**SUSAN STONESTREET, et al.,**

**Grievants,**

**v. Docket No. 05-39-417**

**PRESTON COUNTY BOARD OF EDUCATION,**

**Respondent.**

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

**Susan Stonestreet, Ray Braddock, and Ellen Schafer ("Grievants"), employed by the Preston County Board of Education ("PCBE") as a bus operators, filed a level one grievance on July 18, 2005, (Stonestreet and Braddock) and August 10, 2005 (Schafer) in which they alleged violations of *W. Va. Code* §§ 18A-4-8a(9), 18A-4-5b and 18-29-2(m). Grievants requested that they be correctly compensated for an extra-duty assignment, and for the day they were denied to clean their buses.** (See footnote 1) **After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-20-4(e), and filed a level four appeal on November 9, 2005. At this time, Grievants withdrew their claim regarding payment for the extra-duty assignment, having determined they had been correctly compensated. Grievants, represented by Eric M. Gordon, Esq., of Berry, Kessler, Crutchfield, Taylor & Gordon, and PCBE counsel Kimberly Croyle, Esq. of Bowles Rice McDavid Graff & Love, LLP, agreed to submit the grievance for decision based upon the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before April 1, 2006. The following facts have been derived from a preponderance of the credible evidence made part of the record at level two.**

**Findings of Fact**

**1. Grievants have been employed by PCBE as bus operators at all times pertinent to this grievance.**

**2. June 8, 2005, was considered an Instructional Support and Enhancement Day for PCBE employees. June 9, 2005, was scheduled as a preparation for closing day.**

3. Grievants Stonestreet and Braddock drove students to Kennywood Park on June 8, 2005. Grievant Schafer was also scheduled to drive the students to Kennywood, but was unable to operate a bus at that time. PCBE paid Grievant Schafer as if she had driven the students to Kennywood.

4. Grievants Stonestreet and Braddock completed their year-end tasks in a timely fashion. Grievant Schaefer's bus was cleaned by a substitute bus operator.

5. Grievants did not file grievances until July 18 and August 10, 2005. The grievances were subsequently consolidated at level two.

6. At level two PCBE raised the issue of whether the grievances were timely filed.

## Discussion

The remaining issue is whether Grievants are entitled to an additional day of pay because they had only June 9, 2005, to complete their end-of-year cleaning and paperwork. Grievants argue they were subject to discrimination because other bus operators had two full days to complete their year-end duties while they were performing an extra-duty assignment on June 8, 2005, that it requires two days to properly clean abus at the end of the school year, and that they had not agreed to forfeit one of those days for the extra-duty assignment. PCBE asserted that Grievants are not entitled to two days to complete their year-end duties, that Grievants Stonestreet and Braddock submitted no time sheet indicating that more time was needed to complete their tasks, and Grievants do not allege they were unable to complete their work on June 9, 2005. As for Grievant Schafer, her work was completed by a substitute employee, so she cannot claim she had insufficient time.

Preliminarily, PCBE argues that this grievance was untimely filed. When an 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 & Human Res*., 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 Res*., Docket No. 96-HHR-501 (Sept. 30, 1997). 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). An untimely filing, if proven, 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).

*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). 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."

As PCBE has correctly argued, the grievable event occurred in June, and Grievants do not deny they knew the facts giving rise to the grievance by June 10, 2005. Whether the grievable event is determined to be the fact that Grievants did not work on June 10, or that they did not receive an additional days pay in their mid-month check, their claim wasundisputedly filed well beyond the statutory fifteen-day time limit. Grievants offered no reason to excuse their

failure to file in a timely manner, and none is apparent.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

## Conclusions of Law

1. When an 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 & Human Res*., 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 Res*., 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. 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. *W. Va. Code* § 18-29-4(a)(1).

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). 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."**

**5. Grievants failed to file their grievances within fifteen days of learning they would not receive an additional days salary at the end of the 2004-2005 school year.**

**Accordingly, the grievance is DENIED.**

**Either party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Preston 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 andState 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: APRIL 28, 2006**

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1*** ***They additionally requested attorney fees and costs; however, the Grievance Board lacks authority to grant such relief.***