RINDA ANN MILLER and

SANDRA K. HALSTEAD,

Grievants,

v. Docket No. 02-03-153

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Rinda Ann Miller and Sandra K. Halstead, employed by the Boone County Board of Education (BCBE or Respondent) as an Aide and Bus Operator, respectively, filed individual level one grievances on March 13, 2002, in which they alleged violations of W. Va. Code §§ 18A-4-5b and 18A-4-16 as they are required to perform an extracurricular assignment without compensation. For relief, Grievants seek payment of eleven dollars per day since February 2002. The grievances were denied at level one by Steven K. Bradley, Executive Director of Transportation. The grievances were consolidated at level two, and were denied by Dr. Richard Adkins following an evidentiary hearing. Grievants elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and appeal was made to level four on June 3, 2002. Grievants' representative, John E. Roush, Esq. of WVSSPA, and Respondent's representative, Timothy Conaway, Esq., agreed that the matter could be submitted for decision based upon the lower-level record. The grievance was assigned on August 23, 2002, and received by the undersigned on August 27, 2002.

The following facts are derived from the record.

Findings of Fact

1. Grievants Miller and Halstead are employed by BCBE, and held the classifications of Aide and Bus Operator, respectively, at all times pertinent to this grievance.

2. Grievants have been assigned the same route for approximately seven years transporting special education students. Special education bus routes are particularly susceptible to change, and the posting for the bus operator position specifically noted that the run “may change at any time to serve the needs of identified students.”

3. At the beginning of the 2001-2002 school year, Grievants' schedule was modified when they

began transporting a student from Scott High School to Boone Memorial Hospital four mornings a week. The student, who was participating in a job training program, was picked up between stops at two schools, but remained on the bus and was transported to the Hospital, which then became the last stop of the morning run prior to returning to the garage. (See footnote 1)

4. As a result of this addition, Grievants are required to travel three to four more miles than before, extending their schedule by approximately ten minutes.

5. Grievants understood the High School to Hospital assignment would be temporary, but when it appeared to them to be permanent, they requested inservice credit for the time added to their run. The request was granted, and Grievants were given inservice credit until February of 2002, at which time they had accumulated all the time required.

6. After Grievants met their inservice requirements, they requested to be paid mileage at the rate of twenty cents per mile. This request was denied. 7. Rita Michaelson receives eleven dollars per day for transporting two special education students from Sherman High School to Boone Memorial Hospital. This assignment occurs at mid-day, and coincides with a trip to the vocational school, for which she is compensated seven dollars per day.

8. Respondent raised the issue of whether the grievance was timely filed at level two.

Discussion

Respondent argued the grievance was not timely filed, as the additional stop was added to Grievants' run two weeks into the school year, but the grievance was not filed until March 2002. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). "If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997)." Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

As to when a grievance must be filed, W. Va. Code § 18-29-3(a) provides, in pertinent part:

A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended

whenever a grievant is not working because of suchcircumstances as provided for in section ten, article four, chapter eighteen-a of this code.

The grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4(a) provides, in pertinent part:
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.

. . .

Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . ..

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. 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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievants are challenging the addition of the Hospital stop to their run, asserting that it is not a part of their regular assignment, but rather is an extracurricular run similar to that for which another bus operator receives separate compensation. Grievants argue that thegrievance was timely if calculated from the time their request to be paid mileage was denied, or in the alternative, that it was a continuing practice. Neither of these arguments are persuasive.

As to whether this grievance falls within the continuing practice exception, Grievants are challenging a decision that was made in September 2001, which they knew about at that time, and which continues to affect their status. "This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399

(1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996)." Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). However, when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, 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 giving rise to a timely grievance . . . . See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002); Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995).

Likewise, Grievants' claim is that an alleged specific wrongful act which occurred in the past continues to inflict damage upon them. This does not fall within the continuing practice exception. Grievants did not begin the grievance procedure within fifteen days oflearning they would be making an additional stop during their morning run, which was the grievable event. Respondent's denial of Grievants' request for mileage does not constitute the grievable event giving rise to this matter.

Even had the grievance been timely filed, Grievants could not prevail. There was no violation of the uniformity provision of W. Va. Code 18A-4-5b, because Grievants' single morning run cannot be compared to mid-day vocational runs for which Respondent compensates Ms. Michaelson. (See footnote 2) Her mid-day runs are in addition to her regular assignment, and require over one hour to complete. Because Grievants complete an additional ten minutes at the end of their regular morning run, they are not similarly situated to drivers making the mid-day runs. Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995).

Neither was there a violation of W. Va. Code §18A-4-16. (See footnote 3) "Regular runs" generally has been defined as the transportation of students from their homes to school and from school to their homes. See Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047(May 19, 1992). Unlike the mid-day vocational school shuttle runs, the Grievants simply complete a regularly scheduled morning run. "[A board of education] does not violate any law, regulation or policy when it assigns its bus operators additional driving duties associated with ongoing curricular runs, of whatever nature, time or source, in order to fulfill the operators' . . . work day. Garner v. Monongalia County Bd. of

Educ., Docket No. 00-30- 025 (June 8, 2000).

In addition to the foregoing findings of fact and discussion, the following conclusions of law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). "If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997)." Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

2. In a grievance involving an education employee, the grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4a.

3. "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). Seealso Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993).

4. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, 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 giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Garvin v. Webster County Bd. of Educ., Docket No. 01- 51-616 (Apr. 23, 2002).

5. The grievance challenges a decision made in mid-September 2001, that they would transport a student from Scott High School to Boone Memorial Hospital. Grievants were aware of this decision but did not request an informal conference within fifteen working days of that date. The grievance was not timely filed.

6. No facts were shown which would excuse Grievants' late filing.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 19, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The student returned to Scott High School by other means, and was transported by Grievants to his home during the afternoon run.

Footnote: 2

The uniformity provision of W. Va. Code 18A-4-5b provides, "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed in performing like assignments and duties within the county."

Footnote: 3

W. Va. Code § 18A-4-16 defines extracurricular duties to

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: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions . . .or extra-duty assignments . . . .