CHERYL AMICK,

Grievant,

v. **DOCKET NOS. 01-13-143/234**

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Cheryl Amick, a Custodian, filed two grievances against her employer, Respondent, Greenbrier County Board of Education ("GBOE"), on March 8, 2001. The grievances alleged: (1) a violation of W. Va. Code § 18A-4-15 occurred when she was not allowed to “step-up” into the position of the Head Custodian in her absence; and (2) GBOE violated W. Va. Code § 18-29-2 “by assigning me a disproportionate share of the work load at Smoot Elementary School.” As relief she sought to be paid for March 1, 2001, when the Head Custodian was absent, and that she be permitted to step-up into her position in the future, and “either a reduction in cleaning assignment or additional custodial help.” (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Level II.

Findings of Fact

1. Grievant has been employed by GBOE as a Custodian for two years. She is currently employed as a Custodian III, and works in a half-time position at Crighton Elementary from 2:30 to 6:00 p.m., and a half-time position at Smoot Elementary from 6:30 to 10:00 p.m.

2. During the 1999-2000 school year, Grievant was employed in a full-time Custodian position at Smoot Elementary. At the end of the school year, grades seven through nine at Smoot Elementary were transferred to Western Greenbrier Junior High, and Grievant's position was reduced to a half-time position. Grievant was reduced in force and placed on the transfer list. The half-time positions at Crighton Elementary and Smoot Elementary were posted, Grievant applied for both, and she was awarded both positions.

3. Five rooms which were used during the 1999-2000 school year at Smoot Elementary are not being used now, and a sixth room is now being used as a copy room. There are approximately 60 fewer students. Grievant no longer has any responsibility for sweeping sidewalks, shoveling snow, cutting grass, or picking up trash outside.

4. In each classroom at Smoot Elementary, Grievant dumps the trash, straightens the chairs, sweeps, mops, and dusts. Some classrooms have a small bathroom, sink, and mirror, which she cleans, and she also cleans all the bathrooms which are off the hallways. Many of the bathrooms contain only a single commode, with the sink being located in the classroom. Grievant also cleans the kitchen, band room, computer lab, office, itinerant teacher's room, and library. She dumps the trash and checks the windows in the copy room every day, and she sweeps it once a week. In total, she cleans 18 bathrooms, 10 classrooms, 6 additional rooms, and a hallway.

5. Kenny Baker, GBOE's Maintenance Director, has determined that Custodians should empty the trash, sweep the floor, and clean the chalkboard if necessary, in each classroom each day, and they should do a thorough cleaning of five rooms each day,including washing the blackboards and mopping the floors. Following this schedule, those rooms which get a thorough cleaning require 15 to 20 minutes each, and the other classrooms require 7 to 8 minutes each. He considered Grievant's required job duties to be a light schedule compared to that of other Custodians, and believed she could complete all her work in three and a half hours.

6. Grievant met with Mr. Baker, Freda Gwinn, the Head Custodian at Smoot Elementary, and Fred Holland, the principal of Smoot Elementary at that time, shortly after the beginning of the 2000-2001 school year to discuss her workload. Grievant was provided a schedule at that meeting which listed the amount of time she was to spend cleaning each room so that she could complete her duties within three and a half hours. Grievant expressed her opinion at that time that she could not complete the assigned duties within the allotted time periods.

7. Neither Grievant's job duties nor her schedule have changed since the beginning of the 2000-2001 school year.

8. This grievance was filed on March 8, 2001.

9. The Head Custodian at Smoot Elementary, who works in a full-time position during the day, is classified as a Custodian IV. She works from 6:00 a.m. to 2:00 p.m. On one occasion when this employee was absent from work, Grievant was not allowed to step- up into her position. Had she

been allowed to do so, Grievant would have earned an additional $2.50 for that day.

Discussion

Respondent argued that the grievance challenging Grievant's workload was not timely filed, as Grievant's workload has been the same since the beginning of the school year. Grievant argued the alleged violation continued each day of her employment, and the grievance was therefore timely filed within 15 days of the most recent occurrence. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

As to when a grievance must be filed, W. Va. Code § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code.

A grievant must schedule a conference with her supervisor within 15 days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4(a) provides, in pertinent part:

> (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.
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> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.

> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
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> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, thegrievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

Only working days are counted in determining when the time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 18-29-2(b).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Harvey, supra; 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). Grievant argued her grievance could be filed at any time because each day she performed her duties, it represented a continuing practice. Grievant knew what her duties would be, and what her work hours would be at the beginning of the 2000-2001 school year, and this was the grievable event. This grievance does not fall within the continuing practice exception. Stern and Blackburn v. Brooke County Bd. of Educ., Docket No. 93-05-093 (Aug. 16, 1993). Grievant did not file her grievance within 15 days of learning of her schedule, nor did she offer any excuse for her delay in filing.

Even were this grievance timely filed, Grievant has not demonstrated she should be relieved of any of her duties. Mr. Baker testified that Grievant's problem with getting her work done is organization, and he has tried to assist her by preparing a schedule of her work, but she does not follow it. He stated that if she followed the schedule, she would have plenty of time to get her work done. It is clear from Grievant's testimony that she is doing more than she is expected to do, and is not following the schedule. She admitted that Mr. Baker told her to “just whiz through it, but I don't clean that way.”

Further, a board of education has substantial discretion in determining the number of positions needed, the number of positions it can afford to fund, and where its limited resources are best used. Milosicevic v. Hancock County Bd. of Educ., Docket No. 99-15-281 (Feb. 14, 2000); Miller v. Lincoln

County Bd. of Educ., Docket No. 97-22-083 (July 23, 1997). GBOE determined that it could not afford more than a half-time Custodian at Smoot Elementary in the evening. If that means some cleaning does not get done which Grievant believes should be done, Grievant will have to adjust to the choices made by the board of education.

Finally, as to Grievant's argument that the full-time, day shift Custodian's duties are not as great as hers, the only comparison of the two was the written schedules of the employees. These documents standing alone do not provide sufficient information to draw any conclusions as to the amount of work these two employees are expected to do. Grievant admitted that she had not worked the day shift since the beginning of the 2000- 2001 school year, and was not familiar with everything which was listed on the written schedule. It is also clear that the written schedule is incomplete, as testimony was offered regarding the day shift Custodian's snow removal duties, which are not listed on this document. In addition, the duties of the day shift Custodian are much different from Grievant's, as the day shift Custodian cannot clean classrooms while the students are there, she is responsible for maintaining the grass, shoveling snow, and ice removal, while Grievant has no responsibilities in these areas, and she is responsible for emergency clean-ups and repairs as they arise, while Grievant's job is to clean the rooms assigned to her each day.

As to whether Grievant should be allowed to step-up into the day shift Custodian's position when she is absent, Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).

W. Va. Code § 18A-4-15 addresses, among other things, the “step-up” provision upon which Grievant relies for the proposition that she should be allowed to “substitute” for the Head Custodian in her absence, providing, in pertinent part:

> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall

be given the opportunity to hold that position throughout such absence.

Respondent did not dispute that Grievant was in the same employment classification as the day shift Head Custodian. Respondent argued Grievant was not entitled to step-up into the Head Custodian position when she was absent, because Grievant was not employed at Smoot Elementary full-time, and in order to allow her to step-up into that position, GBOE would have to hire two substitutes on a part-time basis to cover Grievant's two part-time positions.

The statute does not exclude half-time employees from the benefits of the step-up provision, and this Grievance Board has found that an employee employed in a half-time position at a location is entitled to the benefits of the step-up provision, even if that employee holds another half-time position at another location. Miller v. Brooke County Bd. of Educ., Docket No. 98-05-343 (Apr. 26, 1999). The undersigned is not persuaded that the fact that GBOE would have to hire a substitute to fill Grievant's two separate half-time positions, or two substitutes to fill Grievant's positions, is such a tremendous burden that it requires a different reading of the applicable statutory provision.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Haleand Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. A grievant must schedule a conference with her supervisor within 15 days following the occurrence of the event upon which the grievance is based. W. Va. Code §§ 18-29-3(a) and 18-29-4(a). After receiving the response from the supervisor, the written grievance must be filed within 10 working days. Id.

3. Grievant knew what her duties would be, and what her work hours would be at the beginning of the 2000-2001 school year, and this was the grievable event. Grievant did not schedule an informal conference with her supervisor regarding her grievance within 15 days of learning of her schedule, nor did she offer any excuse for her delay in filing. The grievance challenging her workload

at Smoot Elementary was not timely filed, and it does not fall within the continuing practice exception. Stern and Blackburn v. Brooke County Bd. of Educ., Docket No. 93-05-093 (Aug. 16, 1993).

4. Grievant offered no excuse for her failure to timely file her grievance challenging her workload at Smoot Elementary.

5. Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996).

6. An employee employed in a half-time position at a location is entitled to the benefits of the step-up provision of W. Va. Code § 18A-4-15, even if that employee holds another half-time position at another location. Miller v. Brooke County Bd. of Educ., Docket No. 98-05-343 (Apr. 26, 1999).

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to pay Grievant $2.50 for the one day she was not allowed to step-up into the Head Custodian position at Smoot Elementary.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Greenbrier County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 1, 2001

Footnote: 1

The grievances were denied at Level I on March 8, 2001. Grievant appealed to Level II, where the grievances were consolidated, and a hearing was held on March 20, 2001. The grievances were denied at Level II on April 11, 2001. Level III was waived by Grievant, and she appealed the Level II Decision to Level IV on April 25, 2001. The parties agreed that these grievances could be submitted for decision at Level IV based upon the record developed at Level II. Grievant was represented by Gary Archer, and Respondent was represented by Erwin L. Conrad, Esquire. These grievances became mature for decision on June 22, 2001, upon receipt of the last of the parties' written arguments.