

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

**Karen Richardson,
Petitioner Below, Petitioner**

vs) **No. 11-0045** (Kanawha County 09-AA-143)

**The Board of Education of the County of Putnam,
Respondent Below, Respondent**

FILED

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Karen Richardson appeals the circuit court's order affirming the decision of the West Virginia Public Employees Grievance Board ("Grievance Board") denying her grievance. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The Board of Education of the County of Putnam ("Board") has filed its response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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 is appropriate under Rule 21 of the Revised Rules.

Petitioner is employed as an extracurricular bus operator, performing a bus run one to two days per week. Petitioner drives under an "as needed" contract, and has driven under this type of contract since approximately 2002. However, petitioner asserts that at some point prior to 2004, extracurricular bus operators were paid under a 200-day contract which allowed for paid time off for holidays, sick days and snow days. Several extracurricular bus operators filed grievances, relating to the change in their contracts from 200 day contracts to "as needed" contracts, after one bus driver was successful in a similar grievance. The successful driver operated his bus five days a week.

Petitioner filed her own grievance, arguing that she should receive the benefits of a 200-day contract, including paid holidays, sick days and snow days, should those days fall on the date of her scheduled runs. She also argued that although she is similarly situated, she was not being treated in an equal manner when compared to other drivers who have previously prevailed in grievance actions. Petitioner's grievance was denied at all levels, and

this denial was appealed to the Kanawha County Circuit Court, wherein the circuit court affirmed the Administrative Law Judge's decision denying relief. The circuit court agreed with the ALJ that petitioner was not similarly situated, as her duties were not "like" that of the successful grievant, since her run is performed less than half of the days of the successful grievant's run. Petitioner appeals the denial.

This Court has found 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." 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 County Bd. of Educ.*, 227 W.Va. 525, 711 S.E.2d 595 (2011). Moreover, "[a] final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W.Va. Code, [6C-2-1], *et seq.* [], and based upon findings of fact, should not be reversed unless clearly wrong." Syllabus Point 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989)." Syl. Pt. 2, *Darby*, 227 W.Va. 525, 711 S.E.2d 595.

Petitioner argues that the Board violated West Virginia Code § 18A-4-5b, which mandates that "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." In order to prove discrimination pursuant to West Virginia Code § 18-29-2(m)¹, an employee must prove "(a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and (c) that the difference in treatment was not agreed to in writing by the employee." Similarly situated employees must perform jobs with "the same or nearly the same qualities or characteristics." *Weimer-Godwin v. Board of Educ. of Upshur County*, 179 W.Va. 423, 427, 369 S.E.2d 726, 730 (1988). The number of days worked between two employees is a factor in determining whether uniformity principles

¹ This section was repealed in 2007, and has been replaced by West Virginia Code § 6C-2-2.

apply. *Bd. of Educ. of County of Wood v. Airhart*, 212 W.Va. 175, 569 S.E.2d 422 (2002). It is clear from the record that petitioner works less than half of the days of the successful grievant to whom she compares herself. Therefore, she is not similarly situated or performing a “like” assignment to the employee who succeeded in his grievance. In the present case, upon a review of the entire record on appeal, this Court finds no error in the findings of the Grievance Board or the circuit court.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Acting Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISQUALIFIED:

Chief Justice Margaret L. Workman