NANCY SHAY,

Grievant,

v. **Docket No. 01-30-024**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

TRINA SHRIVER,

Intervenor.

DECISION

Nancy Shay ("Grievant") initiated this proceeding on April 12, 2000, alleging she should have been placed in a half-time aide position at Easton Elementary School. As relief, she seeks retroactive wages, benefits, and seniority, plus interest. The record does not reflect what proceedings occurred at level one. A level two hearing was held on November 30, 2000, followed by a written decision, denying the grievance, dated January 8, 2001. Level three consideration was bypassed, and Grievant appealed to level four on January 25, 2001. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on May 4, 2001. Grievant was represented by John E. Roush, Esquire, of the School Service Personnel Association, and Respondent was represented by counsel, Harry M. Rubenstein. This matter became mature for consideration on June 11, 2001, the deadline for the submission of the parties' final written arguments. The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. On August 10, 1999, Respondent posted a vacancy for a half-time regular aide at Easton

Elementary School.

2. Grievant and Intervenor, both employed as substitute aides by Respondent, applied for the posted position.

3. Intervenor was awarded the position, based upon Respondent's conclusion that she had greater substitute seniority than Grievant. According to Respondent's records, Intervenor's substitute seniority date was January 5, 1998, and Grievant's was January 7, 1998.

4. Grievant first applied for employment with Respondent by application dated October 6, 1997.

5. Grievant took the aide competency test on October 23, 1997, and failed.

6. Although she had not been formally approved for employment by Respondent and had failed the competency test, Grievant was called to substitute as an aide on December 10 and 11, 1997. Grievant was compensated for these two days of substitute work.

7. Grievant was approved by the Board for employment as a substitute aide on December 16, 1997. (See footnote 1) 8. Intervenor was approved for employment as a substitute by the Board on October 14, 1997, and executed a probationary employment contract on the same date.

9. When Intervenor was first called to substitute on January 5,1998, she had not taken the aide competency test.

10. Grievant took the aide competency test again on March 21, 1998, and failed.

11. Although neither of them had passed the aide competency test, both Grievant and Intervenor continued to work as substitutes throughout the rest of the 1997-1998 school year.

12. Although neither of them had passed the aide competency test, Grievant and Intervenor were both selected for new positions at the beginning of the 2000-2001 school year. Intervenor was placed in a full-time, regular aide position at North Elementary School, and Grievant was placed in a long-term substitute position at Easton Elementary School (not the original position which Intervenor received).

13. After it came to Respondent's attention at the level two hearing that neither Grievant nor Intervenor had passed the competency test, both were notified by letter dated February 13, 2001, that they would need to schedule a competency test within ten days of receipt of the letter.

14. Intervenor contacted the appropriate office and took the competency test on March 24, 2001. She passed the test at that time.

15. Grievant did not schedule a competency test within ten days of receiving the letter, and she

was unable to take the test in March due to personal scheduling conflicts. Grievant had not passed the aide competency test as of the date of the level four hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

A preliminary issue which has been raised by Respondent is that this grievance was not filed within the timeframes specified in W. Va. Code § 18-29-4(a), which states in pertinent part:

> 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. . . .
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> * * * * *
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> Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor[.]

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. 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). 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). Grievant's explanation for her delay in filing this grievance was that she had applied for numerous positions during the summer of 1999 and had not been selected for any of them. She then contacted a representative from the local service personnel association, and asked them to find out why she had not been selected for these positions and who the successful applicants had been. After several months, Grievant was finally informed that Intervenor had received the Easton Elementary position,

based upon her substitute seniority date, prompting the filing of this grievance.

In Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), the West Virginia Supreme Court of Appeals held that, until an employee knows of the relevant facts giving rise to his grievance, the time limitations contained in W. Va. Code §18-29-4(a)(1) are tolled. However, it has been held by this Grievance Board that a grievant has a responsibility to act reasonably to discover the facts underlying the basis of her grievance. Goodwin v. Monongalia County Bd. of Educ., Docket No. 00-30-163 (Sept. 25, 2000). In the instant case, when Grievant was not selected for any particular position, it was incumbent upon her to inquire as to why. Reliance upon an association representative, who obviously did not investigate the matter quickly or thoroughly, does not toll the statutory timelines or fall within the discovery exception. Accordingly, this grievance was not timely filed.

Nevertheless, Grievant has failed to prove any entitlement to relief based upon the merits of this grievance. Grievant contends that her seniority began on December 10, 1997, when she was called to substitute by an unidentified Board employee. Respondent counters that Grievant was not actually employed by the Board at that time, and she wasnot formally hired until the Board's meeting on December 16, 1997. Accordingly, the first date upon which Grievant substituted with official Board approval was January 8, 1998, three days after Intervenor's substitute seniority date. Moreover, Respondent contends that Grievant could not have been placed in the Easton Elementary position in the fall of 1999, because she was not legally qualified, not having passed the aide competency test. Grievant argues that, because Respondent continued to employ her after she had failed the competency test, it cannot now claim she was not qualified for a particular position for not having passed it. Grievant also claims that she was informed at some time during 1998 that she had passed the test, by phone call from an unidentified person.

W. Va. Code §18A-4-8b provides that service personnel positions must be filled on the basis of seniority, qualifications and evaluations. “Qualifications shall mean that the applicant holds a classification title in his category of employment . . . and must be given first opportunity for promotion and filling vacancies.” The statute further provides that “[o]ther employees then must be considered and shall qualify by meeting the definition of the job title.”

W. Va. Code § 18A-4-8e provides for competency testing of school service personnel as follows:

> The state board of education shall develop and cause to be made available

> competency tests for all of the classification titles defined in section eight [§ 18A-4-8] and listed in section eight-a [§ 18A-4-8a] of this article for service personnel. Each classification title defined and listed shall be considered a separate classification category of employment and shall have a separate competency test, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment and shall have a single competency test. . . .
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> The purpose of these tests shall be to provide county boards of education a uniform means of determining whether school service personnel employees who do not hold a classification title in a particular category of employment can meet the definition of the classification title in another category of employment as defined in section eight of this article. Competency tests shall not be used to evaluate employees who hold the classification title in the category of their employment.
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> . . . Once an employee passes the competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [§ 18A-4-8b] of this article and shall not be required to take the competency test again.
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> An applicant who fails to achieve a passing score shall be given other opportunities to pass the competency test when making application for another vacancy within the classification category.
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> * * * *
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> Competency tests shall be utilized to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee.

This Grievance Board has consistently recognized that the competency testing requirements set forth in the above statute do not allow a board of education to place an employee in any position for which he or she has not passed the applicable test. Edmonds v. Lincoln County Bd. of Educ., Docket No. 97-22-120 (May 27, 1998). See Seabolt v. Kanawha County Bd. of Educ., Docket No. 00-20-307 (Dec. 22, 2000). Until an employee has passed the competency test, he or she is simply not qualified to fill positions in that particular classification. See Edmonds, supra. Accordingly, neither Grievant nor Intervenor was legally qualified to be hired for the vacancy at Easton Elementary. Because Grievant was not qualified for selection for the position in 1999, she is not entitled to the relief she has requested. (See footnote 2) Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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.

2. A grievance must be initiated within fifteen days of the occurrence upon which it is based, or within fifteen days of the discovery of such event or occurrence. W. Va. Code § 18-29-4(a).

3. 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).

4. Grievant failed to file this grievance within fifteen days of her non-selection for the aide position at Easton Elementary School, nor did she act reasonably to discover why she had not been selected.

5. A school service employee is not qualified to fill positions in a particular classification until he or she passes the competency test required by W. Va. Code § 18A-4- 8e. Edmonds v. Lincoln County Bd. of Educ., Docket No. 97-22-120 (May 27, 1998). See Seabolt v. Kanawha County Bd. of Educ., Docket No. 00-20-307 (Dec. 22, 2000). 6. Grievant was not qualified for placement in the aide position at Easton Elementary School in September of 1999, because she had not successfully competed the aide competency test.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia 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: July 23, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

No contract of employment for Grievant, prior to November of 1999, was submitted for the record. The record had been left open after the level two hearing for submission of any such document, which apparently could not be found by either party.

Footnote: 2

Moreover, it would seem that Respondent cannot continue to legally employ Grievant, until such time as she successfully passes the competency test.