LUE ANN GARDNER,

Grievant,

v. **Docket No. 02-19-094**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Lue Ann Gardner, employed by the Jefferson County Board of Education (JCBE) as an Aide, filed a level one grievance on January 4, 2002, in which she alleged a violation of W. Va. Code §§ 18A-4-8b and 18A-4-15 when a posted position was not filled within twenty working days. For relief, Grievant requested back pay with interest, and benefits. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c) and advanced this matter to level four on April 4, 2002. An evidentiary hearing to supplement the lower level record was conducted in the Grievance Board's Morgantown office on June 4, 2002. Grievant was represented by Kimberly Levy, Esq., of WVSSPA, and JCBE was represented by Howard E. Seufer, Jr., Esq., of Bowles, Rice, McDavid, Graff & Love. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before July 2, 2002.

The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant was first employed by JCBE as a substitute Aide in April 6, 2000, and held that position at the time of the initiation of this grievance. 2. JCBE posted position vacancy #2020 on October 10, 2001, for a “special education/transportation/general/classroom aide-itinerant” at Charles Town Middle Junior High School. Another substitute Aide, Linda Hoffman, had the most seniority of the four applicants. Grievant was the second most senior.

3. JCBE did not fill position #2020 by November 14, 2001, i.e., within twenty working days of the expiration of the posting, but placed the vacancy on hold pending the outcome of a grievance filed by Karen Vance, a regular, full-time aide who had contested the posting as an itinerant position.

(See footnote 1)

4. A third grievance was filed regarding posting #2020 on January 8, 2002, when substitute aide Robin Carper claimed that she had timely submitted an application in October for the position. Ms. Carper the applicant with the most seniority, requested instatement to the position and back pay. This grievance was not appealed beyond level two.

5. On December 4, 2001, JCBE posted vacancy #2041, a “general/clerical/special education/transportation aide” at Page Jackson and T.A. Lowery Elementary Schools. Both Ms. Hoffman and Grievant applied for this position. 6. There were no grievances filed regarding this posting, and Ms. Hoffman was approved by JCBE to fill the Jackson/Lowery position, effective January 9, 2002. 7. Following the level two hearing, JCBE determined that the claim pursued by Ms. Vance lacked merit, and Grievant was placed in the Charles Town position, effective February 7, 2002.

8. Grievant did not file a grievance regarding posting #2020 within fifteen working days of JCBE's failure to fill the position.

9. JCBE specifically raised the issue of whether the grievance was timely filed at the level two hearing.

Discussion

Initially, JCBE contends this grievance is untimely because the grievance was not initiated within the time frame contained in W. Va. Code § 18-29-4(a). 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. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 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 whichcase the merits of the case need not be addressed. Crouch/Tyree v. Raleigh County Bd. of Educ., Docket No. 01-41-

586 (Mar. 28, 2002); 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 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.

W. Va. Code § 18A-4-8b requires that service personnel positions be filled within twenty working days of the closing date of the posting period:

Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. . . . After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. Dep't of Transp, Docket No. 96-DOH-445 (July 28, 1997). The posting was from October 10 through October 16, 2001, and the twenty working day period in which the position was to be filled concluded on November 14, 2001. Grievant testified that she called and inquired about the position within a couple of days of the posting period. Thus, Grievant knew of the facts giving rise to the grievance in October 2001, but did not begin these proceedings until January 2002,long past the fifteen day period established by statute. Grievant does not dispute that she delayed filing this matter, but asserts that the grievance was timely because she had been advised by an employee in JCBE's personnel office that the position was not going to be filled. In the alternative, Grievant argues that JCBE's failure to fill the position was ongoing and continuous in nature.

The evidence does not support a finding that Grievant was deterred by JCBE from filing a grievance in November 2001. Her testimony at the level two and four hearings was that she was advised a number of times by a secretary in the Human Resources office that the position would not

be filled until a grievance regarding the posting was resolved. Grievant also stated that she knew the position needed to be filled, and was aware of the twenty day deadline, but took no action. There is no evidence that the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." See Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

Grievant also stated at level two that prior to January 2002, she was unaware of her rights, and that her representative advised her that only the applicant with the most seniority could file a grievance. Neither ignorance of one's rights, or reliance upon erroneous information provided by co-workers tolls the time lines for filing a grievance.

Grievant's alternative claim, that the failure to fill the vacancy was ongoing and continuous in nature, is not persuasive. While it is true that the position continued to be vacant, the failure to fill the position within the statutory time lines was a single, grievableevent, from which damages, if proven, continued to accrue, rather than an infraction which was committed over and over. Therefore, the grievance was not timely filed. (See footnote 2)

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. W. Va. Code § 18-29-3(a).

3. Respondent properly raised the issue of timeliness at level two, and established that the grievance was not filed within fifteen days of the grievable event, as required by W. Va. Code § 18-29-4.

4. Grievant failed to prove that her delay was "was the result either of a deliberate design by the employer or actions that an employer should unmistakably haveunderstood would cause the

employee to delay filing [her] charge." Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (1989). See, Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

5. An untimely filing, if proven, will defeat a grievance, in which case the merits of the case need not be addressed. Crouch/Tyree v. Raleigh County Bd. of Educ., Docket No. 01-41-586 (Mar. 28, 2002); Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

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 Jefferson 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.

Date: July 23, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

See Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030 (Mar. 28, 2002), in which it was held that the posting was proper.

Footnote: 2

Even if the grievance had been timely filed, it is unlikely that Grievant would have received the Charles Town position, since she was not the most senior applicant. She appears to acknowledge that fact by noting that had the position been awarded to Ms. Hoffman in a timely manner, Grievant would have been the most senior applicant for the Page/Lowery position, and would have started receiving salary, benefits, and seniority beginning on January 8, 2002, rather than on February 7, 2002.