DAVID JENNINGS,

Grievant,

v. **Docket No. 05-55-462**

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

David Jennings ("Grievant") filed a level one grievance on August 29, 2005, claiming he should have been selected to fill a summer bus operator assignment. After denials at the lower levels, Grievant appealed to level four on December 24, 2005. At level four, the parties elected to submit this matter for a decision based upon the record developed below, accompanied by fact/law proposals, the last of which were received by the undersigned on May 10, 2006. (See footnote 1)

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

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator since October 17, 1988.
2. There are twenty bus operators with more seniority than Grievant.
3. Shelby Nuckolls is also employed by Respondent as a bus operator. For several years, he has held two summer assignments. One is a vocational run that lastedapproximately ten days and began the week immediately following the end of the school year, and the second is a six-week program called "Energy Express."
4. On the Friday immediately prior to the beginning of his summer vocational run on Monday, Mr. Nuckolls was admitted to the hospital for emergency surgery.
5. Because time was short, and Arlen Lane, another regular bus operator, had substituted for Mr. Nuckolls the previous summer, Transportation Director Jimmy Graham called Mr. Arlen and asked him to perform Mr. Nuckolls' summer assignments. Mr. Arlen served in those positions

throughout their duration for the summer of 2005.

6. Mr. Arlen is less senior than Grievant.

7. On August 4, 2005, at the end of the Energy Express program, Grievant's brother called him and asked him why Mr. Lane was driving the run instead of Mr. Nuckolls. Grievant's brother's son was attending the program and riding the bus driven by Mr. Lane.

8. On approximately August 15, 2005, Mr. Graham telephoned Grievant to ask him about his first aide card and CDL license for the upcoming school year. During the conversation, Grievant inquired why Mr. Arlen was driving the Energy Express run, and Mr. Graham informed him that Mr. Arlen had been called after Mr. Nuckoll had emergency surgery. When asked why he wasn't given an opportunity to take the assignment, Mr. Graham told Grievant he did not realize Grievant was interested.

9. About three days after the above-described telephone conversation, Grievant went to Mr. Graham's office and requested a grievance form. He did not mention an informal conference.

10. Grievant filed his written grievance form on August 29, 2005.

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.

* * * * * *

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 he did not know that Mr. Nuckolls' run had been given to a different driver until his brother called him and informed him of this on August 4, 2005. There is no explanation for why, after his son had been riding the same bus driven by Mr. Arlen for six weeks, Grievant's brother did not notice who was driving the bus until the last day of the program. In addition, testimony from Carol Milam, an aide employed by Respondent, was that she saw Grievant at a local Wal-Mart store either in mid- or late July, and he mentioned he was going to file a grievance.

However, even if Grievant is taken at his word that he did not “discover” the facts giving rise to his grievance until August 4, there is a substantial issue in this case regarding Grievant's request--or lack thereof--for an informal conference. Although Grievant contends that he requested an informal conference “a few days” after his telephone conversation with Mr. Graham in mid-August, and that the conference occurred a few days after that, Mr. Graham had no such recollection. He only recalled that Grievant came in about three days after the phone conversation and picked up a grievance form. Surely, if Grievant had stated that he wanted an informal conference, and a discussion of the grievance had ensued, Mr. Graham would have recalled it. In addition, Grievant gave no specific statements of what was said during this informal conference or what Mr. Graham's response was, other than that the grievance was not resolved. Under the facts presented, Grievant has failed to prove that he requested an informal conference within 15 days of discovering that the bus run had been assigned to a different driver. His filing of a written grievance took place 17 days after his discovery. Accordingly, this grievance was not timely filed.

Nevertheless, Grievant has failed to establish a right to relief on the merits. Code § 18-5-39(f) provides that “[w]hen any summer employee is absent, qualified regular employees within the same classification category who are not working . . . shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.” Although Grievant attempted to prove, albeit unsuccessfully, that he had expressed a desire to take Mr. Nuckolls' positions if he decided he did not want them, this is irrelevant. The provisions of the statute are clear, and a school board is required to allow all employees the opportunity to accept the absent employee's assignment, in order of seniority. Being twenty-first on the seniority list, it is doubtful that Grievant would have been given the assignment. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990); *See Clark v. Putnam County Bd. of Educ*., Docket No. 97-40-313 (April 30, 1998).

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. Therefore, this grievance is untimely.

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 Wyoming 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: May 18, 2006

_____DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by John E. Roush, Esquire, of the School Service Personnel Association, and Respondent was represented by counsel, Gregory W. Bailey.