A. D. CARR and HARRY POLING,

Grievants,

v. **Docket No. 01-47-243**

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

___Grievants, A. D. (Sonny) Carr and Harry Poling, employed by the Tucker County Board of Education (TCBE) as bus operators, filed individual level one grievances on April 10, 2001, in which they complained of employees performing volunteer work. For relief, Grievants requested that no volunteer work be allowed. (See footnote 1) Grievants' immediate supervisor lacked authority to grant the relief at level one. The grievances were consolidated, and following an evidentiary hearing, denied at level two. Grievants elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced their appeal to level four on May 4, 2001. An evidentiary hearing was conducted in the Grievance Board's Elkins office on August 3, 2001, at which time Grievants were represented by John E. Roush, Esq., of WVSSPA, and TCBE was represented by Harry M. Rubenstein, Esq., of Kay Casto & Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties by September 12, 2001.

The following facts derived from the record are undisputed by the parties.

Findings of Fact

1. Grievants are employed by TCBE as bus operators.

2. TCBE employs one Mechanic to service the county school buses.

3. Sammy Blosser, Jr. and Bill Simmons, employed by TCBE as a regular and a substitute bus operator, respectively, frequently work in the bus garage and assist the Mechanic on a voluntary basis, without pay.

4. Neither of the volunteers holds the classification title, or has passed the competency test for the positions of Chief Mechanic, Mechanic, or Mechanic Assistant.

Discussion

Initially, TCBE contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code §18-29-4(a). 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. Hawranick v. W. Va. Dep't. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court ofMason 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).

TCBE argues that the grievance was not initiated within fifteen days following the occurrence of the event upon which the grievance is based. Specifically, TCBE notes that volunteers have been involved with the school system for years while Grievants sat on their rights. Further, TCBE argues that the discovery rule exception contained in W. Va. Code § 18-29-4(a), does not apply since Grievants knew the facts of the grievance in 1999, or even earlier.

W. Va. Code § 18-29-4 provides in part:

(a) Level one.

(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.

As noted by TCBE, however, volunteerism is a continuing practice in Tucker County. Therefore, the grievance was filed within the statutory time lines.

TCBE also asserts that Grievants have failed to establish any harm as the result of the volunteerism, and therefore, they lack standing to contest the practice. “Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy.” Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504(Feb. 23, 1996). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant “must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interest protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.” Shobe v. Latimer , 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, a grievant is without standing to pursue the grievance. McElroy v. Monongalia County Bd. of Educ., Docket No. 01-30-020 (Sept. 17, 2001); Elliot v. Randolph County Bd. of Educ., Docket No. 98-42-304 (May 26, 1999); Farley v. W. Va. Parkways Econ. Dev. Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-501 (Feb. 28, 1990).

In the present matter, Grievants assert that by allowing volunteers to assist the Mechanic, they are being deprived of the opportunity to assume those duties on a compensated basis as Mechanics or Bus Operator/Mechanics. TCBE responds that even if the volunteers are prohibited, it does not have the financial resources to hire another employee in the Mechanic classification. Grievants have not incurred any other personal harm, and base the remainder of their claim on prospective potential harm should certain events take place. The Grievance Board has repeatedly held that it does not render opinions which are speculative or advisory in nature. Pierson v. Ritchie County Bd. of Educ., Docket No. 98-43-006 (May 29, 1998); Baker v. Bd. of Directors/Concord College, Docket No. 97-BOD-265 (Oct. 8, 1997); Wagner v. Hardy County Bd. of Educ., Docket No. 20-87-102-1 (Feb. 23, 1996); Adkins v. Lincoln County Bd. of Educ., Docket No. 89-22-323 (Aug. 21, 1989). If it should be determined that Grievants in fact do have standing to pursue this claim, they have the burden of proving the merits of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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. Grievants argue that the volunteers deprive them of the opportunity to undertake those tasks on a compensated basis, and places the volunteers in a position to demand reclassification to mechanic/bus operator. Grievants further assert that it is contrary to public policy to allow an employee of a state or its political subdivisions to volunteer in the same area he is employed because the employer may pressure employees into "involuntary volunteering." Finally, Grievants claim that the volunteers must be prohibited from completing work for which they are not statutorily qualified, since neither hold the title or have passed the competency test.

TCBE responds that it employs the maximum number of service personnel based on formula funding, and functions without the benefit of an excess levy. Functioning under financial constraints, TCBE states that the needs of the system are somewhat alleviated by volunteers, and there are no plans to reclassify those individuals who are volunteering inasmuch as there is no need for the additional position Grievants seek. TCBE denies that it has asked or forced Mr. Blosser or Mr. Simmons to engage in volunteer work, and asserts that any and all work they complete is within their discretion, and is not prohibited by law.

In support of their claim, Grievants rely upon an Interpretation of the State Superintendent of Schools, issued February 21, 1986, which states that "'[a]n employeeof a State or local government may not volunteer to his agency services of the same type the employee is employed to perform. This is because the employee is an unequal partner with the county board of education in the employment relationship." This Interpretation does not apply to the present matter since the individuals who volunteer to assist the Mechanic are employed as bus operators. However, even if applicable, the Grievance Board has since ruled on numerous occasions that volunteers may engage in activities which benefit the board, even if the work falls within the definition of a service position classification title. Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10-357 (Dec. 8, 1998); Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA-117 (Oct. 7, 1994); Willcoxen v. Mason County Bd. of Educ., Docket No. 93-26-199 (Sept. 29, 1993). Grievants have failed to prove that this situation differs in such a way as to prohibit the volunteer work being performed in the bus garage.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

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. Hawranick v. W. Va. Dep't. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). 2. W. Va. Code § 18-29-4 (a) requires that grievance proceedings be initiated within fifteen days following the occurrence of the grievable event, 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.

3. The grievance was filed within the statutory time lines because volunteerism in the Tucker County school system is a continuing practice.

4. Without some allegation of personal injury, a grievant is without standing to pursue the grievance. McElroy v. Monongalia County Bd. of Educ., Docket No. 01-30-020 (Sept. 17, 2001); Elliot v. Randolph County Bd. of Educ., Docket No. 98-42-304 (May 26, 1999); Farley v. W. Va. Parkways Econ. Dev. Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-501 (Feb. 28, 1990).

5. Grievants have failed to establish that they have suffered any personal injury and lack standing to pursue this grievance.

6. In the alternative, Grievants have failed to prove by a preponderance of the evidence that TCBE has acted improperly by allowing employees to engage in volunteer work at the bus garage.

Accordingly, the grievance is **DENIED**.

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

Date: September 24, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Initially, Grievants also requested that they be allowed to take the competency test for the classification of Mechanic. Grievants were advised verbally, and in both the level one and two decisions, that they may take the test the next time it is offered. No further review of this issue is necessary.