JAMES LEWIS,

Grievant,

v. **Docket No. 97-20-554**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

James Lewis (Grievant), an employee of Respondent Kanawha County Board of Education (KCBE), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on September 19, 1997, alleging that he was being denied shift differential pay improperly. (See footnote 1) After the grievance was denied at Level I, Grievant appealed to Level II, and a hearing was conducted on November 21, 1997. Thereafter, on December 9, 1997, Barry Bowe, the Superintendent's designee, issued a decision denying the grievance. Grievant then appealed to Level IV on December 18, 1997, waiving Level III as authorized by W. Va. Code § 18-29-4(c). Following a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on March 18,1998. Subsequently, this matter became mature for decision on April 9, 1998, upon receipt of proposed Findings of Fact and Conclusions of Law from the parties. (See footnote 2)

The pertinent facts in this matter are generally undisputed. Accordingly, the following Findings of Fact have been determined from the testimony and documentary evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Kanawha County Board of Education (KCBE) in the school service personnel multiclassification of Mechanic/General Maintenance. He is assigned to KCBE's Crede operations facility.

2. On November 2, 1995, KCBE posted a position vacancy in its Maintenance Department for a Mechanic/General Maintenance. The posting specified the following:

> The above maintenance jobs are flexible shift. May be schedule[d] to work evenings/night/weekend shift. Successful applicants will be required to obtain asbestos worker or supervisors certification.

G Ex 1 at L II.

3. Grievant was the successful applicant for the position described in Finding of Fact Number 2.

4. After a brief orientation, Grievant was assigned to the evening shift, working from 3:00 p.m. to 11:00 p.m.

5. KCBE employees who agree to work a flexible shift have essentially consented in advance to changes in their hours of work that might otherwise be prohibited by W. Va. Code § 18A-4-8a(7). When Grievant began working in his present position atCrede in December 1995, KCBE had a written policy for compensating service employees who agreed to work flexible shifts. The criteria for compensation were:

> Kanawha County Schools should offer a 50 cents per hour stipend for flex shift workers who are not working the standard shift to help in recruiting applicants and volunteers. The stipend will only be allowed for flex shift on the job hours.

Evaluator's Ex 1 at L II.

6. Upon being transferred to his current position, Grievant began receiving a salary adjustment of 50 cents per hour for each hour he worked.

7. On November 20, 1996, KCBE's Director of Maintenance and Energy Management, Benjamin Shew, wrote to Grievant concerning the salary adjustment he had been receiving as follows:

> It has come to my attention that I erred in allowing the salary adjustment for you without approval from the Superintendent or the Board of Education. Due to my mistake we will be required to discontinue the 50 cents per hour supplement immediately.

I apologize for this misunderstanding.

KCS Ex 1 at L II.

8. Grievant initiated this grievance on September 19, 1997, after determining that other service employees in KCBE's Maintenance Department were still receiving the shift differential.

9. Beginning in approximately March of 1996, Robert Goff, Phillip Baire, and Larry Mullins, employed by KCBE as Painters, volunteered to work flexible shifts. They usually work four days per week on an evening shift from 2:00 p.m. to 10:00 p.m., and one day per week on a day shift from 6:00 a.m. to 2:00 p.m. Each receives an additional 50cents per hour for the days he works on the evening shift. When schools are not in session, the Painters may be assigned to a different work schedule.

10. Michael McNealy, employed by KCBE as a Crew Leader/Carpenter, volunteered to work a flexible shift, and receives an additional 50 cents per hour compensation when he works the evening shift. Elizabeth Childress, employed by KCBE as a Carpenter II, volunteered to work a flexible shift in March 1996, and receives an additional 50 cents per hour when she works the evening shift.

11. Both Mr. McNealy and Ms. Childress have been assigned to the evening shift for an extended period. Ms. Childress works day shift during the summer. Mr. McNealy likewise works day shift during the summer, and occasionally during the school year. When working the day shift, these employees do not receive an additional 50 cents per hour for working a flexible shift.

12. Prior to agreeing to work a flexible shift, Elizabeth Childress, Michael McNealy, Robert Goff, Larry Mullins, and Phillip Baire were assigned to the day shift.

13. KCBE intends the term “standard shift” to be synonymous with “normal shift,” and considers the evening shift to be Grievant's normal or standard shift. The additional 50 cents per hour pay supplement was considered an inducement for employees to agree to move from the day shift to a flexible shift assignment.

14. Since completing his orientation in December 1996, Grievant has not been required to work any shift other than the evening shift, as KCBE has had no need to move Grievant to another shift.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

KCBE contends that this grievance was not initiated within the time limits specified in W. Va. Code § 18-29-4(a)(1):

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). As required by W. Va. Code § 18-29-3(a), Respondent asserted at the Level II hearing that this grievance was untimely. L II HT at 36-37. See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). In the instant matter, Grievant was givenunequivocal written notice by KCBE Director of Maintenance and Energy Management Benjamin Shew in November 1996 that his supplemental compensation of 50 cents per hour was being discontinued. Nonetheless, Grievant waited well over the fifteen working days allowed by statute before filing this grievance. In regard to any claim that he was denied statutory notice or procedural due process before his compensation was reduced, or that he is not receiving compensation to which he is entitled under the terms of KCBE's flexible shift policy, this grievance was not initiated in a timely manner. See Rose, supra; Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Ooten v. Mingo County Bd. of Educ., Docket No. 96-

29-122 (July 31, 1996).

However, Grievant is also alleging that he is suffering from discrimination prohibited under W. Va. Code § 18-29-2(m), in that he is being compensated differently from other KCBE employees who are similarly situated. Grievant submits that he did not discover sufficient facts to support this grievance until well after November 1996, when Mr. Shew terminated his additional compensation.

The language in W. Va. Code § 18-29-4(a)(1) concerning 'the date on which the event became known" provides an exception to the otherwise rigid time limits in the grievance procedure for initiating a grievance. See Ooten, supra. This "discovery" exception was interpreted by the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). In Spahr, the Court found that the grievants there did not learn of the "event" giving rise to the grievance, in that case disparate treatment of similarly situated teachers in regard to a pay supplement, until they met with their union representative. Accordingly, the grievance was timely since it was filed within fifteen days of that "discovery." In addition to the employer having the burden of proving an affirmative defense by a preponderance of the evidence, "school personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Consistent with Spahr, supra, and Morgan, supra, the undersigned finds that KCBE failed to establish by a preponderance of the evidence that Grievant delayed more than fifteen days after discovering other employees he believed to be similarly situated were receiving preferential treatment, before filing this grievance at Level I of the grievance procedure. (See footnote 3) Therefore, Grievant's claim that he is being compensated in a manner that constitutes discrimination prohibited under W. Va. Code § 18-29-2(m) may be adjudicated. See Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994).

W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), inorder to establish a prima facie case (See footnote 4) of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non- discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96- 26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01- 543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991).

Grievant demonstrated that he is similarly situated to other KCBE service personnel in that they are all assigned to work flexible shifts, that the other employees spend muchof their time working the evening shift, and that he is the only employee assigned to a flexible shift who is not receiving supplemental compensation when he works evenings. KCBE established that Grievant has not been required to work any shift other than the evening shift since completing his one-week orientation and being assigned to the evening shift at Crede. Further, a preponderance of the evidence indicates that the other employees to whom Grievant compares himself are all required to work on the day shift from time to time, and they receive no additional compensation while working on the day shift.

It was further established that Grievant is the only KCBE employee in the Mechanic or General Maintenance classifications assigned to a flexible shift. Other KCBE employees in those classifications are assigned to regular evening or day shifts. It is understandable, given these facts, that Grievant believes he is not being treated the same as other employees.

However, notwithstanding that Grievant established a prima facie case of Code § 18-29-2(m)

discrimination under the Steele analysis, KCBE established that Grievant is being treated differently for job-related reasons. Those reasons are that Grievant is needed to repair school buses during the evening and he is on flexible shift in the event his services are needed during the day shift. Should KCBE have a requirement for Grievant during the day shift, he would be compensated by an additional 50 cents per hour for working other than his standard shift. Although this circumstance operates to Grievant's disadvantage in comparison to Painters and Carpenters whose duties change when schools are in and out of session, that does not mean that Grievant is the victim of unlawful discrimination, or that KCBE has abused its discretion in compensating its servicepersonnel. See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). Accordingly, KCBE adequately established non-discriminatory, job-related reasons for its disparate treatment of Grievant, which Grievant failed to establish as being merely pretextual. See Frank's Shoe Store, supra.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. A grievance must be filed within the fifteen day time limit specified in W. Va. Code § 18-29-4(a). W. Va. Code § 18-29-3(a). W. Va. Code § 18-29-4(a) provides:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

3. A timeliness defense is an affirmative defense, which the employer must establish by a preponderance of the evidence. Evans v. Mason County Bd. of Educ., Docket No. 97-26-400 (Jan.

23, 1998); West v. Wetzel County Bd. of Educ., Docket No.96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

5. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

6. KCBE established by a preponderance of the evidence that Grievant did not initiate this grievance within fifteen days of Director of Maintenance and Energy Benjamin Shew's unequivocal notice that Grievant would no longer be receiving additional compensation for working the evening shift as a multiclassified Mechanic/General Maintenance employee assigned to a flexible shift. Therefore, Grievant is time-barred from asserting that KCBE terminated his supplemental compensation without proper notice or that he is being denied compensation to which he is entitled under the terms of KCBE's flexible shift policy. See Rose, supra; Naylor, supra; Kessler, supra.

7. Under the "discovery provision" of W. Va. Code § 18-29-4(a)(1), "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Pate v. Summers County Bd. of Educ., Docket No. 97-45-188(Feb. 5, 1998); Lowry, supra; Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27- 481/482 (Aug. 19, 1992).

8. KCBE failed to establish by a preponderance of the evidence that the instant grievance was not submitted to Level I within fifteen days after Grievant became aware of the "event" giving rise to this grievance, that other KCBE service personnel working flexible shifts were continuing to receive supplemental compensation while working the evening shift, in arguable violation of W. Va. Code § 18-29-2(m). See W. Va. Code § 18-29-4(a); Spahr, supra; Pate, supra.

9. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant,

seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 10. If a grievant makes out a prima facie case of discrimination in violation of Code § 18-29-2(m), the employer may rebut the presumption of discrimination by offering legitimate, job-related reasons for its action. Grievant may then demonstrate that the offered reasons are merely pretextual. Copley v. Nicholas County Bd. of Educ., Docket No. 97-34-027 (Aug. 18, 1997); Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

11. Although Grievant made out a prima facie case of discrimination under W. Va. Code § 18-29-2(m), KCBE established legitimate, job-related reasons for its disparate treatment of Grievant, in regard to the compensation he receives for working a flexible shift, sufficient to refute Grievant's discrimination claim. See Tex. Dept. of Community Affairs, supra; Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must

be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide thecivil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 27, 1998

Footnote: 1

Grievant also alleged that he was not being given an opportunity to fill in for absent supervisors on a rotating basis. That issue was resolved prior to the Level IV hearing in this matter.

Footnote: 2

Grievant was represented by Perry Bryant with the West Virginia Education Association. Respondent was represented by its General Counsel, Gregory W. Bailey.

Footnote: 3

Because this aspect of Grievant's claim has been determined to have been timely filed in accordance with Spahr, it is not necessary to address Grievant's contention that each paycheck he received from KCBE which did not include the pay differential represents a "continuing violation" in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995).

Footnote: 4

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).