EFFIE BUTCHER,

Grievant,

v. **Docket No. 97-18-458**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Effie Butcher (Grievant), an employee of Respondent Jackson County Board of Education (JCBE), filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on August 28, 1997, alleging that JCBE violated W. Va. Code §§ 18A-4-8b and 18A-4-8g through the manner in which it filled a Custodian IV vacancy at Ripley Elementary School (RES), and subsequently accomplished shift reassignments for certain Custodians at RES. The grievance was denied at Level I by Grievant's immediate supervisor, and Grievant appealed to Level II where a hearing was held on October 6, 1997. Thereafter, Carroll Staats, the Superintendent's designee, denied the grievance on October 17, 1997. Grievant appealed to Level III on October 20, 1997, and JCBE denied the grievance at that level on October 23, 1997. Grievant appealed to Level IV on October 30, 1997, and a Level IV hearing was conducted in this Grievance Board's office in Charleston, WestVirginia, on January 7, 1998. (See footnote 1) At the conclusion of that hearing, the parties agreed to submit written post-hearing arguments, and this matter became mature for decision on February 17, 1998, following receipt of the parties' proposed findings.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at both levels.

FINDINGS OF FACT

1. Grievant is a regular school service employee of Respondent Jackson County Board of

Education (JCBE), assigned as a Custodian III at Ripley Elementary School (RES).

2. On June 6, 1997, JCBE posted a position vacancy for a Custodian IV at RES. The posting indicated that the successful applicant would be working on the evening shift. See Ex 10 at L II.

3. Grievant and six other employees applied for the vacancy described in Finding of Fact Number 2, but the posting was rescinded when the local School Service Personnel Association representative complained that the position had previously been a day shift position.

4. On June 24, 1997, JCBE re-posted the position vacancy for a Custodian IV at RES. The posting indicated the position involved a 210-day employment term and thesuccessful applicant would be required to work the day shift. Ex 4 at L II. Grievant applied for the posted vacancy, but the position was awarded to Carl Wolfe, a regular Custodian employed by JCBE with greater seniority than Grievant. See Ex 5 at L II.

5. On August 13, 1997, JCBE posted a Custodian III position at RES for the evening shift. See Ex 15 at L II. Carolyn Munday was the successful applicant for that vacancy. HT at 34.

6. After accepting the Custodian IV position at RES, Mr. Wolfe voluntarily agreed to work the evening shift. See Ex 21 at L II.

7. After Mr. Wolfe agreed to move to the evening shift, Frances Miller, a regular Custodian III assigned to RES on the evening shift was offered the opportunity to move to the day shift, and she voluntarily agreed to change her shift. See Ex 21 at L II.

8. Grievant has more seniority than Ms. Miller. See Ex 5 at L II. Ms. Miller has an excellent attendance record. HT at 57. Grievant has been absent due to illness or other causes on a number of occasions, taking time off without pay during the 1993-94, 1994-95, and 1995-96 school years after exhausting her available sick leave. See R Ex 1. Grievant's excessive absences have been noted in her performance evaluations. HT at 57.

9. There are three Custodians working the evening shift at RES from 2:30 p.m. to 10:30 p.m. The single Custodian on the day shift works from 6:00 a.m. to 2:00 p.m.

10. Mr. Wolfe began working the evening shift on August 26, 1997. HT at 54. This grievance was initiated on August 28, 1997. Ex 1 at L II.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State

Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

JCBE contends that this grievance was not initiated within the time limits set forth in W. Va. Code § 18-29-4(a):

> (1) 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.

In accordance with W. Va. Code § 18-29-3(a), Respondent properly asserted prior to the Level II hearing that this grievance was not initiated at Level I of the grievance procedure in a timely manner. Ex 2 at L II. See Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Evans v. Mason County Bd. of Educ., Docket No. 97-26-400 (Jan. 23, 1998); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997). See also Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996). A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52- 172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, orwhich is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievant indicated that she had no quarrel with Mr. Wolfe's selection for the Custodian IV vacancy at RES initially, because Mr. Wolfe had greater seniority as a Custodian III. However, when she learned Mr. Wolfe had moved to the evening shift, she became aggrieved, believing that such action was improper. In addition, JCBE moved Ms. Miller to the day shift at about the same time, and she also grieved that action. (See footnote 2) Inasmuch as this grievance was initiated at Level I within fifteen days of these events, the grievance is timely. See Pate, supra.

Grievant initially contends that the reassignment of Mr. Wolfe from the day shift to the evening shift was improper. Grievant suggests that Mr. Wolfe was “pressured” to make this change by his

supervisors. However, Mr. Wolfe appeared at Level IV and credibly testified that he initially proposed to RES' Principal that he return to the evening shift, the shift he previously held as a Custodian III, to supervise two RES Custodian III's working that shift. W. Va. Code § 18A-4-8a(7) provides:

> No service employee may have his or her daily work schedule changed during the school year without the employee's written consent, and the employee's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

To the extent Mr. Wolfe's work schedule was changed to place him on the evening shift, JCBE took that action with the employee's consent. Whether this change representsa change in work schedule under W. Va. Code § 18A-4-8a(7), or a transfer under W. Va. Code § 18A-2-7, or both, Mr. Wolfe affirmatively waived his rights under each of these statutes by consenting in writing to the new schedule. See Thomas v. Wetzel County Bd. of Educ., Docket No. 96-52-268 (Oct. 10, 1996). As the successful applicant for the Custodian IV position at RES, Mr. Wolfe simply exercised his prerogative to agree to a change in his shift.

Likewise, Ms. Miller's shift was changed, with her consent, from evening shift to day shift. However, Grievant argues that if the day shift “vacancy” created by Mr. Wolfe's reassignment to the evening shift had been posted, she would have prevailed over Ms. Miller on the basis of seniority in accordance with W. Va. Code § 18A-4-8b. Accordingly, this grievance requires a determination of whether Grievant's right to compete for a “promotion” from the evening shift to the day shift was violated by JCBE's actions. That issue was previously raised in Daggett v. Wood County Board of Education, Docket No. 91-54-497 (May 14, 1992), but not decided due to a determination that the grievant in that matter lacked standing to contest another employee's shift change.

W. Va. Code § 18A-4-8b defines “promotion” as:

> any change in his employment that the employee deems to improve his working circumstance within his classification category of employment and shall include a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that classification category of employment.

In the situation presented by this grievance, Grievant reasonably contends that the day shift is preferable to the evening shift, and that moving from the evening shift to the day shift at RES constitutes a “transfer.” See Thomas, supra. However, the day shift position at issue was filled by Ms.

Miller, who, as expressly authorized in the statute, holdsthe same classification category of employment as Grievant, Custodian III. In these circumstances, JCBE fully complied with Code § 18A-4-8b because the statute does not require the relative seniority of the employees to be considered in making such assignments and transfers.

JCBE's explanation that Ms. Miller was offered the opportunity to move to the day shift rather than Grievant because Ms. Miller's attendance was more dependable than Grievant, and the day shift Custodian was required to work alone, was not refuted by Grievant's evidence, and represents an adequate explanation to withstand scrutiny under the arbitrary and capricious standard for reviewing such discretionary determinations. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. 2. A grievance must be filed within the fifteen day time limit specified in W. Va. Code § 18-29-4(a). W. Va. Code § 18-29-3(a). W. Va. Code § 18-29-4(a) provides:

> 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.

3. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96- DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. This grievance, as it relates to the reassignment of Custodian IV Carl Wolfe from the day shift to the evening shift, and the reassignment of Custodian III Frances Miller from the evening shift to the day shift, was filed at Level I within the time limits specified in W. Va. Code § 18-29-4(a). See Pate v. Summers County Bd. of Educ., Docket No. 97- 45-188 (Feb. 5, 1998)

5. When a school service employee is moved from the evening shift to the day shift, or from the day shift to the evening shift, such reassignment may constitute a transfer. Thomas v. Wetzel County Bd. Of Educ., Docket No. 96-52-268 (Oct. 10, 1996).

6. Mr. Wolfe and Ms. Miller affirmatively waived their rights under W. Va. Code §§ 18A-4-8a(7) and 18A-2-7, by consenting to their respective shift changes. 7. W. Va. Code § 18A-4-8b defines promotion to include a transfer only if “the position is not filled by an employee who holds a title within that classification category of employment.” Because Grievant and Ms. Miller hold the Custodian III classification, the Principal was not required to consider their relative seniority when offering an opportunity for one of them to voluntarily transfer to another shift.

8. The Principal's decision to offer Ms. Miller an opportunity to transfer to the day shift where she would be required to work alone, based upon her superior attendance, was not arbitrary and capricious. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Accordingly this Grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 13, 1998

Footnote: 1

Grievant was represented by counsel, John Roush, of the West Virginia School Service Personnel Association.

Respondent was represented by counsel, Howard Seufer, of Bowles Rice McDavid Graff & Love.

Footnote: 2

Grievant amended her grievance at Level II, with JCBE's consent, to include this issue.