extracurricular position.

Among other things, Petitioner argues that Respondent is not entitled to additional compensation because she was occasioned to work outside of her regularly scheduled hours. In *Weimer-Godwin v. Board of Education of Upshur County*, 179 W.Va. 423, 369 S.E.2d 726 (1988), the West Virginia Supreme Court of Appeals ("Supreme Court") acknowledged that a teacher is not entitled to extra compensation simply because she is required to work outside of regular school hours.

In *Weimer*, Mrs. Weimer-Godwin was an itinerant general music teacher and choral director whose position required her to work (1) traveling to larger towns outside the county to select choral music and (2) preparing for and directing two performances each year, one in the fall and one in the spring. *Weimer*, 179 W.Va. at 425, 369 S.E.2d at 728. Mrs. Weimer-Godwin filed a grievance on the ground that she was qualified, under W. Va. Code § 18A-4-5 [1969] and W. Va. Code § 18A-4-5a [1984], to receive additional compensation as the string instrument and band instrument teachers received for a given period because she performed "like assignments and duties" as they. *Weimer*, 179 W.Va. at 426, 369 S.E.2d at 729.

The circuit court determined the overriding issue was whether the appellant performed noninstructional duties outside of the regular school day. Following testimony of the county superintendent of schools, the circuit court held that "preparation, *outside* regularly scheduled hours, for, and presentation of, *evening* choral performances" constitutes noninstructional duties

outside the scheduled hours of the regular school day. *Id.* (emphasis in original). On appeal, the Supreme Court held that the circuit court correctly concluded that the appellant was qualified to receive additional compensation because the evidence provides “she performs certain noninstructional duties outside the scheduled hours of the regular school day.”¹ *Weimer*, 179 W.Va. at 427, 369 S.E.2d at 730.

However, the Supreme Court recognized that a county board of education is not required to pay a teacher additional compensation simply because a teacher is qualified to receive it, noting the use of the word “may,” not “shall,” in the relevant statute. *Id.* Ultimately, the Supreme Court looked to whether teachers performing “like assignments and duties” had previously been provided additional compensation.² Finding that the string instrument and band instrument teachers’ duties were similarly situated to the appellant’s duties, the Supreme Court held that she was entitled to the salary supplement. *Id.*

Weimer differs from the case at bar. In this matter, the record indicates that teachers were provided with their schedules, including bus duty assignments, at the beginning of the school year. As such, bus duty is part of Respondent’s regular schedule. Also, bus duty occurs during the regular school day, not in the evening, such as a choral performance. Furthermore, no evidence has been provided that any teacher has been compensated for bus duty.

The Supreme Court has been tasked with determining whether a position was “extracurricular,” so as to require a separate contract pursuant to W. Va. Code § 18A-4-16. In *Cruciotti v. McKneel*, 183 W.Va. 424, 396 S.E.2d 191 (1990), the school board posted a position for a physical education teacher and athletic trainer. Mr. Cruciotti expressed his desire to be considered for the position of physical education teacher only. When another applicant received the position, Mr. Cruciotti filed a grievance, alleging the announcement constituted an “improper

¹ As previously stated, the noninstructional duties outside the scheduled hours of the regular school day were “preparation, *outside* regularly scheduled hours, for, and presentation of, *evening* choral performances.” *Weimer*, 179 W.Va. at 426, 369 S.E.2d at 729 (emphasis in original).

² “Under W. Va. Code, 18A-4-5 [1969] and its successor, W. Va. Code, 18A-4-5a[1984], once a county board of education pays additional compensation to certain teachers, it must pay the same amount of additional compensation to other teachers performing “like assignments and duties[.]” *Weimer*, 179 W.Va. at 427, 369 S.E.2d at 730.

joinder” of employment positions, in violation of W. Va. Code § 18A-4-16 [1982].

In *Cruciotti*, the issue was whether the position of athletic trainer is “extracurricular” so as to require a separate contract of employment. Based on evidence that *most* of the athletic trainer’s duties take place *after* regular school day hours, the Supreme Court held that the position of athletic trainer is “extracurricular” for purposes of W. Va. Code § 18A-4-16 [1982]. *Cruciotti*, 183 W.Va. at 427, 396 S.E.2d at 194 (emphasis in original). In this case, a student riding the school bus, unlike a sport practice, is a routine part of a student’s regular school day.

Importantly, the Supreme Court has clearly stated that West Virginia Code § 18A-4-16 was enacted in response to *State ex rel. Hawkins v. Tyler County Board of Education*, 166 W.Va. 363, 275 S.E.2d 908 (1980). See *State ex rel. Boner v. Kanawha County Board of Education*, 197 W. Va. 176, 184, 475 S.E.2d 176, 184 (1996); *Cruciotti v. McNeel*, 183 W.Va. 424, 426, 396 S.E.2d 191, 193 (1990). In *Hawkins*, a teacher challenged the school board’s authority to transfer her to another school due to her refusal to coach basketball in addition to her regular teaching responsibilities. In the analysis, the Supreme Court stated the following regarding extracurricular activities:

Extracurricular activities have come to be accepted as an important part of a child’s educational program. “We have come to regard education not as a development of a part of the faculties, but of all them the intellectual, the moral, as well as the physical.” (citation omitted). *Rhoades v. School District No. 9*, 115 Mont. 352, 142 P.2d 890 (1943). Activities such as band, athletics, clubs, cultural and social events are essential to the total development of a child.

Hawkins, 166 W.Va. at 368, 275 S.E.2d at 913. Ultimately, the Supreme Court held that the assignment of coaching duties requires a teacher’s express consent and teaching employment could not be conditioned upon acceptance of these additional duties. *Hawkins*, 166 W.Va. at 373, 275 S.E.2d at 915.

Following the underlying rationale for the enactment of the extracurricular statute, the duties associated with the text should be interpreted to include traditional extracurricular

activities. *Boner*, 197 W.Va. at 184, 475 S.E.2d at 184.³ The Merriam-Webster dictionary defines “extracurricular” as follows:

1 : not falling within the scope of a regular curriculum; specifically: of or relating to officially or semiofficially approved and usually organized student activities (as athletics) connected with school and usually carrying no academic credit

2 a : lying outside one’s regular duties or routine

See <http://www.merriam-webster.com/dictionary/extracurricular>. “Extracurricular” is further defined as “taking place outside the normal school timetable: extracurricular activities.” See <http://dictionary.reference.com/browse/extracurricular?s=t>.

In this matter, teachers are supplied with a staff handbook at the beginning of the school year that informs them of the requisite schedule and procedures for the given year. The handbook includes a schedule to inform teachers of their individual assignments of bus duty. The arrival or departure time for when a teacher performs bus duty is slightly different than when they do not perform the task. However, the record indicates that the schedule is altered to ensure no teacher is required to work more than eight hours per day.

Importantly, bus duty falls within the timetable of a regular school day.⁴ For many students, the school bus is a necessary, routine part of the school day. Therefore, bus duty, unlike athletics, clubs, or other student activities, occurs within the normal timetable for a regular school day.

Based on the foregoing, the Court finds that the Board erred in finding Respondent’s bus duty assignment constitutes an “extracurricular duty” so as to require a separate contract of

³ In *Boner*, the Supreme Court agreed with the West Virginia Education Association that “the inclusion of the term ‘instruction’ within that statute must be viewed ‘narrowly, in a logical manner, consistent with the text of [the] statute itself, and be interpreted to include only that type of instruction associated with traditional extracurricular activities. . . .” *Boner*, 197 W.Va. at 184, 475 S.E.2d at 184.

⁴ The Supreme Court has held that “a ‘regular school day’ is a work day on which both teachers and students report to school and instructional activities take place. The ‘instructional day,’ during which actual teaching occurs, is merely a component of the larger ‘work day’ or ‘regular school day.’” *Lincoln County Bd. of Educ. v. Adkins*, 188 W.Va. 430, 434, 424 S.E.2d 775, 779 (1992).

employment pursuant to W. Va. Code § 18A-4-16.

CONCLUSION

Accordingly, the Court **ORDERS** the following: the Decision of the Administrative Law Judge for the West Virginia Public Employees Grievance Board is **REVERSED**. Therefore, this matter is hereby **DISMISSED** and **STRICKEN** from the open docket of the Court.

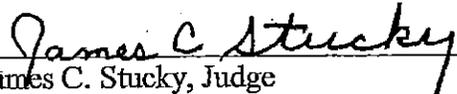
The clerk of the court shall distribute copies of this Order to the following:

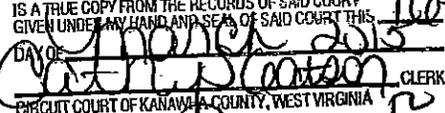
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Enter this Order the 16th day of March, 2015.


James C. Stucky, Judge
Thirteenth Judicial Circuit

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 16th
DAY OF March 2015

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA