CATHERINE MACCUMBEE,

Grievant,

v. **Docket No. 05-32-190**

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Catherine MacCumbee ("Grievant") initiated this proceeding on April 21, 2005, alleging entitlement to serve as a substitute bus operator, in addition to serving as a full- time, regular employee. The grievance was denied at level one on April 25, 2005, and, following a hearing conducted on May 26, 2005, it was denied in a level two decision dated May 31, 2005. Level three consideration was bypassed, and Grievant appealed to level four on June 6, 2005. A hearing was held in Westover, West Virginia, on September 23, 2005. Grievant was represented by counsel, John Roush of the West Virginia School Service Personnel Association, and Respondent was represented by counsel, Jason S. Long. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 20, 2005.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant became a regularly employed cook at the beginning of the 2004- 2005 school year.

2. Prior to her regular employment, Grievant had been employed by Respondent as a substitute bus operator.

3. For the first few months of the 2004-2005 school year, Grievant was permitted to occasionally work as a substitute bus operator, if no substitutes were available. (See footnote 1)

4. In February of 2005, Grievant was informed by Board administrators that she could no longer perform work as an "emergency" substitute bus operator. There were concerns regarding

liability issues, and the Board had determined that only personnel actually employed as bus operators or substitute bus operators should perform these duties.

5. For the remainder of the school year, three other regular employees were allowed to work as substitute bus operators in emergency situations, and they held substitute contracts in addition to their regular employment contracts. These employees were Gary Gaither and Mike Pingley, who are teachers, and Lucinda Swain, who is employed as a half-time cook.

6. When Grievant was on the emergency substitute bus operator list, she was after Ms. Swain in the rotation, which was based upon seniority.

7. Ms. Swain worked as a substitute bus operator on April 7 and 20, 2005. Both Mr. Gaither and Mr. Pingley worked as bus drivers after April 20, 2005, but the dates they substituted were not specified. 8. Grievant became a regularly employed bus operator at the inception of the 2005-2006 school year.

9. Grievant filed this claim after discovering that Ms. Swain had been allowed to work as an emergency substitute bus driver in April of 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

As a preliminary issue, Respondent contends that this grievance is untimely. 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 time lines. 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). As to when a grievance must be filed, 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 thedate 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 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, stating "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."

Respondent argues that the grievable event in this case was the communication to Grievant in February of 2005, informing her that she would no longer be permitted to perform substitute bus operator duties. This information was conveyed to Grievant in a meeting with John Gue, Director of Transportation, and followed up in a memorandum to her from Mr. Gue dated February 18, 2005. Therefore, the filing of this grievance on April 21, 2005, was clearly more than fifteen days after this information was relayed to Grievant.

However, Grievant contends that the grievable event was her “discovery” that another regular employee, namely Ms. Swain, had been permitted to work as a substitute bus operator while retaining her regular position. This claim is tantamount to discrimination that was not previously known to Grievant. Because this grievance was certainly filed within fifteen days of Grievant's discovery of Respondent's allegedly discriminatory practice, it is timely. As to the merits of her claim, Grievant asserts, as mentioned above, that she has been the victim of discrimination, because of Respondent's refusal to allow her to continue to serve as an emergency substitute bus operator, while other regular employees were allowed to do so. Discrimination is defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 18-29-2(m). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than **similarly situated** employees[.]” Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added).

The testimony of Mr. Gue at level four established that the three regular employees who have been allowed to continue to work as emergency drivers have contracts as substitute bus operators in addition to their regular employment contracts. (See footnote 2) The record contains no specific information regarding how those contracts came about or whether these substitute positions were posted for competitive bids. Nevertheless, Grievant has failed to provide any evidence indicating that she had a similar contract. Indeed, Mr. Gue conveyed the concern that liability issues could be a problem in the event that Grievant were involved in an accident, and she was not actually employed as a bus operator. This would lead to the conclusion that Grievant had no contract for the performance of busoperator duties, substitute or regular. In the absence of such a contract, it is difficult for Grievant to establish any legal right to work as a substitute bus driver or to prove that she was similarly situated to the other regular employees.

Moreover, a larger problem in this case is the question of the relief to be awarded, if Grievant were able to establish a right to any. In her original grievance, Grievant requested to be given the right to be called out on an emergency basis like the other employees, which relief is apparently no longer desired, due to Grievant's current status as a regular bus operator. In addition, Grievant had requested compensation for lost wages as a result of Respondent's failure to use her as an emergency driver. Even if Grievant were entitled to relief in this case, there is no substantive evidence of record which would establish what wages she may have lost under these circumstances. Other than the two dates that Ms. Swain was used as a bus driver, there is no information of record regarding how many other occasions the “emergency” bus driver list was used. While Mr. Gue did testify that Grievant was next in the rotation after Ms. Swain, there is no information as to when Grievant may have been requested to drive--if she had continued in the rotation--or whether she may have been interested in driving particular runs on specific days. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998). Grievant has failed to meet her burden of proof in this case.

The following conclusions of law are consistent with the foregoing discussion.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence.

Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. 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).

3. The time period for filing a grievance ordinarily begins to run 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. Grievant initiated this proceeding within fifteen days of discovering Respondent's allegedly discriminatory practice regarding emergency substitute bus operators, so it was timely filed.

5. Grievant has failed to prove discrimination, because she is not similarly situated to the employees to whom she compares herself. See W. Va. Code § 18-29-2(m); Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004).

6. Because there is no evidence of record regarding when “emergency” bus runs were driven at the end of the 2004-2005 school year, and it is unknown whether Grievant would have been interested in driving on any particular occasion, the relief requested is speculative. 7. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Morgan 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 Board with the civil

action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 18, 2005

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record is somewhat unclear as to whether Grievant retained a substitute employment contract for the 2004-2005 school year, but from all indications in the record, it is presumed that she did not.

Footnote: 2

As held by the Supreme Court in Poling v. Bd. of Educ., 215 W. Va. 231, 599 S.E.2d 654, positions on the substitute list must be posted and competitively filled, pursuant to the requirements of W. Va. Code § 18A-4-8b. If Respondent has not awarded these "emergency" substitute contracts in this manner, it would be advisable for it to do so.