JUNIOR HELMICK and

ARTHUR CARR,

Grievants,

v. **Docket No. 05-47-097**

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Junior Helmick and Arthur Carr ("Grievants") are employed by Respondent Tucker County Board of Education ("BOE") as bus operators, and initiated this grievance on January 3, 2005, alleging improprieties occurred in the posting and filling of bus runs which were part of an after-school program. Grievants seek to have the run awarded to John Bava "split" into two runs, and to have the second portion of the run assigned to one of them. The grievance was denied at level one on January 19, 2005, and at level two on February 8, 2005, after a hearing was held on February 1, 2005. The grievance was denied at level three on March 15, 2005. Grievants appealed to level four on March 23, 2005. A hearing was held in Elkins, West Virginia, on May 6, 2005. Grievant Helmick was represented by counsel, John E. Roush; Grievant Carr represented himself; and BOE was represented by Richard H. Hicks, Superintendent. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 2, 2005.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievants are employed as bus operators by Respondent. Grievant Helmick has more regular seniority than Grievant Carr. 2. On September 28, 2004, Respondent posted two sets of vacancies for bus operators to provide services to students in the Extended Learning after-school program. The first posting called for up to three drivers to transport students from site-to-site and

home after the program ended each day, with duties to begin before regular afternoon bus runs ended. The second posting was for up to six drivers only to transport students home at the end of the after-school program each day, with duties to begin after normal working hours for regular bus operators.

3. Grievants bid only on the "after regular hours" runs, because both have regular daily bus runs, which they believed would prevent them from being able to take the assignments which were to begin during regular working hours. Grievants finish their regular afternoon runs at approximately 4:30-4:45 p.m. each day.

4. Grievant Helmick was hired to fill one of the "after regular hours" positions, but it was later determined that only two drivers would be needed, and Grievant was third in seniority.

5. One of the "before regular hours" runs was awarded to John Bava, a substitute bus operator. Mr. Bava picks up approximately eight students at Tygart Valley Elementary School ("TV") around 2:45 p.m. and transports them to Davis-Thomas Elementary School for the after-school program. He stays at the school until the students are finished, then reloads them, plus some additional students, and takes them back to TV at approximately 5:00. After dropping off the original students at TV, he transports the remaining students home.

6. Grievants initiated this grievance after learning, on approximately December 20, that the second portion of Mr. Bava's run did not begin until approximately 5:00 p.m. After seeing a schedule sent home with students in the after-school program, Grievants surmised that the second half of Mr. Bava's duties could be separated into a single assignment, which they would have been available to perform. They initiated this grievance upon their return from Christmas break.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); 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.

As a preliminary issue, Respondent contends that this grievance is untimely. 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). 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 thedate 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 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."

The crux of this grievance is Grievants' contention that the second portion of Mr. Bava's after-school run, during which he transports students from Davis-Thomas back to TV and then home, could have been posted as a separate run, which would have begun “after regular hours.” Respondent argues that Grievants knew that some of the after- school runs, including Mr. Bava's, involved transportation of students both from site-to-site for the after-school program, then home when the program concluded. It contends that Grievants knew this when the runs were posted, so the filing of this grievance some 3½ months later was untimely.

However, Grievants have made a case for application of the discovery rule in this case. They did not see a schedule indicating the exact times at which students were picked up for transportation back to TV and home until late December, and they filed this grievance shortly thereafter upon their return from Christmas break. Accordingly, this grievance was timely filed. As to the merits of the

case, as set forth above, Grievants contend that the second half of Mr. Bava's run should have been posted separately as an “after regular hours” run, so that they would have been able to apply and potentially perform the assignment. Respondent maintains that, pursuant to its ample discretion with regard to service personnel assignments and the needs of the students, it should not have been required to “create” another run by dividing Mr. Bava's assignment, just for Grievants' convenience.

W. Va. Code § 18A-4-16 defines extracurricular assignments as “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.” Further, the statute provides that such assignments “shall be made only by mutual agreement of the employee and the superintendent” and the agreement must be contained in a contract separate from the employee's regular employment contract. In the absence of an alternative method for making such assignments, boards of education must select applicants for extracurricular assignments on the basis of seniority, qualifications, and past evaluations, pursuant to W. Va. Code § 18A-4-8b. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. pt. 3, Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351, S.E. 2d 58 (1986). The evidence has established that Mr. Bava's assignment was somewhat unique insofar as the after-school program was concerned. It involved transportation of students from one elementary school to another,which occurred at a time when no regular bus operators would be available, and then the same students needed transportation back to their original school after the program ended, which occurred at a time when most regular bus operators' daily duties had concluded. However, Grievants have failed to prove any requirement that the board of education separate the two portions of this assignment, merely to favor them. Although Grievants object to Respondent's “bundling” a regular hours run with an after-hours run, allegedly in order to favor substitutes over regular employees, this was a logical setup for the situation. Students needed transportation to the after-school program at another school, which would have to be provided by a bus driver who was not otherwise engaged in transporting students at the end of the day; then, the same students later needed transportation back to the same location. It only seems logical to have the same bus and driver provide these services, rather than requiring students to board several

different buses at the different locations involved.

"Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board." Anderson v. Kanawha County Bd. of Educ., Docket No. 03-20-282 (Apr.30, 2004); aff'd Kanawha County Circuit Court, Civil Action No. 04-AA-65 (June 4, 2004). See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995). The assignment in question began at TV School at approximately 2:45 p.m., when Grievants were performing their regular afternoon bus runs; thus, they were not available to perform this assignment. 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. 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).

3. Grievants have established that this grievance was filed within fifteen days after they discovered that the second portion of John Bava's extracurricular bus run began after regular working hours.

4. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. pt. 3, Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351, S.E. 2d 58 (1986).

5. "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board." Anderson v. Kanawha County Bd. of Educ., Docket No. 03-20-282 (Apr.30, 2004); aff'd Kanawha County Circuit Court, Civil Action No. 04-

AA-65 (June 4, 2004). See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995). 6. Grievants have failed to prove by a preponderance of the evidence that there was any requirement, in law, policy, or otherwise, that the board of education “split” John Bava's extracurricular assignment into two bus runs.

7. Grievants have failed to prove by a preponderance of the evidence that they were available to perform the extracurricular assignment at issue in this grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Tucker 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 28, 2005

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DENISE M. SPATAFORE

Administrative Law Judge