BRENDA FREEMAN,

Grievant,

v. **Docket No. 04-30-411**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Brenda Freeman ("Grievant") initiated this proceeding on August 2, 2004, alleging entitlement to a particular summer assignment. The grievance was denied at level one on August 16, 2004. Upon appeal to level two, a hearing was held on September 29, 2004, and the grievance was denied in a decision dated October 20, 2004. Level three participation was waived by Respondent on November 17, 2004. Grievant appealed to level four on November 23, 2004. A hearing was held on Westover, West Virginia, on January 24, 2005. Grievant was represented by John E. Roush, Esquire, and Respondent was represented by counsel, Harry M. Rubenstein. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 23, 2005.

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

Findings of Fact

1. Grievant is employed by the Monongalia County Board of Education ("MCBOE") as an aide. 2. Grievant has served as a bus aide in the Extended School Year ("ESY") program every summer since 1997.

3. MCBOE's postings for positions in the ESY do not specify any particular location where the employee will be working.

4. When Grievant first began working in the ESY in the summer of 1997, she was assigned a bus run in the Blacksville area.

5. For the past three years, when Grievant has been asked whether she desires to work in the

summer ESY program, she has expressed her preference for a run in the Morgantown area, which would reduce her commuting time.

6. Grievant has continued to receive the Blacksville assignment every summer.

7. For the summer of 2004, an additional bus aide position in the ESY became available, and it was posted on June 3, 2004.

8. Rick Williams, of MCBOE's Human Resources department, phoned Grievant prior to the beginning of the 2004 ESY and asked her if she wanted to work as a bus aide in the program again. Grievant told Mr. Williams she did want to work in the ESY and expressed her preference for a Morgantown position, if one were available.

9. On June 3, 2004, Grievant also expressed her desire for a Morgantown ESY position to Scott Martin, Special Education Coordinator, who told Grievant he did not make the assignments.

10. Grievant asked Mr. Williams if the new bus aide position that was posted for the 2004 summer program was in Morgantown. Mr. Williams indicated that the position did not have a specific location. 11. The additional bus aide position for the 2004 ESY was awarded to Aida Meredith, who had worked as an ESY aide during two previous (but not consecutive) summers.

12. Grievant did not apply for the posted position, because it did not have a specific location, and she had already accepted employment in the 2004 ESY program. 13. A meeting with drivers and aides was held on June 18, 2004, to provide information about the students who would be riding the buses. The meeting was conducted by Mr. Martin, and no supervisors from the transportation department were there. Grievant arrived late to the meeting, and the only driver who did not have an aide sitting with him/her was the driver of the Blacksville run to which Grievant had been assigned during previous summers. Grievant sat with the Blacksville driver and accepted that assignment, assuming that the assignment of runs had already been made. However, no assignments were discussed during that meeting.

14. Aida Meredith was assigned to a bus run in Morgantown for the 2004 ESY program.

15. After the June 18 meeting, Grievant asked Irwin Schuetzner, Director of Transportation, and Duane Prickett, Supervisor of Transportation, who made the ESY assignments and why she had not been placed in a Morgantown run. Mr. Schuetzner and Mr. Prickett indicated that they did not make the assignments and that she should speak to Mr. Williams. Mr. Williams likewise told Grievant that he did not make the assignments, but pledged to find out why she had not received her

requested assignment.

16. In a letter dated June 30, 2004, addressed to Mr. Schuetzner, Mr. Prickett, and Mr. Williams, Grievant inquired again why she had not been given any choiceregarding the 2004 ESY assignments and asked what she should do “in order to work this out.”

17. After receiving no response to her June 30 correspondence, Grievant wrote to DeEdra Lundeen, Director of Special Education, on July 12, 2004. Grievant inquired how ESY aide assignments were determined, and asked why Ms. Meredith received a Morgantown position, when she had less seniority than Grievant.

18. In a response dated July 20, 2004, Ms. Lundeen advised Grievant that she did not make the ESY aide assignments, and that Grievant should contact Mr. Williams.

19. Grievant filed this grievance at level one on August 2, 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 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 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.

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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."

Respondent argues that the grievable event in this case, i.e. Grievant's assignment for the summer of 2004, had occurred by mid-June, and she did not file this grievance until August 2; accordingly, MCBOE believes the grievance is untimely. Conversely, Grievant argues that her attempt to “discover” MCBOE's method for making bus aide assignments in the ESY program should serve as a request for informal conference. Although Grievant's June 30 letter did not mention a grievance, it was, in fact, submitted eight days after the June 18 meeting with bus drivers and aides, at which time Grievant's assignment for the summer became clear. However, Grievant's testimony is not supportive of her counsel's argument that her June correspondence was an informal conference request. At level four, she stated that she had discussed a potential grievance with Mr. Prickett approximately four weeks into the summer program, at which time he told her it was “probably too late” to file a grievance. She then testified that she decided to initiate this grievance in August after two other employees gave her information regarding summer seniority and recommended that she file a grievance.

The grievable event in this case was Grievant's assignment to Blacksville, when she believed she was entitled to an assignment in Morgantown. Regardless of who made this decision, or what method was followed for making the summer assignments, it was totally clear as of June 18, 2004, that Grievant was going to be assigned to the Blacksville run, and she would not be working in Morgantown. 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 as interpreted in Spahr. 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) . Grievant's “discovery” that MCBOE's method of assigning positions within the ESY program may have been improper was not the grievable event. Accordingly, this grievance is untimely and must be dismissed.

The following conclusions of law support this decision.

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. A grievance must be initiated 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. W. Va. Code § 18-29-4(a).

3. This grievance was not initiated within fifteen days of Grievant being notified that she would be assigned to Blacksville for the summer of 2004, so it is untimely.

Accordingly, this grievance is **DISMISSED** as untimely.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 actionnumber so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 23, 2005

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DENISE M. SPATAFORE

Administrative Law Judge