KIMBERLY LEWIS,

Grievant,

v. **Docket No. 01-17-617**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Kimberly Lewis, filed this grievance against her employer, the Harrison County Board of Education ("HBOE"), on August 27, 2001. The statement of grievance reads:

> In the spring of 2001, I was bumped out of my position as Phy. Ed. Teacher at Nutter Fort Primary by Cheryl Carey. I was not the least senior teacher in her certification areas. This violates WV Code 18A-4-7a and Harrison County BOE Policy GBM.

She requested as relief that she be returned to her position at Nutter Fort Primary. (See footnote 1)

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

FINDINGS OF FACT

1. Grievant is employed by HBOE as a behavior disorders teacher at Nutter Fort Elementary School (“NFES”). She has been an employee of HBOE for 18 years.

2. In the Spring of 2001, HBOE eliminated a kindergarten teaching position at NFES. Cheryl Carey was a kindergarten teacher at NFES. Grievant was teaching physical education at NFES.

3. Grievant was notified in March 2001, that she would be placed on transfer, and that Ms. Carey had more seniority than she. Grievant did not request a hearing before HBOE. Her transfer was approved by HBOE on April 30, 2001, Grievant was notified of this action, and Ms. Carey was placed in Grievant's position at the beginning of the 2001- 2002 school year.

4. Grievant requested an informal conference in August 2001, and filed this grievance August 27, 2001, shortly after she became aware of HBOE Policy GBM on August 10, 2001. Grievant

believes that under that Policy, she should not have been displaced from her position, because she views herself as a special program teacher, not subject to transfer under the Policy. (See footnote 2)

DISCUSSION

Respondent argued at the Level II hearing that the grievance was not timely filed, as it was not filed within 15 days of the date Grievant was notified she would be transferred. Grievant testified she was not aware of Policy GBM until August 10, 2001, and spoke to her principal in an informal conference immediately.

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 heshould 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 . . . 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.

The grievance process must be started 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:

> 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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> . . .
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> 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 . . ..

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, supra. 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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of thefacts giving rise to the grievance." The decision being challenged by Grievant was her transfer. She knew on April 30, 2001, that she had been transferred. What she discovered in August 2001, was a legal theory to support her grievance. "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993). The grievance was not timely filed.

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. 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 he 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. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4a.

3. 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, supra. 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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." 4. Grievant knew all the

facts necessary to filing a grievance in April 2001. In August 2001, she discovered a legal theory to support a grievance. "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993).

5. The grievance was not timely filed, as Grievant knew of the events giving rise to the grievance in April 2001, but did not request an informal conference or file a grievance until August 2001.

6. No facts were shown which would excuse Grievant's late filing.

Accordingly, this grievance is **DISMISSED AND STRICKEN** from the docket of this Grievance Board.

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

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BRENDA L. GOULD

Administrative Law Judge

Dated: February 8, 2002

Footnote: 1

Grievant received an unfavorable response at Level I on August 29, 2001, and appealed to Level II on September 4, 2001. A Level II hearing was held on November 9, 2001. Grievant was represented by William C. White, and Respondent was represented by Basil Legg, Esquire. A Level II decision denying the grievance was issued on December 13, 2001. Grievant bypassed Level III, appealing to Level IV on December 17, 2001. The parties agreed that this grievance could be decided based upon the record developed at Level II. This grievance became mature for decision on January 22,

2002, the deadline for submission of written argument, which neither party submitted.

Footnote: 2

Under the Policy, the least senior teacher in an elementary school is the teacher who is put on transfer, unless that teacher is a special program teacher. Special program teachers are "[t]eachers placed in special assignments such as Special Education, Computers, Music, Library, and Chapter I." HBOE denied that Grievant was a special program teacher.