**THOMAS PETERS,**

**Grievant,**

**v.** **DOCKET NO. 03-20-218**

**KANAWHA COUNTY BOARD**

**OF EDUCATION,**

**Respondent.**

## DECISION

Grievant Thomas Peters filed this grievance against his employer, the Kanawha County Board of Education, on April 15, 2003, stating, "Grievant alleges that the Respondent paid carpenter's wages to summer employees who performed the same duties as the Grievant. Grievant alleges a violation of West Virginia Code § 18A-4-8, 18A-4-8a & 18-5-39. Grievant requests the payment of carpenter's wages for the same period of time as received by the summer employees."

The Grievance was denied at level one, but was granted in part at level two, finding "The grievance is not timely filed and no back pay can be awarded for events occurring last summer which he learned about in August, 2002 and failed to grieve at that time. However, if any summer workers are assigned to the renovation shop this summer and perform the same duties as the grievant while receiving carpenter pay, the grievant shall receive out-of-classification pay as a carpenter for each day he works with the summer employees." Grievant appealed the decision, level three was waived, and a level four hearing was held at the Grievance Board's Charleston office on September 15, 2003. Grievant was represented by W. Va. School Service Personnel Attorney John E. Roush, and Respondent was represented by counsel James Withrow. The parties agreed to submit their proposed findings of fact and conclusions of law by October 6, 2003, whereupon the matter became mature for decision.

Based on a preponderance of the evidence contained in the record and adduced at the hearing, I find the following facts have been proven.

## FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a General Maintenance employee in its Crede maintenance facility in the renovation shop, where he has worked for 13 years.

2. During the summer of 2002, as part of his regular contract, Grievant worked in the renovation shop with two summer maintenance employees. The summer maintenance employees and Grievant all performed the same duties.

3. The summer maintenance employees were classified as Carpenters.

4. In late August, 2002, after the summer assignments had ended, Grievant learned for certain what he had heard as rumor over the summer: that the summer employees were being paid higher wages than he was for doing the same work.

5. Grievant requested an informal conference with his immediate supervisor on April 15, 2003. After receiving the response of his supervisor on April 22, 2003, he filed a formal grievance, which was denied April 23, 2003. Grievant signed and dated his level two appeal on April 28, 2003.

6. Respondent asserted this grievance was untimely at level two. 7. Grievant was offered the opportunity to take the examination for the Carpenter classification, or to seek reclassification. He declined to do so.

## DISCUSSION

___This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. However, Respondent has asserted that this grievance was not timely filed. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97- DOH-060 (July 16, 1997). Since an untimely filing, if proven, will defeat a grievance, the merits of the case need not be addressed. Id. Because the timeliness issue is dispositive, it will be addressed first.

Grievant stated he found out in August, 2002, that the summer help were classified as Carpenters and were being paid as Carpenters, for the same work he was doing as part of his regular job,

classified as a General Maintenance Worker and being paid at a lower rate. Summer help was not employed in 2003. Grievant, however, did not file his grievance until April 15, 2003. The grievance process must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, by scheduling a conference with the grievant's immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). Grievant's eight-month delay in filing hisgrievance after he learned of the pay disparity he was complaining of is far outside the fifteen-day time limit, therefore Respondent has proven this grievance was untimely filed and must be denied.

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997). *See*, Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995). The timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair process, as free as possible from unreasonable procedural obstacles and traps. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Grievant testified he heard through the grapevine that the summer help was getting more pay while they were still working there, before the end of August, 2002, but he let it go until he found out for certain they were getting higher pay. To find out, he called someone, he is not sure whom, at the Board office, who told him for certain the help was getting higher pay. He recalled this being in late August. He then spoke to one of his supervisors, Ronald Thomas, who said he did not have anything to do with it. Grievant took no other steps to prosecute his complaint until months later. He did not testify that he was told by anyone in authority to wait before filing a grievance, or that the matter was even being worked on for possible resolution. While the time limit requirement may be given a flexible interpretation, it may not be tortured into the convoluted shape that would be required to excuse an eight-month delay.

## CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). Since an untimely filing, if proven, will defeat a grievance, the merits of the case need not be addressed. Id.

3. The grievance process must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, by scheduling a conference with the grievant's immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 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).

4. Respondent demonstrated that this grievance was untimely filed. 5. Should the employer demonstrate that a grievance has not been timely filed, the employee may 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). *See*, Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995).

6. Grievant did not demonstrate a proper basis top excuse his untimely filing.

For the foregoing reasons, this grievance is hereby **DENIED**.

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

**Date: October 21, 2003** _____

**M. Paul Marteney**

**Administrative Law Judge**