JOYCE ANN CARNES,

Grievant,

v. Docket No. 01-41-351

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Joyce Ann Carnes, filed this grievance against her employer, the Raleigh County Board of Education ("RCBOE"), on April 9, 2001. Her Statement of Grievance and the Relief Sought reads:

> **Arbitrary and capricious termination of extracurricular position or failure to classify position as half-secretary with benefits _ place back in extracurricular position or retroactively pay benefits. (See footnote 1)**

This grievance was denied at Level I in a timely manner on April 12, 2001. Grievant then appealed to Level II, and a Level II hearing was held on May 7, 2001. A Level II Decision was rendered on May 16, 2001. Grievant appealed to Level IV on May 24, 2001, and a hearing was held July 19, 2001. This case became mature for decision on August 22, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent argues the grievance was not timely filed, and moved the grievance be dismissed. This argument was presented by Respondent at Level II, noting Grievant knew the terms and conditions of her contract at the time she signed it. Grievant argues the discovery rule contained in W. Va. Code § 18-29-4(a)(1) should be applied to this grievance. Citing to Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), Grievant argues the event which gives rise to this grievance was her discovery her position was treated exactly the same as all other half- time secretary positions by RCBOE when she

received the notice of her RIF. Grievant notes she filed this grievance within fifteen days of her RIF.

On the merits, Grievant argues her position should have been posted as a regular, half-time secretary position with benefits. She maintains that since she was given the same notice as regular, half-time secretaries at the time of her RIF, this action by RCBOE demonstrates the position was incorrectly identified as extracurricular. Grievant also argues that if she had an extracurricular contract she should be retained, and if it is found she should have had a regular employee contract then she should receive all the rights and benefits of a regular employee, including retirement, seniority, and placement on the preferred recall list.

Respondent asserts Grievant was hired to fill a two-day a week, extracurricular position for the 2000 - 2001 school year only, which terminated at the end of the school year pursuant to the terms of the posting and the contract signed by Grievant. The notice sent to Grievant about the termination of her contract was appropriate, and was designed to meet the requirements of W. Va. Code § 18-4-8b. This notice did not change the terms of Grievant's contract. Respondent notes Grievant was not in a half-time position, but was to work only two days a week.

Since a finding the grievance was untimely filed could be dispositive of the grievance, that issue and the relevant facts, will be addressed first. After a detailed reviewof the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. On December 4, 2000, RCBOE posted a secretary position for Marsh Fork High School. The position was identified on the posting as extracurricular and stated the work schedule was "8 hours per day; 2 days per week." The duties identified in the posting were the ones typically assigned to a secretary who would work in a school.

2. This position was posted after the employee who held the position accepted a regular service personnel position. At the time of the December posting, the principal at Marsh Fork High School, Clyde Stepp, requested it be made half-time. The Superintendent denied this request, and the position was posted as described in Finding of Fact 1. (See footnote 3)

3. Grievant applied for the position, and was the most senior applicant. (See footnote 4)

Grievant began her duties on January 8, 2001.

4. On or about January 8, 2001, Grievant signed a "contract of employment for extracurricular Duty Assignment." The position was for a Secretary II, for eight hours a day for two days a week. The contract stated the "period of this assignment shall be for the 00-01 school year only," and further clarified "[t]he contract shall terminate at the end of the designated school year. . . ." Resp. Ex. No. 4, at Level II. 5. At the time she signed the contract, Grievant knew the position was identified as extracurricular, it was for the 2000 - 2001 school year only, and she would receive no benefits or seniority.

6. Sometime during the end of February 2001, Dr. Emily Meadows, the Director of Personnel, and Dr. Charlotte Hutchins, Superintendent, went to all the schools to inform personally, employees whose positions would be RIF'd. Grievant was not present that day, as it was not a work day for her.

7. When Grievant returned to work, the full-time secretary, Kathleen Dickens, informed Grievant her position would not be eliminated because she held an extracurricular contract.

8. Initially, Dr. Meadows and Dr. Hutchins believed there would be fewer RIF's, but later were directed by RCBOE to cut further to meet budgetary and state funding considerations. (See footnote 5)

9. Sometime during the end of February or the first of March, Grievant's principal called and informed Grievant her position was being eliminated.

10. On March 8, 2001, Grievant received a certified letter stating that because of lack of need, RCBOE had considered realignment of service personnel assignments in the secretarial classification, pursuant to W. Va. Code § 18A-2-6. The letter noted "[e]very secondary school in the County with more than one secretary has been targeted for elimination of one-half secretarial position[,] including the extracurricular position you holdat Marsh Fork High School." The letter stated the termination of her extracurricular contract would be recommended.

11. Grievant asked for and received a RIF hearing, on March 20, 2001.

12. By letter dated March 29, 2001, Grievant was notified RCBOE had voted to terminate her extracurricular contract for secretarial support at Marsh Fork High School. The Notice pointed to the loss of students and the corresponding reduction in funding. Grievant received

this certified letter on March 31, 2001, and filed this grievance on April 9, 2001.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Here, Respondent asserts this grievance was untimely filed. 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); 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). 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); 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 Pub. 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). If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 18-29-4(a)(1) provides 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.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). However, the West Virginia Supreme Court of Appeals in Spahr, supra, stated "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 of the facts giving rise to a grievance." An examination of when Grievant knew "of the facts giving rise to [her] grievance" is in order.

Grievant knew the conditions of her employment and the form of the posting, at the time she accepted the position. The posting and the contract stated what Grievant could expect in terms of benefits, seniority, and compensation. It was clear at the outset that Grievant would receive no benefits or seniority. Grievant already possessed the information that her position would end at the close of the school year, as this data was included in her contract. Grievant also testified she knew all extracurricular positions with RCBOE were for the school year only. Grievant accepted the position on January 8, 2001; this grievance was not filed until April 9, 2001. The event Grievant complains of, improper posting of the position as extracurricular, was known to her months prior to her filing this grievance. Accordingly, the employer has demonstrated this grievance has not been timely filed. Spahr, supra.

In order to overcome Respondent 's evidence, Grievant must demonstrate a proper basis to excuse her failure to file in a timely manner. Grievant testified that when she first received the position she did not file a grievance, even though she knew there were no benefits, because she had been told it was extracurricular, and she "assumed it wasextracurricular."

She testified she did not file a grievance after she was in the position, saw the duties, and understood they were the same as any other school secretary because

> I was still assuming that there was some reason that it was extracurricular even though I did know from my substitute positions it was the same type of work, but I didn't have any idea what _ why it was classified extracurricular, but I assumed that was the way it should be.

Grievant stated she guessed the reason why she "stopped assuming" was because Dr. Meadows came by and told her principal her position would not be eliminated because it was extracurricular, (See footnote 6) and then later the following week, she was told her position would be eliminated and she would be RIF'd.

Grievant has failed to demonstrate a proper basis to excuse for her failure to file in a timely manner. She was aware of the events giving rise to her grievance at the time she accepted the position. Spahr, supra. The data she grieves about, the failure to include benefits, seniority, and increased compensation, was contained in her contract and the posting. Even if she was unsure at the time she accepted the position, she was clearly aware, as demonstrated by her own testimony, within a short time of beginning the duties of the position that the duties were those of a school secretary. Her assumptions, given that she never asked anyone for clarification, are insufficient to toll the time period to file.

It should be further noted Grievant's argument that the notice she received somehow changed her status from extracurricular to a regular employee is without merit. The West Virginia Supreme Court of Appeals has held that in order to terminate theextracurricular contract of a school employee, it is necessary to give that employee notice and an opportunity for hearing pursuant to W. Va. Code § 18A-2-7. Smith v. Bd. of Educ. of County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (1985). In that case, the Court "likened the extracurricular assignment to regular employment and held that a county board of education, if it intended to alter an extracurricular assignment, had to abide by the same procedural strictures applicable to regular contracts. . . ." RCBOE followed the direction of the West Virginia Supreme Court of Appeals and gave Grievant notice as required.

The above-discussion will be supplemented by 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); 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. 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 Pub. 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).

3. W. Va. Code § 18-29-4(a)(1) provides 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.

4. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. The filing of this grievance on April 9, 2001, is outside the fifteen-day time period stated by W. Va. Code § 18-29-4(a)(1).

6. "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 of the facts giving rise to

a grievance." Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

7. Grievant has failed to demonstrate a proper basis to excuse her failure to file in a timely manner, as she was aware of the event giving rise to her grievance in January 2001. Spahr, supra; Higginbotham, supra.

8. It is necessary to give a school employee notice and an opportunity for hearing in order to terminate an extracurricular contract. Smith v. Bd. of Educ. of County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (1985). Accordingly, this grievance is DENIED.

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

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 13, 2001

Footnote: 1

In her post-hearing submissions, Grievant asked for placement on the preferred recall list.

Footnote: 2

Grievant was represented by Attorney Cara Carnes, and Respondent was represented by its attorney, Erwin Conrad.

Footnote: 3

Apparently unbeknownst to RCBOE, Principal Stepp allowed Grievant to work half- time, and also called her in for additional time when the full-time secretary was absent.

Footnote: 4

On January 23, 2001, RCBOE approved Grievant's hiring for the position.

Footnote: 5

RCBOE, because of decreased enrollment, was approximately fifty positions over the state funding limit.

Footnote: 6

The terms of the posting and contract would have required the secretarial position at Marsh Fork High School be reposted for the following school year if it had not been eliminated. While, it appears Grievant may have received the position again if it had not been eliminated, there is no assurance she would have, given the number of cuts in secretarial positions throughout the school system.