KENNA HEDRICK and

LISA GRAPES,

Grievants,

v. DOCKET NO. 01-36-419

PENDLETON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants, both service personnel working as substitute Aides in Pendleton County who have previously held regular-employment Aide positions, filed their joint grievance on February 23, 2001 alleging:

> Grievants, former employees on the preferred recall list, contend that the Respondent has erred in hiring an individual with “independent contract' status for a posted regular teacher's aide position at Pendleton County High School. Grievant Hedrick alleges a violation of West Virginia Code §§ 18A-4- 8b and 18A-4-8g.

As relief, Grievants seek:

> (a) [I]nstatement into the position in question; (b) compensation for any and all wages and all benefits of regular employment (pecuniary and otherwise) lost as a result of Respondent's actions; and (c) interest on any sums to which they are entitled.

Following a Level II hearing held on May 22, 2001, a decision was entered on June 21, 2001 denying the grievance. Grievants thereafter appealed to Level IV, and the parties agreed to submit the matter for consideration based on the lower-level record. Grievant Hedrick is represented by WVSSPA Attorney John Roush and Grievant Grapesrepresented herself. Respondent is represented by Kimberly Croyle, Esq. The parties agreed to submit their proposed findings of fact and conclusions of law by October 29, 2001 and the matter became mature for a Level IV decision on receipt thereof. (See footnote 1)

Based on a review of the entirety of the record, the following facts are evident:

FINDINGS OF FACT

1. Grievant Kenna Hedrick is employed by Respondent Pendleton County Board of Education as a substitute kindergarten Aide at Brandywine School, and has worked as an Aide for two years. She was first employed by Respondent as a regular Aide in October, 1998, and is currently on the preferred recall list for the Aide classification.

2. Grievant Lisa Grapes also works as a substitute Aide in Pendleton County and is on the regular-employee preferred recall list. Grievant Grapes has more seniority than Grievant Hedrick. [Tr. p. 32]

3. On February 7, 2001 Respondent posted a position for a special education Aide at Pendleton County High School. [Gr. Exh. No. 1]

4. Both Grievants were qualified for the position and applied.

5. The position was awarded to Anita Warner, the applicant with the most seniority.

6. Ms. Warner was first employed by Respondent as an independent contractor providing the same services as a regularly employed Aide in 1989. 7. In 1997, Respondent determined that it was improperly paying Ms. Warner as a contractor and should be paying her as a regular employee, with all the benefits of a regular employee.

8. At a regular public meeting of the Pendleton County Board of Education in September, 1997, Respondent hired Ms. Warner as a regular employee on a probationary contract, without changing her duties or job location. Ms. Warner began accruing regular Aide seniority at that time.

9. Respondent posts the county-wide service personnel seniority list twice per year at all locations where personnel are employed. Ms. Warner appeared on this list with credit for eight years' service as a contracted Aide and with seniority as a supervisory Aide from September 8, 1997. Both Greivants had actual knowledge of the seniority attributed to Ms. Warner on these lists and were able to compare that to their own seniority, although they were not aware of the significance of the listings.

10. Grievant Hedrick did not become aware that Ms. Warner's employment status had changed until about the time the 2001 job was posted, although she knew Ms. Warner had originally been hired as a contract employee. [Tr. p. 19]

11. Grievant Grapes also knew Ms. Warner had originally been hired as a contract employee [Tr. p. 64] but was unaware that she had become a regular employee until after the 2001 job was

posted.

DISCUSSION

Grievants are not taking issue with the selection process that gave Ms. Warner the posted position over either of them. Rather, the complaint here is with a decision made bythe Respondent several years ago that only recently had an adverse affect on the Grievants. Respondent asserted at Level II that the grievance was untimely filed, an affirmative defense that requires Respondent to assume the burden of proof on that issue. “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. Dept. 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). If Respondent proves its defense, Grievants are given the opportunity to prove that the untimeliness was excusable. *See* Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997). Because the timeliness defense, if successful, will defeat the grievance, it will be considered first.

The grievance procedure must be initiated “within fifteen days following 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,” by the scheduling of a level one conference with Grievant's immediate supervisor. W.Va. Code § 18-29-4(a). In this case, there were three separate events that influenced the outcome of the selection process for the job posted on February 7, 2001. First, Ms. Warner was awarded an Aide position in 1989 as an independent contractor. Next, Respondent converted Ms. Warner's contract to a regular employee contract in September, 1997, adding her to the county service personnel seniority list with credit for her previous years as a contracted Aide. At this time she beganaccruing Aide seniority as a regular employee. Then, the February, 2001 Aide position was posted, and Respondent filled the position with the most senior applicant, Ms. Warner. The hiring decision for that posting was communicated to the Grievants on February 23, 2001, and they filed this grievance the same day.

Obviously, if the Grievants' non-selection were the trigger, their same-day filing was timely. However, Grievants do not allege any impropriety in the selection process. Their claim is that Ms. Warner should never have accrued the seniority that allowed her to win the position. Grievants point

to the original posting of Ms. Warner's prior Aide job and to the conversion of her contract from independent contractor to regular employee as the improper actions by Respondent. These events that happened in 1989 and 1997 respectively. (See footnote 2)

Because the actual selection process for the 2001 posting is not in controversy, it does not qualify as the "event upon which the grievance is based." Instead, the 1989 and 1997 actions by Respondent are the cause of the current harm to Grievants, so Respondent has met its burden of proving that this grievance is untimely with respect to those actions. Therefore, this grievance was untimely filed.

When Respondent meets is burden of proving a grievance was not timely, the Grievants may take advantage of the "discovery rule" to excuse the late filing. This rulemay be invoked by arguing that Grievants did not discover the event giving rise to the grievance until after the 15-day period had expired. *See* Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). The most common illustration of this rule is a scenario where a surgeon leaves an instrument in a patient, but no one knows this until years later when the object begins to cause problems.

Grievants argue here that they were not harmed by the seniority credited to Ms. Warner until they were denied selection for the 2001 posting. There is a significant difference, though, between Grievants' situation and the unfortunate hypothetical patient's: the actions by the Board that caused the harm to Grievants were in the public record and Grievants actually received regular notice of Ms. Warner's seniority accrual when the seniority list was published twice each year. They knew or should have known that Ms. Warner's contract was converted and that she was accruing regular seniority. What Grievants discovered in 2001 was not the "event giving rise to the grievance," but instead was how that event affected them personally. Unfortunately, that discovery is not enough to excuse the untimely filing, and this grievance must be denied without consideration of its merits.

In support of this decision, the following conclusions of law are appropriate:

CONCLUSIONS OF LAW

1. Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving 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 §§ 18-29-2, 18-29-6.

2. The Grievance Procedure must be initiated "within fifteen days following 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," by the scheduling of a level one conference with Grievant's immediate supervisor. W.Va. Code § 18-29-4(a).

3. 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. Dept. 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).

4. Respondent has demonstrated that this grievance was untimely filed.

5. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate 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 Serv., Docket No. 90-DHS-524 (May 14, 1991). W. Va. Code, 18-29-4(a)(1)(1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception,the time in which to invoke the grievance procedure does not begin to run until the grievant knows the facts giving rise to a grievance. Syllabus Point 1, Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

6. The public actions of the school board and the publication of the seniority roster gave Grievants constructive notice of the events giving rise to the grievance more than 15 days prior to filing the grievance.

Accordingly, this grievance is hereby **DENIED**.

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

DATED: November 7, 2001 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *Grievant Grapes did not file a brief.*

Footnote: 2

Although not made clear in the record, these actions were probably the result of a prior ruling of the Grievance Board in Ganoe v. Hampshire County Brd. of Educ., Docket No. 97-14-229 (July 30, 1997) that determined the practice of using contracted personnel in these types of positions to be improper. This decision also determined that such personnel were entitled to the seniority and benefits given other service personnel.