**EVA BLOSSER and VELMA HART,**

**Grievants,**

**v.** **Docket No. 03-30-331**

**MONONGALIA COUNTY BOARD OF EDUCATION,**

**Respondent.**

**D E C I S I O N**

Eva Blosser and Velma Hart ("Grievants"), employed by the Monongalia County Board of Education ("MCBE") as Cooks, filed a level one grievance on May 28, 2003, in which they alleged violations of W. Va. Code §§ 18A-4-8 and 18A-2-7. Grievants' counsel, John E. Roush, of West Virginia School Service Personnel Association, completed the statement of grievance claiming, "when [Grievants] schools closed, they were unable to obtain positions as Cafeteria Manager[s]. Instead, they were forced to take cook positions with a lower pay grade." For relief, Grievants seek reinstatement to the pay grade of Cafeteria Manager, with back pay and interest for the last two years. The grievance was denied at levels one and two, and MCBE waived consideration at level three. Appeal was made to level four on October 27, 2003, and an evidentiary hearing was conducted in the Grievance Board's Westover office on December 11, 2003. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by Mr. Roush, and MCBE counsel, Kelly J. Kimble, of Kay Casto & Chaney, on January 16, 2004.

The following facts are undisputed.

Findings of Fact

___1.___Grievant Hart has been employed by MCBE for 33 years, and served as Cafeteria Manager at Cools Springs Elementary School prior to the 2001-2002 school year.___2. Grievant Blosser has been employed by MCBE for 26 years, as a Custodianand Cook III. She also served as Cafeteria Manager for 6 years at Summers Elementary School, prior to the 2001-2002 school year.

3. Both Cools Springs Elementary and Summers Elementary Schools were closed at the end of the 2000-2001 school year. Grievants were placed on the transfer/unassigned list.

4. MCBE posted Cafeteria Manager positions for Clay Battelle High School and Waitman

Barbe Elementary School on August 22, 2001, and at Suncrest Middle School on September 9, 2001.

5. Neither Grievant bid on any of the posted Cafeteria Manager positions.

6. Grievant Hart subsequently bid on, and was assigned to, a position of Cook II at South Middle School. Grievant Blosser bid on, and was assigned to a position of Cook II at Brookhaven Elementary School.

7. Grievants work one hour less each day as Cook IIs than they did as Cafeteria Managers.

8. Cafeteria Manager is classified as pay grade "D," while Cook II is compensated at pay grade "B."

9. MCBE challenged the grievance as being filed outside the statutory time frames at both levels two and four.

## Discussion

When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL- 490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96- HHR-501 (Sept. 30, 1997). Should the employer demonstrate 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); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See* Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 18-29-4(a)(1) 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.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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). In this case, Grievants were notified of their reassignment to positions of Cook II by letter dated July 26, 2001, and did not file their grievances until 22 months later, well beyond the 15 day time frame.

However, the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), stated, "W. Va. Code, 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Because Grievants claim their delay was covered by this exception, an examination of when they knew "of the facts giving rise to his grievance" is in order.

Grievants testified that they believed they would remain in the same pay grade no matter where they were transferred. Grievant Hart stated that she had been given no indication there would be a change in her pay grade, and confirmed that she had seen a list of pay grades, but was not sure what applied to her. Grievant Blosser stated that upon assuming the Cook II position she thought her pay was “not right,” but “couldn't tell too much difference.” By May of 2003, Grievants concluded they had been subjectedo a salary reduction.

The July 26, 2001, letter notifying Grievants of their reassignment stated “[y]our salary will be based upon the approved salary schedule according to verified years of experience.” Grievants were unequivocally notified of the facts upon which this grievanceis based in July 2001. Notwithstanding the terms of the letter, Grievants believed their salaries would remain the same. They offered no explanation for this mistaken belief, and their reliance upon it does not fall within the discovery exception of the statutory time lines.

Even had the grievance been timely filed, Grievants could not prevail. A board of education must compensate employees pursuant to their statutory classification and pay grade. Further, Grievants' argument that MCBE violated W. Va. Code § 18A-4-8(m) which prohibits reclassification by class title

or relegation to “any condition of employment which would result in a reduction of his or her salary, rate of pay,' without his or her written consent”, does not apply. Grievants' reclassification was pursuant to Grievants bidding upon the Cook II positions. (See footnote 1)

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). 2. 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); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See* Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. W. Va. Code § 18-29-4(a)(1) mandates a grievance must be filed "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."

4. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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).

5. MCBOE has met its burden of proof and demonstrated Grievants did not file this grievance within the specified statutory filing period.

6. Grievants did not demonstrate a proper basis to excuse their failure to file in a timely manner. Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia 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: FEBRUARY 2, 2004** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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*Footnote: 1* *Grievants did not address the alleged violation of W. Va. Code § 18A-2-7, and this claim is deemed abandoned.*