MARSHA BLANKENSHIP,

Grievant,

v. **Docket No. 98-50-373**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Marsha Blankenship, filed this grievance alleging that the Wayne County Board of Education ("WCBOE") violated her "due process and contractual rights in regard to substitute contracts as a custodian and credit for seniority for the years under such contracts." The relief sought was to be credited with substitute seniority as a custodian from February 1992. This grievance was filed on or about August 1, 1998, and was denied at all lower levels. Grievant appealed to Level IV on September 24, 1998. A Level IV hearing was scheduled on November 13, 1998, and this case became mature for decision on December 15, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant argues Respondent terminated her substitute contract incorrectly, and she should be allowed to return to her substitute custodian position with her prior substitutedate of February 2, 1992. Respondent contends this grievance is untimely, and, in the alternative, that Grievant's substitute contract was properly terminated.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was first employed by WCBOE on January 14, 1992, when she signed a

probationary contract for employment as a substitute custodian. Her first day of employment was February 2, 1992, and she did work some days during the rest of the 1991-1992 school year.

2. Grievant's husband became ill with terminal cancer, and although Grievant was issued substitute contracts for school years 1992-1993, 1993-1994, 1994-1995, and 1995-1996, she requested not to work and this request was granted.

3. Grievant's husband died on January 15, 1996.

4. Grievant had two separate surgeries after the death of her husband. One in July 1996, and the other on September 5, 1996. After the second surgery, Grievant was directed not to drive for six weeks.

5. On September 6, 1996, Respondent sent Grievant, as well as all the other substitutes who had not worked in a long time, a certified letter notifying them that their name would be removed from the substitute records unless it received a response by September 23, 1996, informing them that the individual wished to remain on the substitute list.

6. Grievant did not receive the notice or this letter because she did not check her mail during her entire surgical recovery period. The letter was returned to WCBOE. On September 23, 1996, the board voted to remove Grievant's name as well as approximately sixty others from the substitute records.

7. Grievant first learned of her removal from the substitute list in November 1996, when a friend informed her she had read it in the newspaper.

8. After she found out about her termination, Grievant went to the Board office and talked to Cheryl Ann Thompson about the situation and what her options were. Ms. Thompson is classified as a Secretary/Switchboard Operator and is the employee who is in charge of calling out the substitute employees. Ms. Thompson informed Grievant she had been removed from the list and why. Ms. Thompson also told Grievant her only option was to reapply for another position to be rehired, and a cook's competency test was the next one scheduled.

9. Grievant did not speak to anyone else or question the advice given by Ms. Thompson.

10. Grievant filed a new application for employment as a cook with Respondent on June 25, 1997, when she was told to do so by Ms. Thompson. (See footnote 2) **Grievant took and passed the competency test on December 11, 1997. Her first day of employment as a cook**

was in January 1998.

11. In February 1998, Grievant met with WCBOE and requested her prior seniority be returned to her. This request was not granted. Grievant continued to attend Board meetings and ask for the reinstatement of her seniority. Eventually, WCBOE askedits attorney, Mr. Lycan, to review Grievant's employment file and give a legal opinion on the issue.

12. On July 24, 1998, Mr. Lycan informed WCBOE that, in his opinion, the Board's previous action had been properly done, noted a grievance had never been filed, and asserted that granting Grievant's request could expose the Board to additional grievances.

13. Grievant filed this grievance on or about August 1, 1998.

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 § 4.19 (1996); 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.

WCBOE contends this grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 18-29-4. Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code §18-29-4(a) requires a grievance to 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 . . . .**

Clearly, Grievant is outside the statutory time frame of fifteen days from the date the grievable event occurred. Grievant is also outside this fifteen day time limit if the November date when Grievant first received notice is utilized. Grievant testified she just did what Ms. Thompson told her to do, and that no one told her she could file a grievance. Additionally, Grievant did not ask anyone if she could file a grievance, and no one prevented her from doing so. The grievance statutes do not require an employer to remind an employee of his/her right to file a grievance. Grievant's assertions are insufficient to meet her burden of proof to excuse her failure to file.

In this instance this decision does appear somewhat harsh, especially when it is examined in light of the hardships Grievant experienced during the middle years of the 1990's. In all fairness, it must be noted that WCBOE was worried about the length of Grievant's delay, and it appeared it would have been much more likely to try to accommodate Grievant if her request had been made closer in time to the date of the letter or to the date of her discovery of the termination.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

3. W. Va. Code §18-29-4(a) requires a grievance to 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 . . . .**

4. Respondent has proven that the filing of this grievance was untimely.

5. Grievant has failed to present evidence sufficient to excuse her late filing.

Accordingly, this grievance is DISMISSED.

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

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 30, 1998

Footnote: 1

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by WCBOE's attorney David Lycan.

Footnote: 2

It was unclear why Grievant did not submit an application in November 1996, but it may have something to do with the applications only being kept for one year, and Ms. Thompson knew the test would not be given for some time.