JANE HARRIS,

Grievant,

v. **Docket No. 99-20-126**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On October 23, 1998, Jane Harris (Grievant), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Kanawha County Board of Education (KCBE) improperly filled certain Summer School teaching positions. After her grievance was denied at Level I, Grievant appealed to Level II where an evidentiary hearing was conducted on January 20, 1999. On February 22, 1999, Gary Hendricks, the Superintendent's designee, issued a Level II decision denying the grievance as untimely filed. Grievant appealed to Level III where, on March 4, 1999, KCBE waived participation in the grievance, as authorized by W. Va. Code § 18-29-4(c). On March 10, 1999, Grievant appealed to Level IV, indicating her grievance could be decided on the basis of the record developed at Levels I through III. (See footnote 1) In accordance with a briefing schedule established byan Order dated April 27, 1999, this matter became mature for decision on May 7, 1999, following receipt of Grievant's written argument.

Based upon a preponderance of the credible evidence contained in the record established at Level II, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Kanawha County Board of Education (KCBE) as a classroom teacher at Stonewall Jackson Junior High School.

2. For at least nine years prior to the summer of 1998, Grievant has taught Summer School for KCBE.

3. On May 7 through 16, 1999, KCBE posted vacancies for 18 Summer School teachers to teach two sessions of Summer School. The First Semester was held from June 24 through July 15, 1998, and a Second Semester was held from July 16 through August 5, 1998.

4. The Summer School posting was routinely disseminated by KCBE's personnel office through normal communication channels applicable to all vacancy announcements. However, Grievant did not become aware of the posting until after the application deadline had passed.

5. Not later than June 24, 1999, the first day of classes during the First Semester of Summer School in Kanawha County, Grievant learned from KCBE's Directorof Personnel, William Milam, that she had not been hired to teach Summer School for the First Semester, but would be hired for the Second Semester.

6. Grievant taught the Second Semester of Summer School at Capital High School for KCBE.

7. Sometime between July 16 and August 5, 1998, Grievant learned that less senior teachers had been hired to teach the First Semester of Summer School. Sometime during this same time period, Grievant spoke with Patricia Petty, KCBE's Assistant Superintendent for Area 1, indicating that she believed she had grounds to file a grievance. Ms. Petty said nothing to discourage Grievant from filing her grievance.

8. On at least one subsequent occasion, in or around September 1998, Ms. Petty asked Grievant if she was going to pursue her grievance. Grievant indicated to Ms. Petty that she was still thinking about it. This grievance was initiated with Ms. Petty on October 23, 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. KCBE contends this grievance was not initiated within the time limits specified in W. Va. Code § 18-29-4(a)(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 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. Lewis v. Kanawha County Bd. of Educ., Docket No. 97- 20-554 (May 27, 1998); Lowry v. W. Va. Dep't 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 in the Level I response that this grievance was untimely. Evaluator's Exhibit 1 at L II. See generally Payne v. Mason County 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).

The time period for filing a grievance ordinarily begins to run 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 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). In the instant matter, Grievant became aware that she had not been hired to work the First Semester of KCBE's Summer School not later than June 24, 1998, when the classes began, and she spoke with KCBE's Personnel Director, William Milam. Sometime prior to August 5, 1998, Grievant verified that some of the teachers who were hired by KCBE to teach the First Semester of Summer School had less seniority teaching Summer School. Grievant brought this matter to the attention of her immediatesupervisor, Area 1 Assistant Superintendent Patricia Petty, who said nothing to dissuade Grievant from pursuing her grievance, nor did she make any comment which would lead a reasonable person to believe that the matter would be resolved without the need to file a grievance. Grievant's purported assumption that Ms. Petty had authority to extend the time lines of the grievance procedure is not supported by a preponderance of the evidence.

Grievant waited well over the fifteen working days allowed by statute before filing this grievance. Thus, this grievance was not initiated in a timely manner. See Rose, supra; Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996). Because this matter was not pursued within the time limits specified for grievances challenging personnel actions by a county board of education, the undersigned has no authority to address the merits of this grievance.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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 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. 2. A grievance must be filed within the fifteen day time limit specified in W. Va. Code § 18-29-4(a). W. Va. Code § 18-29-3(a). W. Va. Code § 18-29-4(a) provides:

> 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.

3. A timeliness defense is an affirmative defense, which the employer must establish by a preponderance of the evidence. Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).

5. KCBE established by a preponderance of the evidence that by June 24, 1998, at the latest, Grievant was aware that she would not be teaching during the “first semester” session of summer school, but would only be teaching during the “second semester” summer school session, and that this grievance was not initiated within fifteen days of the date when Grievant became aware of this decision. Therefore, Grievant is time-barred from pursuing this grievance against KCBE. See Rose, supra; Lewis v. Kanawha County Bd. of Educ., Docket No. 97-20-554 (May 27, 1998).

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha 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. 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 26, 1999

Footnote: 1

Grievant was represented at the Level II hearing by John O'Neal, with the West Virginia Federation of Teachers. Grievant's written argument at Level IV was submitted by Steve Angel, with the West Virginia Federation of Teachers. KCBE was representedby its General Counsel, James W. Withrow.