BILLY SPARKS,

Grievant,

v v.

DOCKET NO. 97-27-279

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Billy Sparks alleges that Respondent Mercer County Board of Education has improperly assigned overtime/extra-duty work to substitute service personnel, in violation of W. Va. Code §18A-4-8b; and requests proper assignment of such work, and back pay with interest for overtime/extra-duty work which he should have been assigned. The grievance was denied at Levels I and II, and waived at Level III. Upon appeal to Level IV, hearings were held on August 7, 1997, and on October 21, 1997. The matter became mature for decision on December 1, 1997, the deadline for submission of proposed findings of fact and conclusions of law. For reasons which are explained herein, the grievance is denied.

ISSUES

1 1.

Was the grievance timely filed?

2 2.

Was Grievant entitled to be assigned extra-duty work in the Truck Driver/Warehouse Clerk classification?

3 3.

If so, did Respondent err in assigning extra-duty work to a substitute Truck Driver/Warehouse Clerk, rather than to Grievant?

FINDINGS OF FACT

1 1.

Grievant is employed by Respondent as an Office Equipment Repairman II, and is assigned to Respondent's Maintenance Department. 2 2.

Beginning in the early 1980's, Grievant was offered and accepted extra-duty assignments in Respondent's Pony Express Delivery System ("PEDS"), (See footnote 1) driving trucks, assembling items for delivery to different schools, and loading and unloading materials. This work was regularly performed by Respondent's Truck Drivers, and was connected with Respondent's warehouse, which is part of its Maintenance Department. Grievant last performed such extra-duty work in April of 1994.

3 3.

One of Respondent's two regular PEDS truck driver positions is held by Randall Sizemore. Mr. Sizemore holds that position, although he has been physically unable to perform the job due to a compensable, work-related injury, since the position was awarded to him in 1991. In April of 1994, John Blevins was called to substitute for Mr. Sizemore, his name having been taken from the substitute rotation list. Mr. Blevins has never competitively bid on the substitute assignment, and does not have regular employee status as a result of this assignment. Mr. Blevins has continued in this substitute assignment since April of 1994.

4 4.

In either 1996 or 1997, Respondent changed the classification of its Truck Drivers to a multi- classification of Truck Driver/Warehouse Clerk, so that the personnel in the positions could be required to not only drive trucks, but also to load and unload trucks when necessary. As a consequence of reclassification, Danny Dunn (the regular employee Truck Driver in PEDS) and Mr. Blevins are now multiclassified as Truck Driver/Warehouse Clerk. Mr. Blevins took the test for Warehouse Clerk in February 1997.

5 5.

Since Mr. Blevins was hired, Respondent has offered all overtime/extra-duty work for TruckDriver/Warehouse Clerks to Mr. Blevins and Mr. Dunn. Most of this work consists of assembling items ordered for different schools, and loading them onto the trucks for delivery.

6 6.

There are approximately 50 employees assigned to Respondent's Maintenance Department. There are other Office Equipment Repairmen than Grievant.

7 7.

Respondent's substitute list identifies Mr. Blevins as a substitute custodian only. The only person listed under the Truck Driver/Warehouse Clerk title is Earsil Graham. L IV, R Exh. 2. However, Respondent's minutes of the board meeting held April 26, 1994, show that Mr. Blevins was approved by the Board to be a substitute Truck Driver/Warehouse Clerk. L II, Board Exhibit 1.

8 8.

Respondent's practice is to assign overtime/extra-duty work to persons within the classification performing the work. Respondent has no practice of assigning such work to regular employees before assigning it to substitute service personnel.

9 9.

Grievant inquired as to why he was not receiving extra-duty work within a short time of Mr. Blevins beginning his substitute truck driving. Grievant was initially told that there was no extra-duty work. Grievant later became aware that overtime was being assigned to other employees.

10 10.

On December 19, 1996, Grievant filed a grievance form at Level I with Eddie Davis, his supervisor and Respondent's Maintenance Director. L IV, R. Exh. 1. Grievant determined that he could not gather information necessary to prosecution of his grievance (specifically, information regarding Mr. Blevins' official classification title) within the required time periods, and spoke to Mr. Davis about this. Grievant requested that proceedings on his grievance be delayed until January 6, 1997. On January 6, 1997, Grievant asked Mr. Davisto hold his grievance, as he still did not have the information. Grievant withdrew his grievance, with the understanding that he could re-file the grievance later, after he gathered the necessary information.

11 11.

Grievant requested information regarding Mr. Blevins' classification from fellow workers. Doug Hale, custodian and President of the School Service Personnel Association, told Grievant that there were two substitute lists. Grievant never directly requested the information from Respondent's Personnel Department or from members of the administration.

12 12.

When a grievance is filed with him, Mr. Davis must contact Roger Daniels, Administrative Assistant and Director of Human Resources for Respondent, in order to obtain a grievance control number. Mr. Davis also contacts Mr. Daniels for guidance in handling grievances. For example, he would contact Mr. Davis to determine whether processing of a grievance can or should be delayed at a grievant's request, or whether a grievance could be withdrawn without affecting the grievant's ability to file it again later. Mr. Davis remembered asking Mr. Daniels about delaying Grievant's Level I proceeding until January 6, 1997, and being told it was permissible to do so. Mr. Davis did not recall advising Grievant that he could withdraw his grievance and file it later, and specifically stated that he would have asked Mr. Daniels about this prior to making any such statement. Mr. Davis also did not recall asking Mr. Daniels about Grievant withdrawing his grievance.

13 13.

Grievant filed the grievance considered here on March 13, 1997. The issues involved and relief requested are substantially the same as in the grievance filed December 16, 1996.

14 14.

Mr. Daniels told Mr. Davis that the grievance control number for the grievance filedDecember 16, 1996 was #96-97-10. Mr. Daniels assigned grievance control number 96-97- 14 to the grievance which is the subject of this decision. Mr. Daniels recalled speaking to Mr. Davis about the delay of grievance control number 96-97-10 until January 6, 1997; and he recalled speaking to Mr. Davis about Grievant's March 1997 filing, informing him that it needed a different grievance control number. He did not speak to Grievant at all, and did not have any other conversations with Mr. Davis about Grievant's filings.

DISCUSSION

In a non-disciplinary grievance, the burden of proof is on the grievant to prove all elements of his case by a preponderance of the evidence. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). See also, W. Va. Code §18-29-6. Grievant must prove that Respondent violated W. Va. Code §18A-4-8b in assigning overtime or extra-duty work to Mr. Blevins, and not offering Grievant the opportunity to perform such work. Respondent asserts that it is permissible to assign extra-duty work to a substitute service employee, that Grievant was not entitled to the work, and that the grievance was not filed timely. Timeliness is an affirmative defense, which Respondent bears the burden of proving by a preponderance of the evidence. Louk v. Barbour County Bd. of Educ., Docket No. 95-01-386 (May 23, 1996), and cases cited therein. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Here, a close question of timeliness is presented. However, I find Respondent has failed to prove when Grievant first became aware of the facts giving rise to his grievance. While Grievant'sinitial filing on December 16, 1996, might be viewed as circumstantial evidence of Grievant's knowledge of the events or practices giving rise to the grievance, (See footnote 2) Grievant's testimony shows that the grievance was filed before he had actual knowledge of the facts necessary to constitute a grievable

violation. Specifically, he did not know Mr. Blevins' classification, and Respondent failed to prove when Grievant gained such knowledge. Grievant unwisely withdrew his original grievance, in order to refile it later after obtaining information regarding Mr. Blevins' classification title(s), information essential to his complaint.

It is in the interests of all parties that a grievant be encouraged to make informed decisions about whether there has been some violation, prior to filing a grievance. A priggish insistence that filing is required immediately upon suspicion of wrong-doing hardly serves the purposes of the statute--resolving problems, and doing so efficiently. On the other hand, a grievant has some responsibility to diligently investigate suspected violations, and must not unduly delay.

Ultimately, the circumstances here constitute a continuing practice, as Respondent clearly intends to continue utilizing the extra-duty assignment practice currently at issue. Grievant could always simply wait until the next extra-duty assignment is made, and file a new grievance which would then have to wend its way through the grievance procedure. Such a process hardly seems an economical use of the time of any party, or of this Grievance Board. In light of the liberal interpretation to be given procedural requirements in the grievance statute, and in an effort to avoid “procedural quagmires” preventing resolution of problems, (See footnote 3) I find that Respondent's proof is lacking,and the grievance has not been proven untimely by a preponderance of the evidence.

W. Va. Code §18A-4-8b, paragraph six, defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." "In order to find that a task involves an extra-duty assignment per §18A-4-8b, the name (or nature) of the task is not nearly as important as the time in which the work is performed." Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995) at 6, aff'd Cir. Ct. Kanawha County No. 95-AA-54 (Nov. 6, 1995). Accord Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997). The work involved here, generally filling orders for delivery to schools the following day, clearly qualifies as “extra-duty” when it is performed outside the regular work day.

Extra-duty assignments are governed by W. Va. Code §18A-4-8b, paragraph 6, and are to be made as follows:

> An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle

> then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

(Emphasis supplied.)

"The statute mandates a strict seniority-based, rotational assignment of extra-duty work." Milam v. Raleigh County Bd. of Educ., Docket No. 97-41-380 (Dec. 16, 1997). Unfortunately for Grievant, that rotational assignment is clearly to be "within a particular classification category of employment," unless an alternative procedure is formally approved by the employees and the Board. No alternative procedure was alleged to have been adopted in this instance. Thus, the fact that Grievant does not hold the classification is dispositive of the case. As Grievant does not hold the classification title, he is not eligible for extra duty, at least where there are other employees who do hold the title and who are available to work.

Although Grievant had been offered, and had accepted, extra-duty work in the Warehouse Clerk or Truck Driver classification category of employment for many years, this does not create an exception to the statute, and does not obligate Respondent to continue a practice which is not statutorily approved. Respondent had no express statutory authority, and thus is under no legal obligation, to assign the extra-duty work of a warehouse worker or truck driver to Grievant, who is classified as an Office Equipment Repairman II, not a Truck Diver/Warehouse Clerk. However, as no objection was filed to the practice at the time it was occurring, and as Grievant obtained a benefit from it, the situation is one of "no harm, no foul." Simply put, Grievant obtained some benefit from an unauthorized (even if necessary) former practice of assigning extra-duty work in the warehouse, but he cannot contest its assignment now, as no entitlement to such work was created by the unauthorized practice.

Because Grievant does not hold the "particular classification category of employment" involved, he is not entitled to be assigned any of the extra-duty work. Consequently, it is unnecessary to reach the issue of whether Respondent can properly assign such work to a substituteservice employee in the classification category. (See footnote 4)

CONCLUSIONS OF LAW

1 1.

In a non-disciplinary grievance, the burden of proof is on the grievant to prove all elements of his case by a preponderance of the evidence. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). See also, W. Va. Code §18-29-6.

2 2.

Timeliness is an affirmative defense, which Respondent bears the burden of proving by a preponderance of the evidence. Louk v. Barbour County Bd. of Educ., Docket No. 95-01- 386 (May 23, 1996), and cases cited therein.

3 3.

In the circumstances presented here, Respondent failed to prove that the grievance was not timely filed.

4 4.

Extra-duty assignments are governed by W. Va. Code §18A-4-8b, paragraph 6, and are to be made as follows:

An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated...

5 5.

The statute mandates a strict seniority-based, rotational assignment of extra-duty work, to those employees holding a particular classification category of employment. 6 6.

As Grievant does not hold the classification category of employment involved here, Grievant has no standing upon which to contest the assignment of extra-duty work to those employees holding the classification title.

Accordingly, this grievance must be **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha or Mercer County. 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 the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: December 24, 1997 _____

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1 ***PEDS' purpose is to deliver needed materials to different schools, on a daily basis. Most of the materials come from Respondent's Warehouse.***

Footnote: 2 ***See, W. Va. Code §18-29-4(a)(1), which requires, in part, that action be taken on a grievance within 15 days of "the date on which the event became known to the grievant."***

Footnote: 3 ***"Spahr [v. Preston County Bd. of Educ., 182 W. Va. 203, 382 S.E.2d 40 (1989)] and Duryutta [sic][v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40, 181 W. Va. 203 (1989)],teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." Hale v. Mingo County Bd. of Educ., 484 S.E.2d 640 (W. Va. 1997), n. 11.***

Footnote: 4 ***However, Respondent is urged to review the situation, considering the cited Code provisions and this Grievance Board's decisions in Stutler v. Wood Co. Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987); and Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995) (must post and fill competitively leaves of absence extending beyond 30 days, and only after competitively obtaining the position may the long-term substitute receive the rights, privileges and benefits of the position as provided by Code).***