JOE GARVIN,

Grievant,

v. **Docket No. 01-51-616**

WEBSTER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Joe A. Jr. Garvin, filed this grievance against his employer, the Webster County Board of Education ("WBOE"), on November 5, 2001. The statement of grievance reads:

> Grievant is employed in the bus operator classification. Presently Respondent recognizes him as holding substitute contract status. Grievant bid upon and received an extracurricular position. Grievant contends that this entitles him to a regular contract of employment and all the rights and privileges that accompany said status. Grievant contends that the Respondent has violated West Virginia Code §§ 18A-4-8, 18A-4-8a, 18A-4- 5b, and 18A-4-16.

He requested as relief:

> accrual of regular seniority, daily compensation at a rate of one-half day's salary for each day of his employment term, holiday pay, accrual of personal leave, insurance, retirement and all other benefits of the position (pecuniary and nonpecuniary) retroactive to the date he first filled the position. Grievants [sic] also seek[s] interest on all sums to which he is entitled. (See footnote 1)

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

FINDINGS OF FACT

1. Grievant has been employed by WBOE as a substitute bus operator for two years.

2. On August 31, 2001, WBOE posted several mid-day bus runs, which were listed as extracurricular runs. The rate of pay listed in the posting was $24.00 per day.

3. Grievant applied for one of the posted extracurricular bus runs, and was selected to receive one of the runs. He signed an extracurricular contract, agreeing to make the run at a rate of $24.00

per day. The contract states that WBOE approved his employment in this assignment on September 17, 2001. Grievant began driving the run on September 11, 2001.

4. The bus run involves the transportation of pre-school students, four days a week. Grievant arrives at the bus shack at 10:30 a.m. to pre-trip the bus. He uses the same bus everyday. He keeps a fuel log, and a record of the mileage and number of students transported. He must also complete disciplinary reports on students when necessary. He arrives at Glade Elementary School at 11:00 a.m. The pre-school students board the bus at approximately 11:05 a.m., and Grievant takes them to their homes. He also picks up afternoon pre-school students, and delivers them to Glade Elementary School at 12:25 p.m. He then returns the bus to Webster County High School, about a five minute drive, and sweeps the bus. The entire assignment takes two hours and twelve minutes. Grievant is able to substitute for bus operators who are not able to make their regular morning and afternoon runs. Grievant is only paid if he makes the run, thus if school is not held because of a holiday, and he makes the run only three days that week, he is only paid for three days. 5. At some point after September 11, 2001, and before October 9, 2001, Grievant asked Carol Green, a secretary in the Transportation Department, if the assignment would raise his seniority to the top of the substitute list, and she told him no.

6. Grievant spoke with his union representative on October 9, 2001, and decided after this conversation that he should speak with Harry Given, Administrator of Facilities and Food Services.

7. Grievant's father, who has been a local union representative for many years, asked to meet with Mr. Given, on October 9, 2001, and a meeting was scheduled for October 12, 2001. Grievant and his father spoke with Mr. Given about the nature of the assignment, and Mr. Given told Grievant he would have to speak with his attorney, and would let Grievant know.

8. Mr. Given told Grievant the next day, or shortly thereafter, that the assignment was not a regular run. Grievant then requested a grievance form. He filed his grievance on November 5, 2001. Both parties waived the informal conference as Grievant had already met with Mr. Given.

DISCUSSION

Respondent argued the grievance was not timely filed, as Grievant received the position September 11, 2001, and drove the run for over a month before he met with Mr. Given, on October 12, 2001. Respondent argued this meeting was not an informal conference, and the grievance

process was not initiated until November 5, 2001. Grievant argued the grievance was timely filed, as this grievance falls within the continuing practice exception.

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). "If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997)." Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

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 withinfifteen 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 the facts giving rise to the grievance." Grievant is challenging his employment status as a substitute bus operator, arguing that his acceptance of the extracurricular assignment changed his status to that of a regular bus operator. Grievant knew on September 11, 2001, what he would be paid for each run, and that he would not be considered a regular employee. Fifteen days from September 11, 2001, was October 2, 2001. Grievant's conversation with Ms. Green, whenever it occurred, did not affect his understanding of whether he was a substitute or regular employee.

As to whether this grievance falls within the continuing practice exception, Grievant is challenging a decision that was made on or before September 11, 2001, which he knew about at that time, and which continues to affect his status. “This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparityare continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996).” Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). However, when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this “can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance . . .. See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990).” Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995). Likewise, Grievant's claim is that an alleged specific wrongful act which occurred in the past continues to inflict damage upon him. This does not fall within the continuing practice exception. Grievant did not begin the grievance procedure within 15 days of learning his employment status would continue as substitute employment, which was the grievable event. The grievance was not timely filed, and Grievant has not presented any justification for his failure to timely file his grievance.

Even were the grievance timely filed, the undersigned finds no statutory authority for Grievant's theory. Grievant argued that because he has no regular assignment, the extracurricular assignment

has become his regular assignment. The undersigned has found no Code Section, or combination of Code Sections, which effect this conversion. In fact, the Code does not address who may hold extracurricular assignments; it only speaks to how they are to be filled, and what happens if a regular employee fills such an assignment. Grievant also argued a substitute cannot hold an extracurricular assignment, because it is an add-on to regular duties. If the latter were the case, then the answer would be that WBOE simply could not hire Grievant to fill the assignment, and he would have to relinquish the position. 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). “If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).” Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

2. In a grievance involving an education employee, 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).

4. "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. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this “can only be classified as a continuing damage arising

from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995).

6. The grievance challenges a decision made on or before September 11, 2001, that he would retain his substitute status while he served in an extracurricular assignment. Grievant was aware of this decision on September 11, 2001. Grievant knew of the events giving rise to the grievance on September 11, 2001, but did not request an informal conference within 15 working days of that date. The grievance was not timely filed.

7. 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 Webster 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: April 23, 2002

Footnote: 1

Grievant received an unfavorable response at Level I on November 14, 2001, and appealed to Level II on November 15, 2001. A Level II hearing was held on December 4, 2001. A Level II decision denying the grievance was issued on December 13, 2001. Grievant bypassed Level III, appealing to Level IV on December 18, 2001. A Level IV hearing was

held on March 13, 2002. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by Basil Legg, Esquire. This grievance became mature for decision on April 15, 2002, upon receipt of the parties' written arguments.