VICKI ROSE,

Grievant,

v. **Docket No. 03-38-374**

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Vicki Rose ("Grievant") initiated this proceeding on October 31, 2003, seeking an additional one-half day of personal leave for each school year, retroactive to the 1997-1998 school year. The grievance was denied at level one on October 31, 2003. A level two hearing was held on November 12, 2003, and the grievance was denied on November 17, 2003. Grievant appealed to level four on December 9, 2003. After several continuances granted for good cause shown, a hearing was held in Elkins, West Virginia, on May 7, 2004. Grievant was represented by counsel, John Roush of the School Service Personnel Association, and Respondent was represented by counsel, Gregory Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 1, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a secretary/accountant since 1977. 2. Grievant's employment term was 220 days from 1977 until the 1989-1990 school year, when it was reduced to 215 days.

3. Pursuant to a formula used by Respondent, Grievant received 16½ personal leave days per year while working under a 220-day contract.

4. Grievant continued to receive 16½ leave days even after her contract term was reduced, until the error was discovered by the central office in 1997. Beginning with the 1997-1998 school

year, Grievant was credited with 16 personal leave days at the beginning of each year.

5. When Grievant received her first paycheck in September of 1997, she noticed that her personal leave credit was different. Grievant phoned the payroll department and was informed that her personal leave days should have changed when her contract term was reduced, and the error had now been corrected.

6. Grievant did not file a grievance regarding the reduction in her personal leave days in 1997.

7. On July 17, 2003, Grievant read an article in a service personnel publication regarding calculation of personal leave days. This prompted her to contact both the state department of education and the School Service Personnel Association, questioning whether Respondent's calculation was correct. Prior to that time, Grievant was unaware there was a statute governing the calculation of personal leave time.

8. This grievance was filed by written grievance form on October 31, 2003.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

Respondent contends that this grievance was not filed within the statutory timeframe, so it should be denied on that basis alone. "An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." Lynch v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). 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 she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. West Virginia 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. 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."

It is abundantly clear from the facts established that this grievance was not filed in a timely manner. The act being grieved, i.e. reduction of Grievant's personal leave days, took place at the beginning of the 1997-1998 school year, and Grievant was well aware of it at that time. Grievant contends she did not realize that a statute governed this process, so she did not file her claim until she made that discovery. This argument is in the nature of a discovery rule exception as discussed in Spahr. The discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance within the intent of W. Va. Code § 18-29-4. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996).

In the alternative, Grievant contends that Respondent's application of its policy to her each school year, resulting in the reduction of her personal leave days, constitutes a continuing practice. "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), disputes alleging pay disparity are

continuing violations, which may begrieved 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, even if this were viewed as a continuing practice, the most recent occurrence took place at the beginning of the 2003-2004 school year when Grievant was granted sixteen days of personal leave. The filing of this grievance at the end of October clearly did not take place within fifteen days of the inception of the school year, so this grievance was not timely filed. Even if this claim were timely, Grievant has failed to prove entitlement to the relief requested. Pursuant to W. Va. Code § 18A-4-10, employees are entitled to one and one- half days of personal leave for “each employment month or major fraction thereof.” In turn, “employment month” is defined by W. Va. Code § 18A-4-8 as “twenty employment days.” Accordingly, the formula used by Respondent is the correct method of calculating personal leave days. Since every twenty days worked is considered one employment month, Grievant's leave would be calculated as 215 . 20 x 1.5 = 16.13. That is, 215 contract days divided by 20 working days per month, times 1.5 days of leave for each of those 20-day months. As Respondent has pointed out, Grievant is, in fact, receiving an extra full day of leave for the extra 15 days in her contract term, a “major fraction” of 20, giving her 16 days of leave per year. Therefore, the undersigned concludes that Grievant has established no entitlement to an additional half day of leave per year.

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting thegrievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-060 (July 16, 1997).

2. "An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." Lynch, *supra*.

3. The grievance process must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, by scheduling a conference with the grievant's 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). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 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).

4. The discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance within the intent of W. Va. Code § 18-29-4. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996).

5. This grievance was not filed within fifteen days of the event upon which it was based, so it is untimely.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Pocahontas County. Any 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: June 18, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge