REBECCA LUTZ and

LOLA FERGUSON,

Grievants,

v. **Docket No. 99-17-445**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Rebecca Lutz and Lola Ferguson (Grievants), employed as Supervisory Aides at North View Elementary School, filed separate grievances alleging that a morning and evening “bus duty” assignment was improperly given to a less senior aide. These grievances were filed on January 12, 1999, and were denied at level one on January 19, 1999. Upon appeal to level two, the grievances were consolidated, and a level two hearing was conducted on August 10, 1999. The grievance was denied in a written level two decision dated October 13, 1999. Grievants were represented by William White of the West Virginia Education Association, and Respondent was represented by counsel, Basil Legg. Grievants appealed to level four on October 20, 1999. The parties agreed to submit the matter for consideration based upon the record developed below, supplemented by written arguments filed at level four. This matter became mature for consideration upon receipt of the parties' written proposals on November 23, 1999.

Findings of Fact

1. On October 7, 1998, the Harrison County Board of Education (HCBOE) approved an “extension of work day” contract for Katrina Knight, a Supervisory Aide, toperform “bus duty” at North View Elementary School. Initially, the contract was for an additional thirty minutes to be added to Ms. Knight's work day for supervision of a handicapped student before school began each morning. On October 19, 1998, HCBOE approved an additional thirty minutes so that Ms. Knight could supervise

the same student after school before her bus arrived to take her home.

2. Ms. Knight received supplemental pay for the morning and evening bus duty assignment, which extended her normal contracted working day of six and one half hours by one hour.

3. HCBOE did not post the bus duty assignment awarded to Ms. Knight.

4. Grievants are more senior than Ms. Knight.

5. Grievants were unaware that Ms. Knight was receiving additional pay for a bus duty assignment until late December, 1998. Upon discovering this information, Grievants discussed the matter with Principal Richard Skinner on or about December 20, 1998. Mr. Skinner stated he would "check into it" and discuss the matter with Grievants after Christmas break.

6. After returning from Christmas break in January, 1999, Mr. Skinner was unable to provide Grievants with any relief for their complaint, so they initiated this grievance.

7. On January 19, 1999, the handicapped student was removed from the school system, so the bus duty assignment ended.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burdenof proving their 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.

An initial matter to be addressed in this grievance is Respondent's contention that this grievance is untimely. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Should the employer demonstrate that a grievance has not been timely filed, the employee may nonetheless demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Respondent argues that Grievants knew or should have known that Ms. Knight was receiving supplemental pay for bus duty beginning in October of 1998, and they did not initiate this grievance until January 12, 1999. W. Va. Code § 18-29-4(a) provides that a grievance must be initiated by scheduling a conference with the grievant's immediate supervisor "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 knownto the grievant." The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). 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).

Grievants testified that they were not familiar with the specifics of Ms. Knight's schedule, and, moreover, they were completely unaware that she was being paid for extra duties until December 20, 1999. There is no evidence of record which indicates otherwise. Accordingly, the undersigned finds that Grievants initiated this grievance within fifteen working days of their discovery that Ms. Knight was receiving pay for a supplemental assignment, and this grievance is not untimely.

The arguments presented by the parties are, unfortunately, of little use to the undersigned. Both parties contend that the bus duty assignment in question was an "extra duty" assignment, as contemplated by W. Va. Code § 18A-4-8b. However, that statute 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." The same provision also provides that such assignments are to be made according to a seniority-based rotation schedule.

Clearly, the bus duty assignment was not an extra duty assignment, because it was not "periodic" or "occasional." This was an assignment for which an aide was needed every day for a half hour in the morning and a half hour in the evening, making it an"extracurricular assignment," defined by W. Va. Code § 18A-4-16 as "any activities that occur at times other than regularly scheduled working hours, . . . which occur on a regularly scheduled basis." There is no dispute between the parties that these duties occurred outside the normal working day, so they clearly meet the definition of extracurricular as stated in W. Va. Code § 18A-4-16. Langmyer v. Ohio County Bd. of Educ., Docket No. 95-35-565 (Mar. 12, 1996). See Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990);

Bowman v. Marion County Bd. of Educ., Docket No. 96-24-261 (Apr. 29, 1997).

The dispute presented in this case has focused upon the method by which this assignment was made. Grievants contend that Principal Skinner failed to offer the assignment to them in order of seniority, as is required for extra duty assignments. HCBOE contends that Principal Skinner did offer both grievants the assignment, and they both declined to accept it. Nevertheless, these arguments are irrelevant to this matter, because the assignment in question was extracurricular, and the seniority rotation would have been an improper method for assigning it. W. Va. Code § 18A-4-16 provides that:

> The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b [18A-4-8b], article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment.

There is no evidence in this case that the aides employed by HCBOE had approved an alternative method for making extracurricular assignments, so this position should havebeen posted. W. Va. Code § 18A-4-8b provides that boards of education must fill positions based upon “seniority, qualifications and evaluation of past service,” and that regularly employed service personnel be given priority in hiring consideration over other applicants. Although Respondent erred by failing to post this extracurricular assignment, Grievants have failed to prove by a preponderance of the evidence that either of them would have received the position. Although the parties agree that Grievant Lutz is the most senior aide at North View Elementary School, the evidence does not indicate who the most senior aide in Harrison County was during the time period in question. Furthermore, W. Va. Code § 18A-4-8b requires that, along with seniority, qualifications and past evaluations are to be considered when service personnel positions are filled. Not only may there have been a more senior aide in the county who could have applied for and been qualified for the position over Grievants, there is no evidence in the record regarding Grievants' past performance evaluations.

Grievants have failed to meet their burden of proof by demonstrating that either of them would have received this position if it had been posted. “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).

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, Grievants have the burden of proving theirgrievance 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 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. Grievants initiated this grievance within fifteen working days of their discovery that an aide was receiving supplemental pay for a bus duty assignment, so this grievance was timely filed.

4. An "extracurricular assignment" is defined by W. Va. Code § 18A-4-16 as "any activities that occur at times other than regularly scheduled working hours, . . . which occur on a regularly scheduled basis."

5. Extracurricular assignments must be posted and filled on the basis of seniority, qualifications and past evaluations, with regularly employed service personnel receiving first consideration in the selection process. W. Va. Code § 18A-4-8b.

6. The bus duty assignment in this case was an extracurricular assignment, which should have been posted and filled pursuant to the provisions of W. Va. Code § 18A-4-8b.

7. Grievants failed to prove by a preponderance of the evidence that they would have received the extracurricular assignment in question if it had been properly posted.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison 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.

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: November 30, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge