LOTUS M. ROSE, JO LEE DANIELS, FRANCES O. CARPENTER

JIENELL GILKERSON, SANDRA BOLAND, WILHEMINA GOINS

SUE SWEPSTON, DEANNA ARTHUR, JO ANN WICKLINE

RUTH HURT, ALMA WILLIS, FRANCES BAIR, SARAH MOYE

YVONNE PACK, ANN COLE, HERBERT CLAYPOOL

FLETCHER PARKER, JR., ROBIN RIFE, SALLY YOUNG

JACQUELYN MILAM, GLORIA FREEMAN, KETHEL HOLLEY

SHARON WALKER, FRANCES THOMPSON and DOROTHY MASSIE

v. **Docket Nos. 94-41-296**

94-41-314

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

The grievants are service personnel employed by the Raleigh County Board of Education (Board) in its central office in Beckley. (See footnote 1) They initiated grievances in June 1994 protesting a change in their work schedule for summer months. Their supervisor was without authority to grant relief and the grievances were denied at Level II following hearings held June 29 and July 5, 1994. The Board, at Level III, declined to address the matter and appeal to Level IV was made on or about July 22, 1994. A hearingwas held October 6, 1994 (See footnote 2) and the parties submitted proposed findings of fact and conclusions of law by November 14, 1994.

There is no dispute over the facts necessary for the resolution of the case. For approximately thirty years prior to the action giving rise to the grievance the Board's central office employees adhered to a summer schedule which deviated from that for the remainder of the school year. Instead of their regular 8:00 a.m. to 4:00 p.m. Monday through Friday shift, they were allowed to work from 8;30 a.m. to 4:00 p.m on Monday, Tuesday, Thursday and Friday and from 8:30 a.m. to 12:00 p.m. on Wednesday. (See footnote 3) This schedule was in effect from the beginning of the week after teachers had finished their school year and ended the week prior to their return in the fall. The employees were compensated for the additional time off under the terms of their contracts of

employment which called for them to work a minimum of 261 days per year.

Apparently, central office service staff who transferred to other worksites over the years were allowed to keep this summer schedule. This arrangement caused other service employees at those sites, who adhered to a year round 8:00 a.m. to 4:00 p.m. schedule, to complain of unfair treatment.

In a July 24, 1990 letter to Board counsel, Superintendent of Schools Dwight Dials described what he believed to be an inequity between the groups of service employees working on different summer schedules and expressed concern over "what may become a grievance." In an August 20, 1990 letter, counsel responded that the superintendent's concerns were well-founded and that since "Board Policy had never been modified to permit the [shortened summer schedule]," the schedule should be eliminated "as regards to all similarly classified and situated service personnel in order that a preference is not being granted in an un-uniform fashion."

Evidently, the Superintendent took no immediate action as a result of counsel's advice. By March 1993, however, continuing complaints from employees caused him to conclude that the shortened summer schedule should be abolished for all employees. After further conferences with counsel, he also determined that the employees to be effected should receive notice that he intended to make this recommendation to the Board and the opportunity to be heard per W.Va. Code §18A-2-6. (See footnote 4) The grievants received lettersdated March 3, 1994, in which Superintendent Dials explained to the employees the nature of the inequity in the different work hours and advised that he would recommend to the Board that their 1994-95 contracts be terminated and "supplanted" with new contracts reflecting adherence to a regular summer schedule. Mr. Dials also advised that this proposal was in accordance with a "recent West Virginia Supreme Court decision" and that the employees could appear at a March 14, 1994 Board meeting and present their views and/or evidence on the matter.

The grievants appeared at a March 28, 1994 Board meeting (See footnote 5) and were afforded a full opportunity to comment on and argue against Mr. Dials' proposal. The Board voted on that date to place the grievants on a "full day on Wednesday" summer schedule. (See footnote 6) By letter dated April 6, 1994, Superintendent Dials formally advised the grievants of the Board's action. In a June 7, 1994 memorandum, the Superintendent set forth a summer schedule for all central office employees which provided that they were to work an 8:00 a.m.to 4:00 p.m. shift Monday through Friday for the week of June 13; and an 8:30 a.m. to 4:00 p.m. with Wednesday afternoon off schedule for the

weeks of June 20 and June 27. (See footnote 7) that "Beginning July 1, 1994 the work schedule will be Monday through Friday (8 a.m. to 4 p.m.)." The grievants filed their claims within fifteen days of their receipt of this memo.

The grievants advance several legal arguments for reversal of the Board's action. The Board responds to each and additionally asserts that the complaints were untimely. (See footnote 8) Because the undersigned concludes, for the reasons hereinafter discussed, that the Board is correct in this assertion, it is not necessary to address the merits of the case.

The grievants do not dispute that as of the date of their receipt of Mr. Dials' April 6, 1994 letter, they knew that the Board had accepted his recommendation. The Board urges that the statutory timelines for filing a grievance over the action began running on that date. The grievant's assert that the time forfiling did not begin until June 7, 1994, the date of Mr. Dials memorandum. (See footnote 9)

W.Va. Code §18-29-4(a)(1) provides that an employee must file a grievance "within fifteen days following the occurrence of the event upon which the grievance is based." Consistent with the pronouncements in Naylor v. W.Va. Human Rights Comn'n., 378 S.E.2d 843 (W.Va. 1989), the Education and State Employees Grievance Board has held that "when a county board of education acts to reduce an employee's current employment term, the "grievable event" is the board's approval of the superintendent's recommendation." Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Roberts, et al. v. Gilmer County Bd. of Educ., Docket No. 89-11-68 (Aug. 31, 1989). Despite that the employment terms of the grievants herein were not reduced, this holding is fully applicable. Clearly, the Board made a decision on March 28, 1994 which affected the terms of their employment and Superintendent Dials' April 6, 1994 letter made this abundantly clear. His June 7, 1994 memorandum was merely an additional confirmation of the Board's decision and not the event upon which the claims are based.

Equitable theories, including estoppel may be applied to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994); Duruttya v. Mingo County Bd. of Education, 382 S.E.2d 40 (W.Va. 1989). TheWest Virginia Supreme Court of Appeals also has held that the statute contains an "discovery rule" exception to the timelines. Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990). There is, however, no evidence of record in the present case which would support the application of any equitable principle. To the contrary, the record reflects that the grievants' decision to delay filing until the new schedule went into

effect was based either on their belief that the Board would reconsider its decision or that they would "suffer no harm" until the new schedule went into effect. There is no evidence that any Board administrator made statements or took actions which encouraged such beliefs. Obviously, the grievants' hope that the Board would retract its decision is insufficient justification for a delay in filing of over two months. Similarly, their mistaken belief that no "harm" occurred when the Board voted to change the schedule on March 28, 1994, cannot justify the application of any equitable tolling theory.

Accordingly, the grievance is **DENIED** as untimely.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Raleigh County and 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. Any appealing party must advise this office of theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: November 29, 1994

Footnote: 1Most of the grievants are secretaries. Others hold other classifications including clerk and computer operator.

Footnote: 2Grievants Rose, Daniels, Carpenter and Gilkerson submitted their cases for decision on the records developed at their July 5, 1994 Level II hearings. The remaining grievants, who were represented by the West Virginia School Service Personnel Association, requested a Level IV hearing.

Footnote: 3The record is unclear on the origins of this practice. It appears that the central office was once located in the Raleigh County Courthouse at a time when it was an area custom for businesses and government offices to close on Wednesday afternoons. The record also reflects that government offices, including the Board's central office, were open for four hours on Saturdays. There is some evidence which suggests that either the operation of federal wage and hour laws or the relocation of the office caused the Board to cease requiring employees to work on Saturday. The shortened summer work week, however, continued.

Footnote: 4That statute, in pertinent part, provides,

The continuing contract of any [service employee] shall remain in full force and effect except as modified bymutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

Footnote: 5The record does not reflect the reason for the change in meeting dates and the grievants do not allege any impropriety in the delay.

Footnote: 6This decision also applied to all central office professional staff.

Footnote: 7The record does not reflect the reason the Superintendent allowed the employees to return to their preferred schedule for the weeks of June 20 and June 27.

Footnote: 8The assertion regarding the timeliness of the complaints was raised at Level II in accordance with W.Va. Code §18-29-3(a). The Level II evaluator subsequently ruled that the grievances were "continuous" in nature and that the "effect" of the action complained of "began" with Mr. Dials' June 7 memo. For the reasons discussed herein, these findings were in error.

Also, it is noted that the Level II evaluator ruled that the Board had voted on March 28 to eliminate the "Wednesday afternoon off" portion of the schedule but it had not addressed the earlier starting time of 8:00 a.m. Accordingly, the evaluator granted the grievances to the extent that they could retain the later starting time. At the Level IV hearing, the parties advised that this part of the relief sought had already been implemented.

Footnote: 9This assertion was made by several grievants during their testimony at Level II. Curiously, the grievants do not address the timeliness issue in their proposed findings of fact and conclusions of law at Level IV.