WANDA LOUDERMILK,

Grievant,

v v.

Docket No. 04-13-025

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Wanda Loudermilk, filed this grievance on October 9, 2003, against her employer, the Greenbrier County Board of Education ("GCBOE"). Her Statement of Grievance states:

> Grievant is regularly employed as a Cook III. Grievant has been required to rotate all of the meal preparation/clean up duties with the Cook I's and Cook's II at her school, though retaining sole responsibility for record keeping and reporting duties. This system is utilized in only one other school in the system and not in the school (Greenbrier East) most like Grievant's school. Grievant contends that this arrangement violates West Virginia Code §§ 18A- 4-8(i) and 18-29-2(o).
>
> Relief sought: Grievant seeks relief from the strict rotation system currently in place at her school and a return to the prior system for division of duties and responsibilities which permitted her sufficient time to perform her bookkeeping responsibilities. In the alternative, she seeks implementation of a modified rotation system such as is currently in use at Greenbrier East. (See footnote 1)

This grievance was denied at Level I and granted, in part, at Level II, and Level III was by-passed. Grievant appealed to Level IV on January 16, 2004, and a Level IV hearing was held on February 24, 2003. This case became mature for decision on March 10, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by GCBOE as a Cook III at the Lewisburg Elementary School ("LES"). She has 38 years of seniority and has been Head Cook for 15 years. As a Cook III, Grievant is paid on a Pay Grade C because of her increased responsibilities. 2. Cook III is defines as "personnel employed to prepare and serve meals, make reports, prepare requisitions for supplies, order equipment and repairs for a food service of a school system." W. Va. Code § 18A-4-8(28).

3. Cook I's are "personnel employed as a cook's helper" and Cook II's are "personnel employed to interpret menus, to prepare and serve meals in a food service program of a school and shall include personnel who have been employed as a 'Cook I' for a period of four years." W. Va. Code § 18A-4-8(26) & (27).

4. Within recent years, there have been multiple complaints about the distribution of work among the five cooks assigned to LES. Additionally, there have been complaints about the conduct of these cooks, such as leaving early, not being on task, shouting at each other in the presence of students and staff, and having boyfriends at work.

5. In the Spring of 2003, the four other cooks at LES complained again to then Principal Bob McClintic, about the division of duties. They indicated Grievant did not perform her share of the work.

6. Through a memo dated May 20, 2003, Principal McClintic informed all the cooks, including Grievant, that, "In order to make the daily tasks more equitable foreveryone involved we will require all five cooks to be scheduled in the weekly duty assignment rotation. Please make this change effective for the 2003-2004 school year." Level II Exh.

7. Grievant did not file a grievance at the time she received of this memo.

8. During the summer, before school started, Grievant saw the new, in-coming principal, Robert Toothman, and asked about the rotation system. Principal Toothman indicated he could not discuss it at that point as he did not have the paperwork. Later, Principal Toothman decided to leave the rotation system in place, as it was a method used by the prior principal to resolve an ongoing problem. He saw no reason to change, and he currently endorses the rotation system, as he believes it improves morale and promotes cross-training. (See footnote 3) Accordingly, the rotation system began at the start of the school year, in late August 2003.

9. Grievant did not file a grievance until October 9, 2003.

10. Prior to the implementation of the rotation system, Grievant "helped out" when she could

and where she believed she was needed. Frequently, Grievant worked on the end of the serving line, and she would stop this work if a salesman came in. Grievant had been told that she was not to talk to vendors during serving time. Grievant does not understand why the other cooks complain about the division of labor, and she feels she has worked for many years and "should get what she has earned." Test. Grievant, Level IV Hearing. 11. All Head Cooks are required to complete paperwork, such as production reports and inventory. Grievant has always had trouble with the completion and accuracy of her paperwork, but her problems have increased slightly since she was required to rotate duties with the other cooks.

12. Occasionally, Grievant completes her paperwork during her work time, while the other cooks are sitting around waiting to go home because they have finished their duties. For many years, Grievant has asked the principal or assistant principal at LES if all the cooks could leave early when their work is finished. This request is made approximately every two to three months.

13. Occasionally, Grievant stays over 10 to 20 minutes, two or three times a week to complete her paperwork. She stayed over to complete her paperwork prior to the rotation system being in place, but indicates she stays over more often now.

14. LES is not the only school to utilize the rotation system, but the majority of the GCBOE's schools do not.

15. Deborah Kilcollin, Food Service Supervisor, is responsible for the reports and paperwork Grievant is to complete. She has frequently assisted Grievant with these tasks and conducted an individual training session on the paperwork with Grievant in the Fall of 2003. (See footnote 4) Grievant was not the only Head Cook who needed this individual assistance; three others, out of fourteen, were also given individual training sessions. 16. Ms. Kilcollin supports cross-training of cooks. She also estimated the paperwork for a Head Cook should take about 30 minutes. Additionally, although some of the paperwork must be completed at the end of the day, other portions of the paperwork can be completed the day before or earlier in the day.

17. Ms. Kilcollin also noted Grievant has consistently had trouble with the leadership role as a Head Cook, and she believed this change to a rotation system could be positive because the other cooks would see Grievant as willing to help and cooperate in the completion of necessary tasks.

18. At Level II, Grievant was granted 30 minutes of release time from the rotation system to complete her record-keeping and recording duties.

19. After the Level II Decision, Principal Toothman met with Grievant on January 15, 2004, to discuss the implementation of this relief if the Level II Decision was not appealed. Principal Toothman directed Grievant to cease scanning students' names at breakfast from 7:20 a.m. to 8:00 a.m. and to use this time for her paperwork. The cook assigned to dishwashing/baking would perform these scanning duties. If Grievant was the cook on the dishwashing/baking rotation, she was to take the time from 9:00 a.m. to 9:30 a.m. for this paperwork.

20. GCBOE properly raised the issue of timeliness at the Level II hearing.

Issues and Arguments

Grievant asserts she is not being treated equitably because she now has to rotate with the other cooks and still has her paperwork to complete. Grievant notes the rotation "scheme" is not required, and avers this rotation was put into place to "satisfy" the other cooks without regard to the fact that this plan was unfair to Grievant. While Grievantrecognizes the benefits of rotating duties, her desire is to not be included in the rotation, but to continue as before and help when she can, and where she is needed. Grievant maintains the relief granted at Level II, thirty minutes off the rotation schedule each day, is insufficient for the completion of her paperwork duties.

Respondent asserts this grievance is untimely filed, and if it is found to be timely filed, it is without merit as there is nothing within the West Virginia Code or Grievant's Job Description to prevent the rotation of duties. Respondent also notes that pursuant to W. Va. Code § 18A-2-9, school principals are responsible for the efficient operations of their schools and have the authority to make such changes to achieve these goals as long as they do not violate any statute, policy, rule, or regulation. Respondent also asserts Grievant has not demonstrated the rotation system constitutes such a violation, and LES's principal was within his authority to institute the rotation system.

Grievant asserts she should not be punished for trying to work out the problem before she filed a grievance, (See footnote 5) and also argues the rotation system is a continuing violation and as such was timely filed.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance 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. McDowellCounty Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Timeliness

At the beginning of the Level II hearing and again at the Level IV hearing, GCBOE properly raised the issue of timeliness. Respondent notes Grievant was aware of the change on May 20, 2003, and started utilizing the rotation system in late August when the school year started. Grievant did not file this grievance until October 9, 2003.

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26- 394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97- DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v.Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). An untimely filing, if proven, 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).

W. Va. Code § 18-29-4(a)(1) 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.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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). However, 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), stated "W. Va. Code, 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, 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." An examination of when Grievant knew "of the facts giving rise to [her] grievance" is in order.

Grievant knew on May 20, 2003, that a rotation system would be instituted at her school at the beginning of the next school year, and did not file a grievance. Additionally, Grievant knew when she began the school year that she was using the rotation system,and she still did not file until October 9, 2003. Grievant did not file this grievance until more than a month after the rotation system was in place, and many months after receipt of the memo, the fact giving rise to her grievance. Accordingly, this grievance is untimely filed.

In order to overcome Respondent 's evidence, Grievant must demonstrate a proper basis to excuse her failure to file in a timely manner. Grievant's assertion that this was a continuing violation is belied by the facts. She was aware of the events giving rise to her grievance in May 2003. Spahr, supra. Grievant has failed to demonstrate a proper basis to excuse her failure to file in a timely manner.

II. Merits

Although this grievance has been found to be untimely filed, a brief discussion of the merits may be helpful to the parties. First, pursuant to W. Va. Code § 18A-4-8(28) a Cook III is "employed to prepare and serve meals. . . ." Accordingly, the requirement that Grievant perform this duty in a rotating manner is within the statutory definition of her duties.

Second, Grievant asserts the rotation is an act of favoritism. W. Va. Code § 18-29-2(o) defines favoritism as, "unfair treatment of an employee as demonstrated by preferential, exceptional or

advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism under W. Va. Code §§ 18-29-2(o), 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 the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Serv., Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't 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).

It is assumed from Grievant's argument that the other cooks at LES and the other schools where there is not a rotation are the recipients the act of favoritism. The first thing that must be noted is that Grievant is not similarly situated to the cooks she supervises. Grievant is the Head Cook, in a different classification and higher pay grade, and as such she receives more money and has greater responsibility. Accordingly, Grievant has not demonstrated a prima facie case of favoritism. As for the other schools within the system that do not rotate, there was no evidence to demonstrate there was a need to place a rotation system into effect. Further, even though this grievance is found to untimely filed, the undersigned Administrative Law Judge, in the interest of fairness and after reviewing the record, believes the relief granted at Level II is appropriate and **suggests** one addition.

If the clean-up work in the kitchen and lunch room is not completed by 2:15 p.m., Grievant should also be relieved of the completion of this duty to complete the work that is required at the end of the day. This total release time should be sufficient to allow Grievant to complete her paperwork, as Ms. Kilcollin indicated the work should require approximately thirty minutes.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filingby a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

3. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

4. An untimely filing, if proven, 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).

5. W. Va. Code § 18-29-4(a)(1) 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.

6. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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).

7. In Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990) the West Virginia Supreme Court of Appeals held "W. Va. Code 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, 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."

8. Grievant knew on May 20, 2003, that a rotation system would be instituted at her school at the beginning of the next school year, and Grievant knew when she began the school year the rotation system was in place, as she did not file a grievance until October 9, 2003, this filing was untimely.

9. In order to overcome Respondent 's evidence, Grievant must demonstrate a proper basis to excuse her failure to file in a timely manner. Grievant has failed to demonstrate a proper basis to excuse the failure.

Accordingly, this grievance is untimely filed and is **DISMISSED**. However, the undersigned Administrative Law Judge, in the interest of fairness and after reviewing the record, believes the relief granted at Level II is appropriate and **suggests** Grievant begiven release time from 2:15 p.m. to 2:30 p.m. to complete her paperwork duties, if the clean-up work in the kitchen and lunch room is not completed.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court

of Greenbrier 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 14, 2004

Footnote: 1

Grievant's prior relief sought was. "Job assignment rotation among all cooks to end. Classifications and duties to be upheld."

Footnote: 2

Grievant was represented John Roush, Esq., from the West Virginia School Service Personnel Association, and GCBOE was represented by Attorney Erwin Conrad.

Footnote: 3

Prior to the implementation of this rotation system cooks at LES could have the same duty for years, i.e., dishwashing.

Footnote: 4

Ms. Kilcollin also provided Grievant a desk for completion of her paperwork, as Grievant had difficulty with organizational skills, but Grievant testified she did not have a desk.

Footnote: 5

It was unclear from the record what steps Grievant took to "work out" the problem. Additionally, as has been noted in prior grievances, employees can file grievances to make sure they are within the timelines, and then hold them in abeyance while settlement negotiations are conducted.