DAVID CROUCH and JACKIE TYREE,

Grievants,

v. Docket No. 01-41-586

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievants, David Couch and Jackie Tyree, filed this grievance against their employer, the Raleigh County Board of Education ("RCBOE") on September 6 & 7, 2001, respectively. There were additional Grievants at the lower levels. Since several of the Grievants won their grievance at Level II, they, of course, did not proceed to Level IV. Additionally, one of the Grievants who filed to Level IV, Michael Holshouser, requested on January 10, 2002, to have his name withdrawn from the grievance, and this request was granted. The Statement of Grievance alleges:

> **Grievants are regularly employed bus operators. Each Grievant held an extracurricular assignment during the 2000 - 2001 school year. These employees contend that they were entitled to those assignments for the 2001 - 2002 school year. Grievants contend that the Respondent has violated West Virginia Code §§ 18A-4-16 & 18A-4-8b.**
>
> **Relief Sought: Grievants seek instatement into the extracurricular positions they formally held with back pay, seniority, and all other benefits of the position (pecuniary and nonpecuniary) retroactive to the beginning date of the 2001 - 2002 school year. Grievants also seek interest on all sums to which they are entitled.**

This grievance was granted, in part, at Level II, and several Grievants did not pursue this grievance further. Level III was by-passed. Grievants appealed to Level IV on December 5, 2001, and a Level IV hearing was held at the Grievance Board's Beckleyoffice on January 14, 2002. This case became mature for decision on February 13, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievants allege they should not have been removed from their extracurricular bus runs and replaced by bus operators with greater seniority, who had lost their runs due to a reduction-in-force of extracurricular runs. They argue that once they received these runs they should be theirs until the need for the run no longer exists. Grievants also seem to argue that since their positions were not cut for lack of need, there cannot have been a reduction-in-force. (See footnote 2)

Respondent argues this grievance is untimely filed, as Grievants were given notice in March 2001, that their positions were being terminated to open positions for more senior bus operators who had lost their mid-day runs. Respondent also notes it previously dealt with extracurricular runs the way Grievants want, but since the holding in Wood County Board of Education v, Smith, 202 W. Va. 117, 502 S.E.2d 214, (1998), they have changed this method to follow the directions given in that decision.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are employed as bus operators with RCBOE.

2. In March 1999, Grievants were notified RCBOE would be following the Smith decision, and they were being reduced-in-force ("RIF'd") so that more senior bus operators would have an opportunity to bid on their extracurricular positions. (See footnote 3)

3. Grievants ended up returning to their former positions, as a more senior bus operator did not bid on them.

4. In March 2001, Grievants received notice of a reduction-in-force ("RIF") of their mid-day, extracurricular bus runs. Acting Superintendent Charlotte Hutchins notified each Grievant she would recommend termination of his mid-day run because "[y]our seniority is insufficient to allow you to retain your mid-day duty." Superintendent Hutchins noted mid-day runs of more senior bus operators had been eliminated.

5. By a letter dated March 29, 2001, Superintendent Hutchins notified Grievants that RCBOE had accepted her recommendation to terminate Grievants' extracurricular contracts

because their seniority was insufficient to be retained during this RIF.

6. Grievant Crouch asked for and received a RIF hearing. At the end of this hearing, RCBOE voted to uphold the RIF decision.

7. All bus operators were allowed to bid on the posted extracurricular assignments. No bus operator with less seniority than Grievants was placed in a mid-day run.

8. Grievant Crouch now has a mid-day run, but the compensation is considerably less. 9. The issue of timeliness was raised at or before Level II.

Discussion

As 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); 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.

A. Timeliness

Respondent asserted at the Level II hearing that this grievance was untimely filed. When 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, DocketNo. 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 his 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). An untimely filing, if proven, 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 proceduredoes not begin to run until the grievant knows of the facts giving rise to a grievance." An examination of when Grievants knew "of the facts giving rise to [their] grievance" is in order.

Grievants knew in March 2001 that their extracurricular runs were terminated because of insufficient seniority. They were also aware then that more senior bus operators had lost their extracurricular runs, and they were being RIF'd to provide positions for these employees. Grievants did not file this grievance until after their positions were posted in September 2001. Accordingly, this grievance is untimely filed.

In order to overcome Respondent 's evidence, Grievants must demonstrate a proper basis to excuse their failure to file in a timely manner. The only evidence presented by Grievants on

this issue was that they assumed they would get their positions back because they in the past. They were aware of the events giving rise to their grievance in March 2001. Spahr, supra. Grievants have failed to demonstrate a proper basis to excuse their failure to file in a timely manner.

B. Merits

Although these grievances were untimely filed, a brief discussion of the merits may be helpful as the issue here is clear cut. The ruling in this grievance is controlled by Smith, supra. The West Virginia Supreme Court of Appeals in Smith cited to the Syllabus Point in Berry v. Kanawha County Board of Education, 191 W. Va. 422, 446 S.E.2d 510 (1994), which stated, "if a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code 18A-4- 8b [1996]." The Court then held the elimination of extracurricular bus operator positions constituted a RIF. Accordingly, RCBOE acted properly in following the provisions of W. Va.Code § 18A-4-8b and the directions in Smith, when it released the least senior bus operators from their extracurricular runs to provide positions for the more senior bus operators.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When 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). An untimely filing, if proven, 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).

2. 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.**

3. 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."

4. Grievants knew in March 2001 that they were RIF'd from their positions, but did not file this grievance until September 2001. Accordingly this grievance is untimely filed.

5. In order to overcome Respondent 's evidence of untimely filing, Grievants must demonstrate a proper basis to excuse their failure to file in a timely manner.

6. Grievants have failed to demonstrate a proper basis to excuse their failure to file in a timely manner. They were aware of the events giving rise to their grievance in March 2001. Spahr, supra.

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 28, 2002

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 2

Since Grievants did not offer any legal support for this theory, it will not be addressed further, other than to say RIF's frequently occur when a specific need still exists, but the overall number of needed employees is decreased.

Footnote: 3

Grievant Tyree also received a RIF notice for his extracurricular assignment in 2000, but was returned to his position, as a more senior bus operator did not bid on it.