SUSAN STEADMAN,

Grievant,

v. **Docket No. 01-17-147**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Susan Steadman, employed by the Harrison County Board of Education (HCBOE) as a Secretary III-A, filed a grievance on September 7, 2000, stating she had not been assigned the position which she bid on in 1995. For relief, Grievant requested classification as Coordinator with back pay from April 1996, when the position was reclassified. (See footnote 1) Consideration of the grievance was waived by the parties at level one. Following an evidentiary hearing at level two, Dr. Carl H. Friebel, Superintendent of Harrison County Schools, denied the grievance. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced the matter to level four on April 24, 2001. Grievant, represented by Charles G. Johnson, Esq., and HCBOE, represented by Basil R. Legg, Jr., Esq., agreed to submit the grievance for decision based upon the lower-level record, supplemented by proposed findings of fact and conclusions of law which were filed on or before July 31, 2001.

The following facts are derived from the level two record.

Findings of Fact

1. Grievant was initially employed by HCBOE on January 5, 1987, and classified as Foreman/Printer of HCBOE's Print Shop. 2. In March 1995, HCBOE approved the transfer of Mitzie Reider from Secretary III-A: Central Office (personnel department) to the position of Accountant/Secretary III: Central Office (finance department). The position previously held by Ms. Reider was posted and filled by Diana Borror. After one day, Ms. Borror concluded that she did not wish to work in the personnel department, and through the bidding process returned to her previous position in the special education department.

3. By posting dated June 12, 1995, HCBOE posted position vacancy #SP-94- 090, for a full-time, Secretary III-A to be assigned to the Central Office. The posting was general in nature, and did

not reflect any specific assignment or duties. Grievant was awarded the position, effective June 23, 1995.

4. Upon her arrival at the personnel office, Grievant found that Rebecca Knight, another Secretary III-A assigned to the Central Office, was performing the duties of the position vacated by Ms. Reider. Grievant was directed to fill the position previously held by Ms. Knight.

5. Grievant inquired why she had not received the position vacated by Ms. Reider, and was advised by Administrative Liaison Robert Skidmore that she could be assigned anywhere in the Central Office.

6. In April 1996, Ms. Knight was reclassified as a Coordinator, a position which provides compensation at a higher pay grade, plus an annual supplement of approximately $3200.00.

Discussion

___Initially, HCBOE asserts the grievance is untimely filed since the grievable event occurred in 1995, that Grievant was aware of all the facts constituting the complaint, andknew that a grievance procedure existed. Grievant argues that she accepted the representation made by Mr. Skidmore in 1995 that she could be assigned anywhere in the Central Office, and only learned that employees could not be assigned without a formal posting and placement in August 2000. Grievant further claims that the assignment was a continuing practice, but that in any event, the grievance was filed within fifteen days of learning that she had been misled into believing that she had no complaint.

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). 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 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) provides in part:

(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 todiscuss the nature of the grievance and the action, redress or other remedy sought.

The grievable event in this case occurred when Grievant was placed into the Central Office position. The fact that Grievant has remained in the assignment does not constitute a continuing practice. By her own admission, Grievant was aware that she had applied for the position held by Ms. Reider, but when she reported to work, found Ms. Knight performing the duties previously completed by Ms. Reider. When she was directed to the position formerly held by Ms. Knight, Grievant inquired regarding the changes. Mr. Skidmore did not testify at level two; however, Grievant's recollection was that he advised her in June 1995, that HCBOE advertised Central Office positions generically, and assigned personnel as they wished. Accepting Grievant's testimony, it appears that Mr. Skidmore relayed this information, not in an attempt to mislead her, but as an explanation of HCBOE's practice. There is no evidence that any HCBOE employee discouraged Grievant from filing a complaint at that time.

It is understandable that Grievant relied upon the information provided by Mr. Skidmore, and that she was upset to learn that HCBOE had, in fact, transferred her improperly. However, Grievant's eventual realization that her transfer had been contrary to law was the discovery of a legal theory, and the Grievance Board has repeatedly held that it is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines. Childers v. Dep't of Health and Human Resources, Docket No. 98-HHR-447 (Feb. 24, 1999); Galloway v. Dep't of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Stratton v. Mingo County Bd. of Educ., Docket No. 97- 29-387 (Oct. 21, 1997); Edwards v. Clay County Bd. of Educ., Docket No. 96-08-064 (July9, 1996). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Given the fact that Grievant was aware of the operative facts in 1995, her delay of approximately five years renders the grievance untimely filed. (See footnote 2)

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). 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 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).

2. In this case, the grievable event occurred in June 1995 when Grievant was assigned duties for a position other than that for which she applied. The grievance is not the result of a continuing practice by HCBOE. 3. It is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines. Childers v. Dep't of Health and Human Res., Docket No. 98-HHR-447 (Feb. 24, 1999); Galloway v. Dep't of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997); Edwards v. Clay County Bd. of Educ., Docket No. 96-08- 064 (July 9, 1996). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

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

(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.

5. HCBOE has proven by a preponderance of the evidence that Grievant knew the operative facts in 1995, and that this matter was not filed within the time lines set forth in W. Va. Code § 18-29-

4.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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 andState 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: August 27, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

In her proposed findings of fact, Grievant appears to amend her requested relief claiming that she is entitled to back pay for one year prior to the date of filing the grievance.

Footnote: 2

The merits of this grievance have not been addressed at any level.