ED RAY,

Grievant,

v. **Docket No. 96-06-343**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Ed Ray (Grievant), employed by Respondent Cabell County Board of Education (CCBE) as a Bus Operator, initiated this grievance under W. Va. Code §§ 18-29-1, et seq., on February 28, 1996, contesting CCBE's selection of Johnny Jordan for a part-time First Aid Instructor position. Grievant filed a written grievance at Level I on April 2, 1996. The grievance was denied at Level I on April 10, 1996, and Grievant appealed to Level II where a hearing was held on May 29, 1996. The grievance was denied at Level II on July 15, 1996, by CCBE Superintendent Richard Jefferson. Grievant appealed to Level III on July 22, 1996, and CCBE waived participation, as authorized by W. Va. Code § 18-29-4(c), on July 31, 1996. Grievant then appealed to Level IV on August 7, 1996, and a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on September 25, 1996. The parties made oral closing arguments, waiving post-hearingwritten submissions. Thus, this matter became mature for decision at the conclusion of that hearing.

There is no significant dispute between the parties regarding the facts relevant to disposition of this grievance. Accordingly, the following findings of fact have been made from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant is employed by the Cabell County Board of Education (CCBE) as a Bus Operator, a school service personnel position. HT at 19. (See footnote 1)

2. On January 4, 1996, CCBE advertised an "extracurricular assignment" for a "First Aid & CPR [cardiopulmonary resuscitation] Instructor." HT at 38; R Ex 2.

3. The posting referenced in Finding of Fact No. 2, above, stated: "The successful applicant must hold current certification as an instructor of Community First Aid and Safety through the American Red Cross." R Ex 2.

4. CPR and first aid classes are usually conducted for CCBE personnel after normal working hours. They are scheduled irregularly on an as-needed basis. Patty Pauley testimony at L IV.

5. Grievant timely applied for the posted position. After being extended due to snow days, the posting closed on January 19, 1996. HT at 38, 44-45. See R Ex 2. 6. As of January 19, 1996, only one applicant, Johnny Jordan, had current certification from the American Red Cross to teach first aid and CPR. HT at 45-46; R Ex 3. See R Ex 2.

7. The Supervisor of Transportation is specifically tasked with conducting first aid and CPR training as part of his job duties. R Ex 5. Because these duties are normally performed outside normal working hours, such employee is compensated separately for these duties. Pauley testimony at L IV.

8. Gary Lusher became CCBE's Supervisor of Transportation in October 1995. HT at 36.

9. On January 25, 1996, Grievant was issued an Instructor Certificate in Community First Aid and Safety by the American Red Cross. G Ex A at L IV.

10. Mr. Lusher completed the same training course as Grievant, and likewise received an Instructor Certificate from the American Red Cross on January 25, 1996. R Ex 3.

11. After the posting closed, CCBE conducted a two-day first aid and CPR training class on January 24 and 25, 1996. HT at 46. This course was conducted in the evening, separate and apart from the Red Cross course discussed in Finding of Fact No. 10, above. Pauley testimony at L IV.

12. Mr. Jordan and CCBE Director of Transportation Patty Pauley instructed the class on January 24th, and Ms. Pauley assigned Mr. Jordan and Mr. Lusher to instruct the class on January 25th. HT at 47.

13. On January 24, 1996, Mr. Lusher informed Grievant that Mr. Jordan would be teaching the CPR class for CCBE personnel that evening. Ed Ray testimony at L IV. Likewise, on January 25, 1996, Grievant was advised by Mr. Lusher that Mr. Lusher and Mr. Jordan would be teaching the CPR class that evening. Ray testimony at L IV.

14. Prior to January 24, 1996, another CCBE employee, Chester Mays, held a similar, but separate, part-time assignment as First Aid and CPR Instructor. Mr. Mays was off work on Workers' Compensation from the middle of January 1996 until the start of the 1996-97 school year. HT at 35; Pauley testimony at L IV. Since returning to work, Mr. Mays has continued to teach CPR courses.

15. As of the Level IV hearing on September 25, 1996, Mr. Jordan's selection as First Aid & CPR Instructor had not been submitted to CCBE for approval. Pauley testimony at L IV.

16. On February 28, 1996, Grievant requested an informal conference with his supervisor, Ms. Pauley, to initiate this grievance at Level I. See Agreed Ex 1.

15. On March 12, 1996, Grievant met with Ms. Pauley to discuss his Level I grievance. HT at 22-23; G Ex 1.

16. During the course of the discussion regarding the grievance on March 12, 1996, Grievant alleged that Mr. Lusher was being improperly assigned to perform CPR and First Aid instructional duties, and that CCBE had failed to post an instructor's vacancy created by the extended absence of Chester Mays on Workers' Compensation.

17. Larry Eastham is employed by CCBE as a Bus Operator. Mr. Eastham served as Grievant's representative at Level I. HT at 9.

18. A week or two prior to February 28, 1996, Mr. Eastham discussed the issue of Mr. Jordan's placement in the First Aid Instructor position with David Roach, an employee of CCBE not otherwise identified in the record. HT at 15-18, 31.

DISCUSSION

In grievances which do not involve disciplinary matters, the grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. CCBE has interposed two affirmative defenses, contending the grievance was not initiated within the time limits in W. Va. Code § 18-29-4(a)(1), and Grievant substantially altered the original grievance in the course of his appeal to Level II, rendering the original complaint a different grievance, contrary to W. Va. Code § 18-29-3(j). These issues must be addressed before proceeding to the merits.

W. Va. Code § 18-29-4(a)(1) contains the following time limits for an employee to initiate a grievance.

> 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.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52- 172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). As required by W. Va. Code § 18-29-3(a), Respondent asserted this grievance was untimely both before and during the Level II hearing. HT at 6-7. See generally Payne v. MasonCounty Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

Grievant did not initiate this grievance until February 28, 1996. However, Grievant learned of the "events" giving rise to at least a portion of the grievance by January 25, 1996. Although Grievant was not formally notified that he was not selected for the First Aid & CPR Instructor position at issue [See Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994)], Grievant was aware that Mr. Jordan was the new instructor, and Mr. Lusher was performing those duties as well. Moreover, while Mr. Eastham spoke with someone "in Grievant's behalf" on an unspecified date prior to February 28, 1996, Grievant did not establish that this conversation was of such a nature to place CCBE on notice that he was initiating a grievance, nor that the conversation took place within the W. Va. Code § 18-29-4(a)(1) time limits. Moreover, there was no evidence that any CCBE official made any representation which would warrant tolling of the time limits. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Stout, supra.

In the circumstances present here, CCBE has met its burden of establishing by a preponderance of the evidence that this grievance, as it relates to Grievant's nonselection to the posted assignment of First Aid and CPR Instructor, was not initiated in a timely manner. See West, supra; Lowry, supra; Hale, supra. Likewise, because Grievant was aware that Mr. Lusher was performing instructional duties on January 25, 1996, if that can be considered as a part of this grievance, that portion of the grievance was also untimely. Id.

As for that portion of the grievance which complains that CCBE failed to post a notice of vacancy in regard to Mr. Mays' continued absence, it is not clear from the recordwhen Grievant first learned

that Mr. Mays had been absent more than thirty days. Thus, it cannot be determined by a preponderance of the evidence that this portion of the grievance was untimely initiated under W. Va. Code § 18-29-4(a)(1). Id. Therefore, it is necessary to address CCBE's second affirmative defense, that Grievant improperly expanded the grievance at the Level I conference.

W. Va. Code § 18-29-3(j) provides as follows:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same; the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling. (Emphasis added.)

On March 19, 1996, Patty Pauley, the grievance evaluator at Level I, responded to this grievance as follows:

> On Tuesday, March 12 at 8:30 a.m. we met in my office to discuss the instruction of First Aid and CPR provided for all transportation department employees.
>
> You have expressed that you feel that I have denied a bus operator the opportunity to make extra money by placing the responsibility for this program in the hands of the supervision; however, I disagree. The supervisor is definitely responsible for all training the staff is to receive. These responsibilities include making sure that the training is done, scheduling so as to meet deadlines, assuring that the quality of the training meets specified standards, and documenting all of the above. If there is a breakdown in this process, supervision is held accountable. The only way we can know first hand about the training process is to participate.
>
> Staff members are also participating in the training process. For the past seven years one bus operator has served as an instructor. As of this year two bus operators are eligible to share in the training. Although one ofthe operators is not working currently due to an injury, he will resume his position when he returns to work.
>
> Instead of denying bus operators the opportunity to share in the training process I have increased the number of operators from one to two. I see this as increasing the opportunity for bus operators. G Ex 1.

Subsequently, on April 10, 1996, Ms. Pauley completed an "Immediate Supervisor's Level I Response Form," addressing Grievant's formal grievance as follows:

> Your grievance alleges violation of WV Code 18A-4-8b in regard to a First Aid and CPR instructor's position. The position was posted for the required 5 days. The posting period ended on January 19, 1996 at which time each applicant's qualifications were determined. There was only one person who held the required certification and the position was awarded to that person. The first class was taught on January 24, 1996. You did not obtain your certification until January 25, 1996 which was after the fact; therefore, at the time the position was to be filled you were not qualified. In addition to not meeting the qualifications, you were also not the most senior applicant.

Agreed Ex 1.

Although the evidence indicates that failure to post Mr. Mays' "vacancy" was discussed on March 12, 1996, at no point is there any indication that CCBE's representative at Level I invoked W. Va. Code § 18-29-3(j), advising Grievant that he was improperly raising a new and different grievance. Instead, the written response specifically addresses the merits of this complaint.

The West Virginia Supreme Court of Appeals noted in Duruttya v. Board of Education, supra, that the education grievance procedure is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." The Duruttya court rejected a school board's defense of untimely filing based upon a finding of "substantial compliance" with the grievance procedure time limits set forth in W. Va. Code §§ 18-29-1, et seq. Similarly, our Supreme Court of Appeals stated in Spahrv. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990): "[w]e do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer; therefore the process should remain relatively simple."

In the circumstances present here, CCBE did not properly invoke § 18-29-3(j) at the appropriate time. The grievance which Grievant elevated to Level II involved the same matters he presented to Ms. Pauley at Level I. Accordingly, that portion of the grievance dealing with Mr. Mays' extended absence was properly appealed to Level IV.

Having ruled upon CCBE's affirmative defenses, the merits of this grievance may now be addressed. The outcome of this grievance is generally governed by this Grievance Board's prior decisions in Froats v. Hancock County Board of Education, Docket Nos. 93- 15-251/257 (Sept. 28, 1995), and Conner v. Barbour County Board of Education, Docket No. 94-01-1108 (July 18, 1996). In

Froats, it was determined that an assignment involving instruction, in that case a similar assignment to provide CPR instruction to bus operators, did not meet the definition of a service personnel position. Froats, supra. Likewise, in Conner, a bus operator's claim that she should have received a bus operator trainer position over two less-senior applicants was rejected, noting that the assignment was not covered by W. Va. Code § 18A-4-8b and other statutes regulating the employment of service personnel. Conner, supra.

Consistent with Froats and Conner, this assignment does not involve a service personnel position controlled by W. Va. Code § 18A-4-8b. Therefore, CCBE was under no obligation to post and fill any "vacancy" created by the extended absence of another employee. Moreover, even if the position at issue were a service personnel position to befilled in accordance with W. Va. Code § 18A-4-8b, and this grievance were filed in a timely manner, Grievant could not prevail in regard to the selection of Mr. Jordan, because Grievant did not hold the required certification to qualify for the position at the time the posting closed. (See footnote 2) See Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994); Wilson v. Marion County Bd. of Educ., Docket No. 93-24-084 (July 27, 1993). Further, because these duties cannot be performed by any service employee in a particular classification of employment, but only those who have been duly trained and certified by the American Red Cross, the position at issue is not an extra-duty assignment governed by W. Va. Code § 18A-4-8b. Therefore, it was not improper for CCBE to assign these duties to the Supervisor of Transportation, Mr. Lusher, or to compensate him separately for the performance of such duties without allowing other service employees to perform those duties in rotation by seniority.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994). See W. Va. Code § 18-29-6.

2. A timeliness defense is an affirmative defense, which must be established by a preponderance of the evidence. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of

Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. CCBE established by a preponderance of the evidence that Grievant did not grieve his nonselection to a posted "extracurricular assignment" of First Aid and CPR Instructor, nor CCBE's assignment of first aid and CPR instructor duties to Supervisor of Transportation Gary Lusher, within the 15-day time limit established by W. Va. Code § 18- 29-4(a)(1). See Norton v. Bd. of Directors, Docket No. 96-BOD-369 (Dec. 9, 1996); Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995).

4. An administrative law judge at Level IV will not rule upon a legal claim in a grievance which was not properly presented for consideration at the lower levels of the grievance procedure. See W. Va. Code § 18-29-3(j); W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993).

5. CCBE failed to establish that the grievance was substantially altered in violation of W. Va. Code § 18-29-3(j) where that provision was not properly invoked at Level I by the grievance evaluator.

6. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretionis exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. The First Aid and CPR Instructor position at issue in this grievance is an assignment which is not covered by the various statutes regulating the employment of school service personnel. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1108 (July 18, 1996); Froats v. Hancock County Bd. of Educ., Docket Nos. 93-15-251/257 (Sept. 28, 1995).

8. As of the time the posting closed for the First Aid and CPR Instructor assignment, Grievant did not meet the minimum qualifications for the position. See Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994).

9. Grievant failed to establish by a preponderance of the evidence that CCBE violated W. Va. Code § 18A-4-8b, or any other law, rule or regulation, in selecting Johnny Jordan as a First Aid and CPR Instructor, or by assigning such instructional duties to the Supervisor of Transportation.

10. Grievant failed to establish by a preponderance of the evidence that CCBE violated W. Va.

Code § 18A-4-8b, or any other law, rule or regulation, in failing to post the First Aid and CPR Instructor assignment during the extended absence of Chester Mays.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 andState 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 21, 1997

Footnote: 1

The transcript from the Level II hearing in this matter will be cited as "HT at ." Grievant's exhibits will be cited as "G Ex " while CCBE's exhibits will be cited as "R Ex ." All exhibits cited are from Level II, unless otherwise indicated.

Footnote: 2

Inasmuch as Grievant was not qualified to hold the position at issue, he has no standing to complain that CCBE has not yet formally approved Mr. Jordan's selection to the position. Weaver v. Mason County Bd. of Educ., Docket No. 94-264-168 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). See W. Va. Code § 18-29-2(a); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35- 229/239 (Nov. 27, 1991); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Moreover, assuming Grievant does have standing, he has failed to show how he has been prejudiced by this irregularity.