PATRICIA WOODALL,

Grievant,

v. **Docket No. 04-DOE-232**

DEPARTMENT OF EDUCATION/

SCHOOLS FOR THE DEAF AND BLIND,

Respondent.

DECISION

Patricia Woodall ("Grievant") filed this grievance at level four on June 14, 2004, (See footnote 1) challenging a one-day suspension, which was imposed by her employer, the Schools for the Deaf and Blind ("SDB") on May 14, 2004. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on September 21, 2004. Grievant was represented by Harvey Bane of the West Virginia Education Association, and SDB was represented by Heather Deskins, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 29, 2004.

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

Findings of Fact

___1. Grievant is employed by the Schools for the Deaf and the Blind ("SDB") as a Child Care Worker or "Houseparent." 2. Grievant is responsible for the supervision and care of students at SDB when they are not in classes. Because students at SDB (ages 3 to 18 years) are from all over the state and live in a dormitory setting at the school, they require 24-hour supervision. This may include dressing, bathing, toilet assistance, medication administration, and general supervisory care.

3. During the spring of 2004, Grievant was assigned to the blind "little boys" (ages 3-11) dormitory, working the midnight to 8:00 a.m. shift.

4. Grievant had previous warnings from her superiors regarding tardiness. She received a verbal reprimand for being twenty-five minutes late for work on September 15, 2002, and a written warning for being thirty minutes late for work on March 19, 2003. On these occasions, she did not notify her supervisor that she was going to be late.

5. SDB employees are only disciplined for tardiness if they do not notify their supervisor that they are going to be late.

6. Grievant's performance evaluation in May of 2003 noted her problem with tardiness, along with deficiencies in the area of functioning efficiently under stress. Grievant was placed on an improvement plan, and was advised that further tardiness without notification would not be acceptable. Grievant was to take extra steps to ensure her timely arrival to work, including having coworkers from the previous shift call her to make sure she was awake; placing her alarm clock away from the bed, so she would have to get up to turn it off; and laying out her clothes before going to sleep.

7. Grievant was verbally reprimanded by her supervisor, Sharon Eglinger, Director of Student Living, for arriving five minutes late on August 18, 2003, and on August 20, 2003. 8. On May 2, 2004, Grievant was expected to arrive at work by 12:00 midnight. She did not arrive until approximately 12:45, and the houseparents working the previous shift could not reach her. When they phoned Grievant's house, they received an answering system or voice mail. Ms. Eglinger was contacted by those houseparents, and they were advised to take the two boys sleeping on that floor of the dorm to another floor of the dorm, where they could be attended by other employees. May 2 was on a weekend, so there were not many students present.

9. SDB's employee handbook provides that, if employees are going to be absent, they are to notify their immediate supervisor.

10. The dormitory handbook provides that the “line of contact” for employees begins with Ms. Eglinger. If she cannot be reached, employees are to call the school office, then the houseparents in the girls' dorm.

11. On the evening of May 2, 2004, Ms. Eglinger was spending the night with her mother. She called the dormitories and left the telephone number with the houseparents on duty and also with her husband, who was at her home.

12. Grievant's electricity was not working on the evening of May 2, and she did not wake up in

time to get to work by midnight. When she woke up, she dressed, and went out to her car to get her cell phone. At approximately 11:30, she attempted to phone Ms. Eglinger and received no answer. She then called the girls' dorm, and told the houseparent on duty that she would be arriving to work shortly.

13. On Monday, May 4, 2004, Grievant met with Ms. Eglinger, and explained what occurred the night she was late to work. Ms. Eglinger inquired where Grievant's cell phone was when these events occurred and why Grievant did not have it readily available. 14. After investigation and consultation with Ms. Eglinger, Superintendent Jane McBride informed Grievant of her suspension in a letter dated May 6, 2004. The suspension was to occur on May 14, 2004.

15. Grievant and her representative requested a meeting with Superintendent McBride, which occurred on June 3, 2004. During the meeting, Grievant provided information to Ms. McBride regarding the circumstances which caused her tardiness on May 2, and asked her to reconsider the suspension. Ms. McBride stated that she would consider the information. There was no mention of a grievance during this meeting.

16. By correspondence dated June 7, 2004, Ms. McBride informed Grievant that her decision regarding the May 14 suspension would stand, because she did not feel that Grievant made “any significant attempt to report [herself] absent” and it was the third offense of this type for Grievant.

17. This grievance was filed directly at level four on June 14, 2004.

Discussion

As a preliminary issue, Respondent contends that this grievance was not filed within the statutory time frame, and should be denied on that basis. 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 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 thecase need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

As to when a grievance must be filed, 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. 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, stating "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 undisputed that this grievance was not filed until well beyond the fifteen-day statutory timeframe. Grievant was notified of her suspension on May 6, 2004; it was imposed on May 14, 2004; and this grievance was not filed until June 14, 2004. However, Grievant contends that she did not file the grievance earlier, due to “settlementnegotiations.” However, as has been recognized in other cases, a grievant always has the option of filing a grievance and placing it in abeyance while negotiations are conducted. See Loudermilk v. Greenbrier County Bd. of Educ., Docket No. 04-13-025 (April 14, 2004). Moreover, Superintendent McBride testified that, although she met with Grievant and her representative to discuss the suspension on June 3, 2004, no mention was made of a grievance at that time. For settlement negotiations to occur, both parties would have to be aware that a grievance was under consideration. As far as McBride was concerned, Grievant was only requesting reconsideration, which was denied. These circumstances do not excuse Grievant's untimely filing, so the grievance must be denied on that basis.

In addition, Grievant's claim would also fail on the merits. It is well-settled that employers have a basic right to expect their employees to come to work on time and when expected. English v. W. Va.

Div. of Corrections, Docket No. 98-CORR-082 (June 29, 1998); Hatfield v. Dep't of Corrections, Docket No. 98-CORR-020 (Apr. 30, 1998). Grievant was advised regarding her employer's expectations and had been placed on an improvement plan to assist her in getting to work on time. Although a power outage is an event beyond anyone's control, as Respondent has aptly noted, this is an event which everyone knows is a possibility at any time. Therefore, Grievant could have taken other steps to ensure she would awake in time to get to work, such as using an alarm with a battery back-up or a watch alarm, and she could have made sure her cell phone was in her house, so that coworkers could call her on it when her home phone did not work. Accordingly, a one-day suspension for a 45-minute late arrival, under these circumstances, cannot be found to be inappropriate. (See footnote 2)

Consistent with the foregoing, the following conclusions of law are appropriate.

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).

2. Respondent has proven by a preponderance of the evidence that this grievance was not filed within fifteen days of the grievable event, and the delay in filing was not justified. See W. Va. Code § 18-29-4(a); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Hampshire 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 isrequired 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: November 19, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

As an auxillary employee of the SDB, Grievant is not a board of education employee who would be entitled to file a disciplinary grievance directly at level four following a board hearing, pursuant to W. Va. Code § 18A-2-8. However, Respondent did not object to having the matter heard initially at level four.

Footnote: 2

Grievant also introduced evidence indicating that she was on medication for adult attention deficit disorder, contributing to her heavy sleep. However, in light of the evidence showing that her supervisors had put into place several mechanisms to ensure she would awaken in time for work, it appears that Grievant's employer has made every effort to allow for this impairment.