JAMES DODGINS,

Grievant,

v. **Docket No. 06-DOE-134**

WEST VIRGINIA SCHOOLS FOR
THE DEAF AND THE BLIND,

Respondent.

DISMISSAL ORDER

This grievance was initiated at level one by James Dodgins ("Grievant") on March 26, 2006, alleging he was assigned duties in violation of an "agreement" between himself and Jane McBride, Superintendent of the Schools for the Deaf and the Blind ("SDB"). After denials at the lower levels, this grievance was appealed to level four on April 23, 2006. Prior to the scheduled level four hearing, Respondent filed a Motion to Dismiss, due to untimeliness. A telephonic hearing on that motion was conducted on July 24, 2006. Grievant represented himself, and SDB was represented by Heather Deskins, General Counsel.

The following facts, material to the issue of timeliness, have been proven.

Findings of Fact

1. Grievant has been employed by SDB for many years. In 1996, he began working as a maintenance/groundsman in the maintenance department

2. Due to conflicts with his supervisor, Superintendent McBride recommended that Grievant be assigned to the School for the Blind, with Connie Newhouse, Principal, tobecome his new supervisor. In a memorandum dated March 21, 2001, Superintendent McBride advised Grievant that his work area would include all buildings associated with the School, including the dormitory, cafeteria, and school buildings.

3. On April 22, 2002, Principal Newhouse advised Grievant that she believed that the job

classification of Custodian would more accurately encompass his current job duties. She memorialized this change in a written memorandum, stating there would be no change in his pay or hours, and that “[h]e would be custodian for the School for the Blind classroom building.” Grievant signed this memorandum to indicate his agreement.

4. Prior to the summer of 2005, a specific custodian was assigned to clean the cafeterias, but that employee's contract expired in July of 2005.

5. By letter dated March 29, 2005, Superintendent McBride informed Grievant that, beginning July 1, 2005, each of the school principals would be assigned to determine custodial responsibilities for the cafeterias, so “[Grievant's] assigned area of responsibility may include the dining room for your school.” She further advised that the principals had been directed to develop a plan to be implemented by July 1, 2005, and that his cooperation was greatly appreciated.

6. Grievant met with Superintendent McBride in April of 2005 to discuss an ongoing issue that he had with his seniority, in that he believed he had been deprived of job opportunities when his job classification was changed in 2002. Also during this meeting, the custodial assignments were discussed, and Superintendent McBride indicated that the principals were going to come up with a plan and see how it worked out. 7. On April 18, 2005, Grievant wrote to David Stewart, State Superintendent of Schools, describing his work history at SDB, and seeking his opinion regarding his alleged loss of seniority and the change in his job classification.

8. In a memorandum dated June 29, 2005, Principal Newhouse informed all custodians, including Grievant, that the cleaning of the dining room would be performed by teams of two custodians, to be rotated throughout the school year. Grievant's “turn” cleaning the cafeteria was to begin on March 7, 2006.

9. In correspondence dated June 29, 2005, Dr. Stewart responded to Grievant's questions about his job classification, opining that SDB had done nothing improper.

10. On March 7, 2006, Grievant was directed to begin his turn cleaning the cafeteria, prompting him to file this grievance.

11. Respondent asserted a timeliness defense at the level two hearing in this grievance. (See footnote 1)

Discussion

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 defeata 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.

* * * * * *

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."

Grievant contends that the incident which gave rise to his grievance was the alleged “breach” of the “agreement” reflected in the 2002 memorandum, which changed his job classification. He believes that, because that memo only mentions that he would be acustodian for the classroom building, the alleged agreement was breached when he was instructed to clean the cafeteria.

As Respondent has pointed out, Grievant was notified at least twice that there was going to be a change in his job duties, which would include cleaning the cafeteria. First, Superintendent McBride

informed him in her letter of March 29, 2005, that the principals would be developing a plan to cover the cafeteria cleaning, and that his responsibilities may include the cafeteria. Although Grievant contends that in his April meeting with the superintendent he was given the impression that the cafeteria cleaning issue was somewhat “up in the air,” any question regarding the issue was resolved by Principal Newhouse's memorandum on June 29, 2005. Grievant has provided no evidence which would indicate that he had any reason to question whether he was being instructed to begin cleaning the cafeteria when his turn came in March of 2006. While he has contended that he was waiting for a response to his inquiry to the State Superintendent, there is nothing in Grievant's inquiry or the Superintendent's response which discuss whether or not he would be cleaning the cafeteria.

Accordingly, the undersigned finds that Grievant was unequivocally notified on June 29, 2005, that his job responsibilities would include the school cafeteria. His filing of a grievance nearly nine months later was untimely. 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. 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).

4. Grievant did not initiate his grievance within fifteen days of discovering the grievable event.

Accordingly, this grievance is **DISMISSED** for untimely filing.

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 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: July 26, 2006

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

A timeliness defense must be asserted by the employer "at or before the level two hearing." W. Va. Code § 18-29-3(a).