TOMMY FARMER and GEORGE SMITH,

Grievants,

v. DOCKET NO. 94-27-185

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Tommy Farmer and George Smith, filed this grievance at Level I on March 8, 1994. Grievants allege violations of W. Va. Code §§ 18A-4-7a and 18A-4-16, stating that "[a]pplicant having less qualification was awarded position over grievants. Wish to be instated into the position." The grievance was denied at Level I due to lack of authority, and a hearing was held at Level II on April 26, 1994. Grievants were represented by Harold Smith, West Virginia Education Association, and Respondent was represented by its attorney, Kay Bayless. The grievance was denied at Level II on May 3, 1994, and appealed to Level IV. The parties have agreed to submit the case on the record developed below, which consists of the grievance submissions, Level II transcript and exhibits, and the Level II decision. (See footnote 1)

Background

Respondent posted a position for an Adult Evening Program Facilitator at the Mercer County Tech Ed Center on September 7, 1993, as follows:

> Adult Evening Program Facilitator (Extra-Curricular Contract) - Technical Education Center
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> Minimum
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> Qualifications:

> A valid West Virginia teaching certificate required. Experience in working with adult learners. Duties to include facilitating the Adult Evening Classes at the Mercer County Technical Education Center, 3 hours per evening while classes are in session. Contract is for $5,000.00 for the year.

Board Exhibit 1.

Grievants, both teachers at the Tech Ed Center, and Joe Fuda, the successful applicant, applied for the position. All three applicants were interviewed by an evaluation committee, and the Board acted on October 19, 1993 to hire Joe Fuda for the position based upon the amount of experience he had working with adult learners. Tr., p. 48. Mr. Fuda had approximately 20 years experience with adult learners, Grievant Smith had 8 years experience and Grievant Farmer had about 3 years experience. Tr., p. 33. Grievant Farmer found out that Mr. Fuda had been awarded the position on October 21, 1993. (See footnote 2) Tr., p. 22. Mr. Farmer wrote a letter on October 25, 1993 to Roger D. Daniels, AdministrativeAssistant/Director of Human Resources for the Mercer County Public Schools asking for a written statement of the reasons he did not receive the position "with suggestions for improving my qualifications." Tr., p. 7. Mr. Daniels responded on November 3, 1993, stating that "additional experience in working with adult learners would be the suggestion for improvement." Grievant's Exhibit 1.

Mr. Farmer then requested an informal conference with Mr. Robert J. Bailey, Director, Tech Ed Center, which occurred on December 13, 1993. Mr. Farmer testified that the reason for the delay was due to illness, and that it took until December 13, 1993 to schedule the informal conference. Tr., p. 5. Mr. Bailey told Mr. Farmer at that time that he was not selected because the other candidate had more experience in working with adult learners. Tr., p. 22, 39. Mr. Bailey had a separate informal conference with Grievant Smith, the exact date of which was not established for the record. Tr., p. 37. Grievants filed their grievance at Level I on March 8, 1994.

Discussion

Respondent argues that the grievance is untimely pursuant to W. Va. Code § 18-29-4, as the informal conference was held on December 13, 1993, and the grievance was not filed until March 8, 1994, nearly three months later. Respondent properly raised this issue at Level II in accordance with W. Va. Code § 18-29-3(a).

Grievants argue that they did not receive a written response following the informal conference, and that is the reason they delayed filing their written grievance at Level I.

W. Va. Code § 18-29-4 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, . . . 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.
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> . . .
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> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
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> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant or the designated repre-sentative on a form furnished by the employer or agent.

Grievant Farmer and Mr. Bailey had an informal conference on December 13, 1993. Although this was well beyond the fifteen-day requirement in subsection (1) above, Mr. Farmer explained that the delay was due to illnesses on both his and Mr. Bailey's part. The undersigned finds Grievants' explanation plausible and inasmuch as Respondent does not take issue with that initial delay, it is deemed excusable and not fatal to the grievance.

Nevertheless, Grievants still did not file their written grievance at Level I until March 8, 1994, nearly three months after the informal conference. Mr. Bailey did not specify exactly when the informal conference with Grievant Smith took place, but stated that more than 15 days passed between the informal conference and March 8, 1994, when Grievants filed their Level I grievance. Tr., p. 40. No testimony contradicting that statement was offered onthe Grievants' behalf. Grievant Farmer explained that they were waiting for a written response from Mr. Bailey. However, W. Va. Code § 18-29-4(a) does not require that a written response be issued following the informal conference. See Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994). Subsection (2), above, merely states that the immediate supervisor shall respond to the grievance

within ten days of the conference. Both Grievant Farmer and Mr. Bailey testified that Mr. Bailey explained the reasons why Grievant did not get the job on December 13, 1993, the day of the informal conference. Thus, Mr. Bailey satisfied his duty to respond at that time.

Grievants' representative apparently approached Mr. Bailey in March, telling him that they needed to move this grievance and needed him to sign off on some papers. Mr. Bailey then told Grievants' representative that he would be glad to comply, but that nothing was ever submitted to him in writing. Tr., pp. 43-46. At that point, on March 8, 1994, Grievants filed their Level I written grievance. Mr. Bailey responded in writing on March 9, 1994, well within the time frame set out in W. Va. Code § 18-29-4(a)(4).

It is incumbent upon an employee to timely pursue his rights through the grievance process or to demonstrate a valid reason for the delay. Butta v. Ritchie County Bd. of Educ., Docket No. 43-86-315-3 (Sept. 11, 1987). Based upon the foregoing discussion and the following findings of fact and conclusions of law, the undersigned finds that Grievants did not timely pursue their grievance and have not offered a valid reason for the delay.

Findings of Fact

1. Grievants are teachers at the Mercer County Tech Ed Center.
2. Respondent posted a position for an Adult Evening Program Facilitator at the Tech Ed Center on September 7, 1993.
3. Grievants and Mr. Joe Fuda applied for the position.
4. All three applicants were interviewed and Mr. Fuda was awarded the position by the Board on October 19, 1993.
5. Grievant Farmer scheduled an informal conference with Mr. Robert Bailey on December 13, 1993 to discuss the Board's decision to hire Mr. Fuda.
6. Grievant Smith also scheduled an informal conference with Mr. Robert Bailey, the exact date of which is unknown, but which was more than 15 days from the date the Level I grievance was filed.
7. Mr. Bailey explained to Grievant Farmer on December 13, 1993 that Mr. Fuda was awarded the position because he had more experience with adult learners.
8. Grievants filed their Level I grievance on March 8, 1994.

Conclusion of Law

W. Va. Code § 18-29-4(a) does not require that a written response be issued following the informal conference. Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994). Therefore, Grievants' rationale for the delay in filing their grievance for three months following the informal conference withMr. Bailey is not valid, and this grievance is untimely under the provisions of W. Va. Code § 18-29-4.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO ALLEN

Administrative Law Judge

Dated: August 3, 1994

Footnote: 1 *This case was assigned to the undersigned from another Administrative Law Judge for administrative reasons.*

Footnote: 2 *Grievant Smith did not appear at the Level II hearing and did not contact the hearing examiner to explain his absence. The evidence regarding Grievant Smith's experience and involvement in the grievance process was provided through Grievant Farmer, Mr. Bailey, and the Grievants' representative.*