**HUBERT PATE,**

**Grievant,**

**v.** **Docket No. 97-45-188**

**SUMMERS COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Hubert Pate (Grievant) submitted this grievance pursuant to W. Va. Code §§ 18-29- 1, et seq., complaining that his employer, Respondent Summers County Board of Education (SCBE), was not compensating him in compliance with the uniformity requirements set forth in W. Va. Code § 18A-4-5b. This grievance was initiated at Level I on September 16, 1996. The grievance was waived to Level II where a hearing was conducted on February 26, 1997. (See footnote 1) Following denial at Level II in a decision issued by the Superintendent's designee, James Irwin, on March 20, 1997, Grievant appealed to Level III where SCBE waived consideration of the grievance, as authorized by W. Va. Code § 18- 29-4(c), on April 3, 1997. Grievant then appealed to Level IV on April 18, 1997, and a Level IV evidentiary hearing was held in Oak Hill, West Virginia, on June 9, 1997. This matter became mature for decision following receipt of the parties' post-hearing argumentson August 20, 1997. Thereafter, for administrative reasons, this grievance was reassigned to the undersigned administrative law judge on October 23, 1997.

The relevant facts necessary for resolution of this grievance are not in dispute, and the following findings of fact have been developed from the record established at Levels II and IV.

## FINDINGS OF FACT

1. Grievant has been employed by the Summers County Board of Education (SCBE) in the school service personnel classification of Mechanic since November 8, 1976.

2. Another school service employee, Roger Mann, has been employed by SCBE in the classification of Chief Mechanic, or "Head Mechanic," since February 13, 1975.

3. W. Va. Code § 18A-4-8 defines "Mechanic" to mean "personnel employed who can independently perform skilled duties in the repair and maintenance of automobiles, school buses and other mechanical and mobile equipment to use in a county school system."

4. W. Va. Code § 18A-4-8 defines "Chief [M]echanic" to mean "personnel employed to be responsible for directing activities which ensure that student transportation or other board-owned vehicles are properly and safely maintained."

5. There is no excess levy in effect in Summers County. Therefore, SCBE does not pay a county supplement to its service employees.

6. At the time of his employment, SCBE paid Mr. Mann in excess of the minimum statutory salary schedule subsequently promulgated in W. Va. Code §§ 18A-4-8and 18A-4-8a. This statutory salary schedule was already in effect at the time Grievant was hired by SCBE.

7. Following the enactment of W. Va. Code § 18A-4-8a, the State Superinten dent of Schools issued guidance which indicated that county boards of education could continue to pay employees in excess of the minimum level required by the newly-enacted salary schedule if they were being paid in excess of the minimum prior to enactment. See Bd Ex 7 at L II. Based upon this guidance, SCBE continued to pay Mr. Mann in excess of the minimum salary schedule. Similar compensation was awarded to two other SCBE employees who had likewise been compensated above the minimum level required by the newly-enacted salary schedule prior to its enactment. Those two employees are no longer employed by SCBE.

8. As across-the-board pay raises and other statutory salary adjustments have become effective over the past twenty years, SCBE has maintained Mr. Mann's salary at the same level above the statutory salary schedule as it was in relation to the new statutory pay schedule in 1976. At the present time, after discounting the additional compensation resulting from his higher classification as Chief Mechanic and one year's greater experience, Mr. Mann receives $102 per month not paid to other service employees. Except for this additional $102, Mr. Mann and Grievant are compensated in accordance with the statutory salary schedule for their respective classifications.

9. Grievant's immediate supervisor is Paul Blankenship, SCBE's Transportation Director. Mr. Mann also reports to Mr. Blankenship.

10. Mr. Mann is not Grievant's direct supervisor. However, Grievant has recognized since his initial employment that Mr. Mann is the "Head Mechanic" in the busgarage and generally follows Mr. Mann's guidance. As Chief Mechanic, or Head Mechanic, Mr. Mann has primary responsibility for accomplishing the work of the bus garage, a responsibility that is not assigned to Grievant.

**DISCUSSION**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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.

SCBE contends that this grievance was not initiated within the time limits set forth 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.

In accordance with W. Va. Code § 18-29-3(a), Respondent properly asserted during the Level II hearing that this grievance was not initiated at Level I of the grievance procedure in a timely manner. HT at 49. See Evans v. Mason County Bd. of Educ., Docket No. 97-26-400 (Jan. 23, 1998); Byrd v. Cabell County Bd. of Educ., Docket No. 96- 06-324 (May 22, 1997). See also 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). A timeliness defense is an affirmative defense which the employer mustestablish by a preponderance of the evidence. 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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievant testified that he was aware for many years that Mr. Mann was receiving more pay than

he was. However, Grievant professes that he was not aware that this disparity was based upon any factor other than Mr. Mann's higher classification and greater experience, until he happened to see Mr. Mann's pay statement shortly before he filed this grievance. At that point, Grievant became aware that Mr. Mann was receiving some form of "supplement" which he was not. Further, after reading W. Va. Code § 18A-4-5b, Grievant believed such disparity was improper.

This issue is controlled by the decision of 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), wherein the Court interpreted the "discovery" provision in W. Va. Code § 18-29- 4(a), quoted above. 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." "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 SCBE failed to establish by a preponderance of the evidence that Grievant delayed more than fifteen days from becoming aware of the "event" giving rise to this grievance before he initiated a grievance at Level I of the grievance procedure.

Turning to the merits of this grievance, Grievant alleges that SCBE is violating W. Va. Code § 18A-4-5b (1993). That statute provides in pertinent part:

> The county board of education may establish salary schedules which shall be in excess of the state minimum fixed by this article.
>
> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like duties and assignments within the county . . . .

W. Va. Code § 18A-4-5b is directed toward employees who perform comparable work but receive dissimilar pay. Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Fowler v. Mason County Bd. of Educ., Docket No. 94-26-037 (Oct. 6, 1994). See Harper v. Pendleton County

Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). However, Grievant has failed to establish by a preponderance of the evidence that SCBE is failing to compensate him in accordance with W. Va. Code § 18A-4-5b under the circumstances presented in this grievance. Unlike the situation in Miller v. Boone County Board of Education, Docket No. 93-03-110 (June 11, 1993), relied upon by Grievant, Grievant and Mr. Mann are not in the same classification category of employment asdefined in W. Va. Code § 18A-4-8. That fact alone appears to trigger one of the exceptions contained in the uniformity provision of W. Va. Code § 18A-4-5b.

Further, although their day-to-day duties repairing school buses and other county school vehicles may be similar, by statutory definition controlling their respective classifications, Grievant, a Mechanic, and Mr. Mann, a Chief Mechanic, do not perform the same duties. See Clark v. Kanawha County Bd. of Educ., Docket No. 95-20-559 (Apr. 15, 1996); Hissom v. Hancock County Bd. of Educ., Docket No. 94-15-568 (Jan. 31, 1995); Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Wilkinson v. Lincoln County Bd. of Educ., Docket No. 95-22-248 (Sept. 7, 1995). Thus, Mr. Mann has greater responsibility in his position as Chief Mechanic than Grievant.

Finally, SCBE has consistently paid Mr. Mann an additional amount, based upon the salary he was receiving when the minimum salary schedule contained in W. Va. Code § 18A-4-8a was first implemented. This particular circumstance is directly related to Mr. Mann's more favorable terms of employment obtained before these statutes were enacted. Although these statutes do not contain a per se "grandfather clause," SCBE has followed explicit guidance from the State Superintendent of Schools to permit Mr. Mann to retain the additional compensation, rather than arbitrarily rescinding this additional pay. In these circumstances, the uniformity requirements of W. Va. Code § 18A-4-5b are not being violated.

Based upon the differences between Grievant and Mr. Mann discussed above, in terms of their duties, responsibility, classification, and circumstances of original employment, either individually or collectively, SCBE is not violating W. Va. Code § 18A-4- 5b by failing or refusing to pay an additional $102 monthly to Grievant. 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 each element of 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. "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." W. Va. Code § 18-29-4(a)(1).

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. 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); Lowry, supra; Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992).

5. SCBE 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 the Chief Mechanic with whom he worked was receiving a "supplement" over and above the statutory salary schedule for school service personnel, which Grievant was not receiving. See W. Va. Code § 18-29-4(a); Norton v. Bd. of Directors, Docket No. 96-BOD-369 (Dec. 9, 1996); Porterfield v. Lewis County Bd. of Educ., Docket No. 96-21-270 (Oct. 31, 1996); Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995).

6. W. Va. Code § 18A-4-5b requires uniformity of compensation for all persons performing like assignments and duties. Mersing v. Preston County Bd. of Educ., Docket No. 89-39-513 (July 12, 1991); Hardbarger v. Ritchie County Bd. of Educ., Docket No. 89- 43-74 (Aug. 31, 1989). See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

7. Grievant, a Mechanic, does not perform "like assignments and duties" within the meaning of W. Va. Code § 18A-4-5b as Roger Mann, another service personnel employee of SCBE classified as a Chief Mechanic. See Weimer-Godwin, supra; Dillon v. Cabell County Bd. of Educ., Docket No. 93-06-438 (Aug. 9, 1994); Wetherholt v. Cabell County Bd. of Educ., Docket No. 93-06-017 (June 30, 1993); Robb v. Hancock County Bd. of Educ., Docket No. 91-15-356 (Mar. 31, 1992); Skaggs v. Cabell County Bd. of Educ., Docket No. 90-06-054 (Mar. 27, 1990). 8. Grievant failed to establish by a preponderance of the evidence that SCBE is in violation of the pay uniformity requirements in W. Va. Code § 18A-4-5b by the manner in which it compensates Roger Mann, a Chief Mechanic, as opposed to the manner in which it compensates Grievant, a Mechanic.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Summers 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 the civil action number so that the record can be prepared and transmitted to the appropriate court.

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: February 5, 1998**

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*Footnote: 1*

*The record does not explain the delay which transpired between Levels I and II.*