DELORES CARROLL,

Grievant,

v.

DOCKET NO. 98-29-396

MINGO COUNTY BOARD OF EDUCATION,

and

VICKY COPLEY,

Intervenor.

D E C I S I O N

BACKGROUND

Grievant, Delores Carroll, filed this grievance on November 24, 1997, stating:

> I wish to grieve the placement of Vicky Copley as Title I reading teacher at Dingess Elementary School in violation of West Virginia Code § 18A-4-7a since she is less qualified than me for the position.
>
> I also wish to grieve the fact that the Mingo County Board of Education has used inconsistent selection procedures which are arbitrary and capricious in violation of West Virginia Code § 18A-4-7a and the West Virginia Supreme Court of Appeals ruling in Melchiori v. Board of Education, 188 W. Va. 575, 425 S.E.2d 251 (1992). Specifically, I recently learned that Superintendent Conn did not use the seven points of hiring when Vicki Copley was hired for a position at Lenore Middle School; however, the seven points of hiring were used, arbitrarily and capriciously, to screen me out of a position for which Diane Kitchen was hired; and she was the less qualified candidate for the job.

> In addition, I have recently learned that the Mingo County Board of Education has violated § 18A-4-7a by transferring Amy Phillips into the position vacated by Teresa Muncy at Burch Middle School, five (5) days prior to the beginningof the instructional term; and, further, such position was not advertised in violation of West Virginia Code § 18A-4-7a. This position originally was an eighth grade reading and social studies position which was posted as an English/language arts position with responsibilities for four (4) reading classes and one social studies class. Mary Hale was moved into the eighth grade reading position without the job being advertised in violation of West Virginia Code § 18A-4-7a.
>
> Further, I am on the preferred recall list; and the Mingo County Board of Education has violated West Virginia Code § 18A-4-7a by failing to re- employ me according to the provisions of that statute.

A level two hearing in this matter was held on December 11, 1997, and September 24, 1998. Intervenor raised the issue of timeliness at the level two hearing. The level two decision issued by the Superintendent's Designee, William C. Totten, on October 9, 1998, granted the grievance in part and denied it in part. Mr. Totten granted Grievant's claim for the position awarded to Intervenor Copley at Dingess Elementary School on October 16, 1997, with full back pay and benefits. While not explicit, it appears Mr. Totten denied Grievant's claims with regard to the Burch Middle School reading position. Mr. Totten did not address Intervenor's timeliness charge.

Subsequently, Intervenor appealed the level two decision to level four, where a hearing was conducted on December 4, 1998. (See footnote 1) The parties declined to submit findings of fact and conclusions of law; however, this case remained open for the purpose of supplying the transcript from the first day of the level two hearing. This matter became mature on January 26, 1999. Grievant was represented by Steve Angel, West Virginia Federation of Teachers, the Mingo County Board of Education ("Board") was representedby David Temple, and Intervenor was represented by Sydney Fragale, West Virginia Federation of Teachers.

FINDINGS OF FACT

___

1. Grievant, Intervenor, and Diane Kitchen were all hired on the same day by the Board as classroom teachers.

2. All three individuals participated in a random selection drawing to establish seniority for multisubjects K-8 teaching positions in the Spring of 1995. That drawing resulted in the following

order: Kitchen, Carroll, Copley.

3. On the same day, another random selection drawing was held to establish seniority for reading specialization teaching positions. That drawing resulted in the following order: Kitchen, Copley.

4. Grievant Carroll did not participate in the reading random drawing because she did not hold a reading certificate at that time. Grievant Carroll had completed all course work for the certificate, but had not completed the paperwork in the Spring of 1995. She got her reading certificate on December 8, 1995.

5. All three individuals were reduced in force and placed on the preferred recall list.

6. In August 1997, a teacher at Burch Middle School, Teresa Muncy, bid on another job and moved out of that school. She taught eighth grade reading. At the same time, there were four (4) fifth grade teachers at Burch Middle School, but not enough students for four fifth grade classes. The Principal asked the fifth grade teachers to decide which among them had a reading certificate and seniority, and asked that one of themvolunteer to be moved to the vacant eighth grade position. Mary Hale volunteered to move to that position.

7. Ms. Hale moved into the eighth grade position within the first few days of the 1997-98 school year, which would have been sometime between August 27 and September 2, 1997.

8. In October 1997, the Board posted a Title I Reading position at Dingess Elementary School. Grievant and Intervenor applied for the position. A matrix was created utilizing the first set of selection criteria found in W. Va. Code § 18A-4-7a. Mr. John Fullen, Assistant Superintendent, and then-Superintendent Everett Conn both did individual matrices, and both found Intervenor to be the most qualified.

9. Intervenor was selected for the Dingess Elementary position on October 16, 1997.

10. Grievant filed this grievance on November 24, 1997.

11. Grievant was awarded the Dingess Elementary position by a level two grievance decision dated October 9, 1998.

DISCUSSION

Intervenor filed the level four appeal in this case. Intervenor claims, in part, that this grievance was untimely filed. Grievant alleges that only an employer may raise a timeliness defense, and that

Intervenor's claim in that regard must fail. Grievant is wrong. The West Virginia Supreme Court of Appeals has addressed the issue of intervenors' rights in Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997). In that case, the Court held, “that an intervenor in a grievance proceeding under W.Va. Code, 18-29-1[1992] et seq. may make affirmative claims for relief as well as asserting defensiveclaims. “ A claim of untimeliness is an affirmative defense which can be raised by an intervenor in a grievance proceeding. Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 12, 1999).

The general rule with respect to the defense of timeliness is, that, where the 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. Once the employer has demonstrated that 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. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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). The same rule applies to Intervenor, who bears the burden of establishing the grievance was untimely filed. Watts, supra.

A grievance must be initiated within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4(c). The running of the relevant time period is ordinarily deemed to begin to run when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94- 41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Intervenor has established that the actions complained of by Grievant occurred in late August or early September 1997, and on October 16, 1997. The grievance was not filed until November 24, 1997. Grievant has offered no explanation for her delay in filing, although her grievance statement

contains phrases such as, “I have recently learned” in describing the grievable events. Clearly, at the latest, Grievant would have known she was not selected by the Board for the Title I Reading position at Dingess Elementary on October 16, 1997, when the Board voted to hire Intervenor. That Grievant may have later discovered that the selection process was flawed is irrelevant. It is the event, not the discovery of the legal ramifications of the event, that is controlling. Thus, Intervenor has proven by a preponderance of the evidence that the grievance was not timely filed in accordance with the applicable provisions of W. Va. Code § 18-29-4(c).

CONCLUSIONS OF LAW

1. Where the 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.

2. Once the employer has demonstrated that 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. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996);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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. The same rule applies to intervenors, who bear the burden of establishing the grievance was untimely filed. See Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

4. Intervenor has proven by a preponderance of the evidence that the grievance was untimely filed.

5. Grievant has failed to provide any explanation to excuse her untimely filing.

Accordingly, this grievance is **GRANTED** as to Intervenor insofar as the level two grievance evaluator's decision granting the decision in Grievant's favor is reversed. The Board is hereby **ORDERED** to reinstate Intervenor into the subject position with all back pay and benefits, if any, to

which she is entitled.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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 SWARTZ

Administrative Law Judge

Dated: February 3, 1999

Footnote: 1

Mary Hale was an Intervenor at level two but withdrew from the grievance at level four by letter dated December 3, 1998, from her representative, Anita Mitter.