RICHARD BLOOMFIELD,

Grievant,

v. **Docket No. 02-35-046**

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Richard Bloomfield ("Grievant") initiated this proceeding on September 6, 2001, alleging he was wrongfully removed from a substitute bus driving position at the conclusion of the 1998-1999 school year. He seeks back wages plus interest. Grievant had alleged a default occurred at level one of the grievance procedure, which request was denied in a Grievance Board decision dated December 20, 2001. Upon remand to level two, a hearing was held on February 14, 2002, and the grievance was denied at that level. Level three consideration was bypassed, and Grievant appealed to level four on February 22, 2002. A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on May 20, 2002. Grievant was represented by counsel, Eric M. Gordon, and Respondent was represented by counsel, Kathy Finsley. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on June 24, 2002.

The following findings of fact pertinent to resolution of this matter are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as a substitute bus driver. 2. In January of 1999, Nera Cox, a regularly employed bus driver, requested a leave of absence after suffering an on-the-job injury.

3. On January 25, 1999, Grievant was called by Respondent's computer call-out system to fill Ms. Cox's position, as the next substitute in line. Grievant drove the run until the conclusion of the

1998-1999 school year, when he was told by the transportation supervisor that the run would be assigned to another driver at the beginning of the next school year, pursuant to Respondent's practice at that time.

4. At the beginning of the 1999-2000 school year, another substitute was called from the substitute bus operator list to fill Ms. Cox's run. The same driver held the position for the entirety of the 1999-2000 school year.

5. At the beginning of the 2000-2001 school year, Beth Nelson, a substitute bus operator, was called to fill Ms. Cox's run, which she did until the conclusion of the school year.

6. During the summer of 2001, Respondent discovered that its previous practice of placing a new substitute in a leave of absence position at the beginning of each school year was legally improper. Therefore, Ms. Nelson was allowed to remain in Ms. Cox's position when the 2001-2002 school year began, so that the position could be posted.

7. On September 7, 2001, Respondent posted Ms. Cox's position. (See footnote 1) Nancy Hlebiczki, a regularly employed bus driver, was selected to fill the position. 8. Grievant did not file this grievance until September 6, 2001, upon learning that Ms. Nelson had been allowed to remain in the Cox run as a substitute at the beginning of a new school year.

Discussion

Respondent contends that this grievance was not filed within the statutory timeframe, so it should be denied on that basis alone. 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). As to when a grievance must be filed, West Virginia 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. West Virginia 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). Grievant contends that he filed this grievance upon discovering that Respondent's previous practice of removing each substitute from a leave of absence position at the conclusion of the school year might be improper. He was alerted to this possibility when Ms. Nelson was allowed to remain in the run at the beginning of the 2001-2002 school year.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. 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 has admitted that what he discovered in August 2001, was a legal theory to support his 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). Grievant further contends that he had the right to drive the run in question until the hiring of a regular employee, which right he was first denied on August 30, 1999, and this denial was a continuing

practice until September 25, 2001, when a regular employee was hired. "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 disparity are 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, the wrongful act being his removal from the bus run at the conclusion of the 1998-1999 school year. This does not fall within the continuing practice exception.

Grievant did not begin the grievance procedure within 15 days of learning of his removal from the run, 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. Nevertheless, even if Grievant had filed this claim in a timely manner, he has not demonstrated any right to relief under the circumstances presented. He argues that, pursuant to the provisions of West Virginia Code § 18A-4-15, he should have remained in the leave of absence position until it was filled with a regular employee. That statute, as written in 1999 when Grievant served in the position, (See footnote 2) stated as follows regarding the employment of substitute service personnel:

> The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (1) To fill the temporary absence of another service employee;
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> (2) To fill the position of a regular service employee on leave of absence: Provided, That **if such leave of absence is to extend beyond thirty days, the board, within**

> **twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in . . . § 18A-4-8b** . . . . .
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> (3) To perform the service of a service employee who is authorized to be absent from duties without loss of pay.

(Emphasis added). Accordingly, pursuant to the provisions of the applicable statute, when Ms. Cox initially requested a leave of absence in January of 1999, Respondent was required to post and fill the position within twenty days of the beginning of her leave. Pursuant to the provisions of Code § 18A-4-8b, the position would have been filled based upon seniority, qualifications, and past evaluations, with regular employees and those onpreferred recall having hiring preference over substitutes. Nutter v. Harrison County Bd. of Educ., Docket No. 98-17-516 (June 25, 1999); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sep. 30, 1997). Accordingly, Respondent is correct in its assertion that Grievant actually received a windfall by being allowed to remain in the leave of absence position for 90 days until the end of the 1999 school year, when the position should have been posted and filled much earlier. Grievant has provided no evidence that, had the position been posted as required, he would have been the successful applicant. Therefore, no basis for relief has been demonstrated.

Because this grievance was not filed within 15 days of the grievable event and was not based upon a continuing practice as contemplated by Code § 18-29-4(a), it is untimely and must be dismissed. 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, or within 15 days of the most recent occurrence of a continuing practice. 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. Kessler, supra. SeeRose 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. Grievant knew all the facts necessary to filing a grievance in 1999. In August 2001, he discovered a legal theory to support his grievance.

6. “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).

7. The grievance was not timely filed, as Grievant knew of the events giving rise to the grievance in 1999, but did not request an informal conference or file a grievance until August 2001.

8. The specific wrongful act of which Grievant complains was his removal from a leave of absence position in 1999, which was not a continuing practice within the meaning of West Virginia Code § 18-29-4a.

9. 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 the Circuit Court of Ohio 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: July 3, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

By this time, Ms. Cox had informed Respondent she would not be returning to work at all, so the position was to be filled on a permanent basis.

Footnote: 2

The portion of the statute dealing with leave of absence positions was amended in 2000 to state that the position must only be posted when the leave of absence has been requested in writing by the regular employee. That amendment is not pertinent to the facts presented, which occurred prior to the amendment.