CHERYL WILLIAMS,

Grievant,

v. Docket No. 04-30-363

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Cheryl Williams ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a bus operator, filed a level one grievance on August 27, 2004, in which she alleged violations of W. Va. Code §§18-5-39 and 18A-4-8a, when she was paid for summer work under an extra-duty contract rather than at a daily rate based on the salary scale. Grievant requests back pay for the summer work. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three and advanced her appeal to level four on October 4, 2004. An evidentiary hearing was scheduled for March 8, 2005; however, prior to convening, Grievant's representative, Shelby Leary, and MCBE counsel Kelly J. Kimble, agreed to submit the grievance for decision based upon the lower-level record. The grievance became mature for decision on April 1, 2005, the due date for submission of proposed findings of fact and conclusions of law.

The following facts have been derived from a preponderance of the evidence made part of the record at level two.

Findings of Fact

1. Grievant has been employed by MCBE as a bus operator since 1996. She additionally held a summer Kaleidoscope run for a number of years until a 2003 reduction in force.

2. In the summers of 2003 and 2004, Grievant held a two-hour, extra-duty contract.

3. MCBE employs bus operators during the summer to complete short runs which cannot be completed by regular summer employees. These runs are generally completed in one or two hours, and the employees are paid at the extra-duty rate.

4. Grievant inquired about the rate of pay during the summer of 2004, but did not file a grievance until August 27, 2004.

5. MCBE properly raised the issue at level two, as to whether the grievance was timely filed.

Discussion

Initially, MCBE contends that Grievant's claim that she was not properly compensated 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 she 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). 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:

(1) 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 toa 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. 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's response to MCBE's argument is that she contacted Richard Williams, Assistant Manager of Human Resources, and when he did not get back to her she contacted him a second time. When he advised her that she had been properly paid, she initiated these proceedings. The record does not include a copy of the position posting; however, Grievant apparently knew that she had applied for what was labeled an extra- duty assignment, and the

duties of the position. She does not state when she first contacted Mr. Williams, or when he advised her that the compensation was proper. Because Grievant was aware of the essential facts of the matter in early summer, but did not initiate these proceedings until nearly a month after the assignment ended, the grievance claim was untimely filed.

The following conclusions of law support the decision in this grievance.

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 she 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 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).

3. MCBE has proven by a preponderance of the evidence that Grievant's claim regarding her compensation for Summer 2004 was untimely filed.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 Judgesis 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: APRIL 28, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE