THOMAS W. DANCY, SR.,

Grievant,

v. **DOCKET NO. 95-41-384**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On July 17, 1995, Thomas W. Dancy, Sr., Grievant filed a grievance stating:

> Grievant is employed as Custodian at Coal City Elementary School. Grievant was offered an extension of his contract[,] but [was] required to accept a change in his daily schedule to accept [said] extension. Grievant contends that this violated West Virginia Code §18A-4-8a. Grievant seeks to have his contract extended for the 1995-1996 school year.

The grievance was denied at Levels I and II, and Respondent waived Level III in accordance with W. Va. Code §18-29-4(c). At Level IV, the matter was continued twice for good cause, and was then submitted based upon the record developed below, by agreement of the parties. The case became mature for decision with the parties' submissions of Proposed Findings of Fact and Conclusions of Law on September 12, 1996. The matter was reassigned for administrative reasons on March 27, 1997. (See footnote 1)

ISSUES

1. Was the grievance timely filed, under W. Va. Code §18-29- 4(a)?

2. Did Respondent have any duty to reach an agreement with Grievant regarding hours of work?

FINDINGS OF FACT

1 1. Grievant is a Custodian III assigned to Coal City Elementary School, with a 210 day contract. He works regular hours of 6:30 a.m. to 2:30 p.m.

2 2. Two other Custodian IIIs are also employees at Coal City, Ms. Mustofo and Mr. Eller. Both have 210 day contracts. Ms. Mustofo works 12 noon to 8 p.m., while Mr. Eller works 3:30 p.m. to 11:30 p.m. (Tr. p. 55.)

3 3. Ms. Mustofo is most senior of the three Custodian IIIs at Coal City; Grievant is second most senior; and Mr. Eller is least senior. (Tr. p. 55.)

4 4. In 1995, Respondent initiated a program offering one custodian to work at each of Respondent's schools for an extra thirty days after the end of the regular school year, performing a variety of tasks, many of which are not feasible to perform while students are at school during the regular school year. The work was performed from June 26, 1995 to August 4, 1995, for eight hours per day and five days per week. Each principal was allowed some flexibility on the specific hours to be worked at his or her school, so long as the work hours occurred between 5 a.m. and 6 p.m. (Tr. pp. 11, 19, and 51; Admin. Ex. 6.)

5 5. The purpose of flexible hours was to accommodate usage of the schools for educational or other programs. (Tr. pp. 50-52.)

6 6. Respondent did not post the positions, nor did it offer the positions in order of overall county-wide seniority. Rather, assignments were made by offering the work first to the senior custodian at each school. Seniority within each school wasdetermined by comparing the county-wide seniority among that school's custodians. If the most senior custodian at a school declined the offer, the work was then offered to the next most senior custodian at that school. If no custodians already employed in a school wanted the work, it was offered on the basis of seniority to custodians assigned to other schools during the regular school year. (Tr. pp. 15-28.)

7 7. Each custodian accepting the thirty days' work kept his or her existing 200- or 210-day regular employment contract; there were no separate 30-day contracts issued to cover this work. Even if a custodian worked different hours during the thirty days, that custodian's regular contract would dictate the hours worked during the regular school year, according to Respondent's plan. Respondent apparently chose "to extend [each custodian's] employment term... by 30 days from 210 days to 240 days, effective 6-26-95." (Tr. pp. 20 and 38, Admin. Ex. 7.)

8 8. Respondent represented that it never issues new contracts when a contract is extended for a service employee. (Tr. p. 39.) Respondent's intent "was to extend the employment term by 30 days within the conditions" set as to when, where and what work would be performed at the particular school during the summer. (Tr. pp. 39- 40.) The contracts were intended by Respondent to be for continuing summers of employment, and Respondent believed it would only be able to alter the arrangement by notifying employees during the spring of 1996 as to any planned changes. (Tr. p. 41.)

In other words, the individual who accepted the extra thirty days of custodial work in 1995 is offered the work next year. (Tr. p. 27.) 9 9. Coal City Elementary School offered extended education programs for the first time during the summer of 1995. The education program began at 9:00 a.m., although students began arriving as early as 8:05 a.m., and the program concluded at 1:00 p.m., when faculty and students departed.

10 10. Jerry Redden, principal of Coal City Elementary School, received official notice that the 30-day custodial work "extensions" would be offered on June 7, 1995. (See footnote 2) Principal Redden offered the work first to Ms. Mustofo, and Principal Redden specifically informed Ms. Mustofo that the custodian at Coal City Elementary School would be required to work from 10:00 a.m. to 6:00 p.m., in order to accommodate the summer programs and the type of work the custodian was expected to perform. She declined the offer. (Tr. p. 56; Admin. Ex. 8.)

11 11. Principal Redden believed these hours were necessary, as the custodian would perform a lot of painting, and Principal Redden felt painting should be performed when children were not present, and when the maximum time was available to allow the paint to dry and to clear out odors. The hours he set would accomplish this, by leaving paint to dry overnight. In addition, Principal Redden stated that the custodian was less likely to disturb classes if working these hours. Children and teachers would be gone by 1 p.m., so the custodian would have five hours to work without interruption. "[A] lot of thought went into this, it just wasn'thours picked out of the day..." (Tr. pp. 57-61, and 64.)

12 12. Principal Redden offered the work to Grievant on June 8, 1995. Grievant accepted on June 12, 1995. Principal Redden specifically discussed the required hours of work with Grievant. The hours were also specified on documents describing the employment, which were attached to Grievant's signature sheet showing his acceptance of the work offer. (Tr. pp. 56-57, 69; Admin. Ex. 9.)

13 13. Grievant was unable to work the 10:00 to 6:00 schedule because he had privately contracted with some individuals to perform painting work for them over the summer months, and those individuals would not allow him to perform the painting during other hours, such as early mornings, evenings, or weekends. Grievant thus had existing contractual duties which conflicted with Respondent's requirements. (Tr. pp. 76-77, 80.)

14 14. Grievant inquired about the flexibility of hours with Principal Redden, and also with Mr. Racine Thompson, Assistant Superintendent on June 24, 1995. Both gentlemen explained that flexibility was

intended to be for the convenience of Respondent, not necessarily for the employee's convenience. Mr. Redden explained his purpose in setting the hours for Coal City, and refused to allow Grievant to work his regular school year hours for the summer employment. (Tr. pp. 9-11, 22-26, and 47-48.)

15 15. As children arrived for the summer programs as early as 8:05 a.m., Grievant would not have had five hours of uninterrupted work, had he been allowed to work his regular school year hours of 6:30 a.m. to 2:30 p.m. 16 16. On June 24, 1995, Grievant informed Principal Redden that he could not work the hours specified, and would thus not be taking the job. Instead, Grievant was offered, accepted, and worked a summer contract on Respondent's paint crew. Grievant's hours working on the paint crew were 6:30 a.m. to 2:30 p.m. (Tr. p. 88.)

17 17. Had Grievant known in advance that he would have the opportunity to accept the thirty days' summer employment as a custodian, he would not have entered into the private contractual agreements specified above. (Tr. p. 78.) He would accept the position and work these hours if offered the opportunity next year. (Tr. p. 81.)

18 18. Had Grievant worked the thirty days' custodial contract, he would have been offered that work again in each subsequent year in which such work was available.

19 19. Another custodian was offered, accepted and worked the thirty days during the hours set by Principal Redden. (Tr. p. 61.)

20 20. Principal Redden did not know any details of Grievant's outside job commitments. Principal Redden assumed Grievant's outside work was performed at other times than the 10:00 to 5:00 workday. Even if he had known the details of Grievant's situation, Principal Redden would not have changed the required work hours. Principal Redden had been pleased that Grievant accepted the thirty day custodial work, and was not attempting to inconvenience Grievant in maintaining the work hours requirement he set. (Tr. pp. 73-74.)

DISCUSSION

As this grievance does not involve disciplinary action,Grievant bears the burden of proving all elements of his grievance by a preponderance of the evidence. W. Va. Education and State Employees Grievance Board Procedural Rules, 156 C.S.R. 1, §4.19; Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); see also, W. Va. Code §18-29-6. However, Respondent alleges that the grievance is untimely. This allegation constitutes 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.

TIMELINESS OF THE GRIEVANCE:

A grievance by an education employee 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 or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." W. Va. Code §18-29-4(a)(1). Respondent argues that Grievant was aware of the required work hours on June 8, 1995, and that the fifteen day filing period began on this date. As the grievance was not filed until July 17, 1995, it argues that the grievance is time-barred.

It is uncontested that Grievant was told of the work hour schedule on June 8, 1995, and that he accepted the offer of employment on those terms on June 12, 1995. However, Grievant's complaint was not with the original scheduling of work hours, as he initially believed he could alter his private contractual arrangements in order to conform his schedule with those hours. Grievant sought modification of the agreement on working hours, in order to accommodate his private concerns, on June 24, 1995. This modification was denied, and denial left Grievant no choice but to decline that employment. The grievable event occurred on June 24, 1995, a Saturday, when Grievant's request for accommodation was denied.

A conference was held between Grievant, Mr. Thompson and Principal Redden on July 17, 1995. A July 18, 1995 memorandum states this, and concludes that "Mr. Redden and I cannot resolve your grievance at Level I." (Admin. Ex. 1.) However, no direct evidence of when the Level I grievance was filed was located in the record. Thus, Respondent's affirmative defense must fail, because it has not proven the date upon which the grievance was filed.

Even if Respondent showed the grievance had been filed on July 17, 1995, the filing would have been within the statutory time frame. W. Va. Code §18-29-2(b) defines "days" to exclude Saturday, Sunday, or official holidays or school closings. There was a national holiday on July 4, 1995, and there were seven weekend days which are not counted. Thus, July 17, 1997 was the fifteenth "day" following the June 24, 1995 "event." The grievance was timely filed.

CHARACTER OF THE THIRTY DAYS' WORK:

Grievant argues that the thirty days' work was an extension or modification of the employee's

regular contract of employment. (See footnote 3) Consequently, Grievant avers, Respondent was free to offer the work on the basis of seniority, but not to make it conditional upon the employee's consent to a change in the daily schedule. Grievant relies on W. Va. Code §18A-4-8a, which prohibits the employer from changing a service employee's daily work schedule "during the school year without such employee's written consent."

Grievant's argument ignores the fact that Grievant gave his written consent to the change in daily work schedule, when he signed the form accepting the summer work after being advised of the work hours. The work hours were further confirmed in writing, which was either given to Grievant at the time he signed the form or immediately thereafter. That Grievant later reneged on his agreement in no way changes the fact that his signature accepting the thirty days' employment served as "written consent" to the alteration in his work schedule.

Grievant first gave his written consent to the alteration in his work schedule, and thereafter attempted to change the schedule "back" to his regular employment hours. Respondent was under no duty to allow Grievant to change the hours, and indeed could have chosen to enforce Grievant's original acceptance of the employment terms. Instead, Respondent accommodated Grievant by allowing him to void his commitment to work the custodial job, and even allowing him to take a position on the summer paint crew. Thus, in effect, Respondent accommodated Grievant's request for a change in work hours by arranging for him to obtain a summer paint crew position. Respondent was certainly not required to alter the hours for the Coal City Elementary School custodial work, where a reasonablebasis for requiring those work hours was proven.

CONCLUSIONS OF LAW

1 1. In non-disciplinary grievances, Grievant bears the burden of proving all elements of his grievance by a preponderance of the evidence. W. Va. Education and State Employees Grievance Board Procedural Rules, 156 C.S.R. 1, §4.19; Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); see also, W. Va. Code §18-29-6.

2 2. Respondent's allegation of untimeliness of the grievance constitutes 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. Respondent failed to prove that the grievance was not timely filed in accordance with W. Va.

Code §18-29-4(a)(1).

4 4. W. Va. Code §18A-4-8a prohibits the employer from changing a service employee's daily work schedule "during the school year without such employee's written consent."

5 5. Grievant gave his written consent to a change in his daily work schedule, when he accepted the offer of thirty days' additional employment on June 12, 1995.

6 6. Where Respondent had legitimate reasons for requiring a specific work schedule for the thirty day employment term, and the employee had already accepted the employment, Respondent had no duty to alter the work schedule to its detriment for the sole convenience of the employee.

Accordingly, this grievance is **DENIED.**

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

Dated: August 22, 1997 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

Respondent's submission erroneously stated that there had been a hearing held at Level IV.

Footnote: 2

The record discloses that the "extensions" had been discussed and planned over the course of the entire 1994-1995 school year, and that custodians and principals had been involved in surveys.

Footnote: 3

For purposes of this Decision, Grievant's argument is accepted. As noted in footnote 4, one might argue whether there is an extension or modification of the regular contract, rather than a separate summer position.