CHERYL A. PRICKETT,

Grievant,

v. **Docket No. 01-30-549**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

NANCY SHAY,

Intervenor.

D E C I S I O N

Grievant, Cheryl A. Prickett, employed by the Monongalia County Board of Education (MCBE) as a school bus aide, filed a level one grievance on September 10, 2001, in which she alleged violations of W. Va. Code §§ 18A-4-8b when a position at Easton Elementary School was not properly posted and filled, and 18A-4-8e, when individuals who had not passed the competency test were employed. For relief, Grievant requested that the Easton position be posted, and that statutory requirements for testing and qualifications be applied.

Grievant's immediate supervisor lacked authority to resolve the matter at level one. Following an evidentiary hearing at level two, the grievance was denied. MCBE waived consideration at level three and forwarded the case to level four on October 25, 2001. A level four hearing was conducted on December 12, 2001, at which time Grievant appeared pro se, MCBE was represented by Kelly J. Kimble, Esq. of Kay Casto & Chaney, PLLC, and Intervenor was represented by John E. Roush, Esq. of WVSSPA. The grievance became mature for decision on December 20, 2001, the due date for filing any additional proposed findings of fact and conclusions of law.

The following facts have been derived from the record in its entirety, including thelevel two transcript and exhibits, and the testimony with exhibits made a part of the record at level four.

Findings of Fact

1. Grievant has been employed as an Aide at all times pertinent to this grievance.
2. In August 1999, MCBE posted a position for a full-time aide at Easton Elementary School.

3. The posting was rescinded, and the position reposted as half-time at Easton and half-time at North Elementary school.

4. Grievant was offered the position, but declined it after learning that it had been reposted for two schools.

5. Another applicant was awarded the position, but resigned, and a substitute employee held the assignment for the remainder of the 1999-2000 school year.

6. On April 12, 2000, Intervenor filed a grievance claiming entitlement to the position. The grievance was denied at level four on July 23, 2001.

7. In Fall 2000, the aide position at Easton Elementary School was again designated full-time.

8. In Fall 2000, MCBE placed Intervenor into the full-time aide position at Easton Elementary School, "as a means of mitigating its damages in the form of lost wages and back pay in the event that Ms. Shay should prevail in her grievance." Having secured the position, Intervenor did not appeal the level four decision.

9. The position was not posted in Fall 2000. 10. MCBE raised the issue of timeliness at the level two hearing, as required by statute.

Discussion

Initially, MCBE contends this grievance is untimely because the grievance was not initiated within the time limits 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. 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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. 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); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 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 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). Respondent and Intervenor argue that the grievance was untimely filed because Grievant was aware at the beginning of the 2000-2001 school year that the position had been filled without posting, but did not initiate this complaint until the following school year. The lack of a posting was the grievable event, and the representations of other employees that a posting would not occur until a resolution was reached in Intervenor's grievance, were ultra vires acts, not binding upon the employer. They conclude that neither Grievant's reliance upon faulty information, nor misunderstandings regarding the requirements of the grievance procedure, excuses her failure to file in a timely manner.

By her own testimony Grievant established that she knew of the grievance filed by Intervenor, but relied upon the representation of a secretary, a teacher, and the school principal that no posting would be forthcoming until that matter was settled. It was unnecessary for Grievant to know the details of Intervenor's grievance. Clearly, she knew all the relevant facts, i.e., that someone was filling the position which had not been posted, at the beginning of the 2000-2001 school year. Her reliance upon the representations of the employees was misguided, since her concern was not with the outcome of Intervenor's case, but rather was directed to the failure to post. Further, MCBE cannot be held responsible for any information provided by employees who were not directly related to Intervenor's grievance, and had no authority to determine what would happen as a result of that process.

Most importantly, there is no evidence to show that Grievant's delay in filing was “the result of a deliberate design by the employer or actions that the employer should unmistakenly have understood would cause the employee to delay”, as required by Naylor v. W. Va. Human Rights Comm'n., 180 W. Va. 634, 378 S.E.2d 843 (1989); Lilly v. RaleighCounty Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). W. Va. Code §18-29-4 provides that a grievance be filed within 15 days of the grievable event, or within 15 days of the most recent occurrence of a continuing practice. The grievable event was filling the Easton position without posting in Fall 2000, and Grievant's delay of an entire school year renders the present matter untimely filed.

Even if timely filed, there is no evidence that Grievant would prevail. On the contrary, the Grievance Board has repeatedly held that "'[t]he law favors and encourages the resolution of

controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). Adkins v. Lincoln County Bd. of Educ., Docket No. 01-22-041 (July 16, 2001); Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997); Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). (See footnote 1)

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. 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. W. Va. Code §18-29-4 provides that a grievance be filed within 15 days of the grievable event, or within 15 days of the most recent occurrence of a continuing practice.

3. MCBE has proven by a preponderance of the evidence that Grievant knew that the position in question had not been posted prior to the 2000-2001 school year, but did not file a grievance until approximately one year later, making the grievance untimely filed.

4. There is no evidence to show that Grievant's delay in filing was “the result of a deliberate design by the employer or actions that the employer should unmistakenly have understood would cause the employee to delay”. Naylor v. W. Va. Human RightsComm'n., 180 W. Va. 634, 378 S.E.2d

843 (1989); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

5. Grievant failed to demonstrate a proper basis to excuse her failure to file in a timely manner.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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: January 24, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant correctly asserted that Intervenor had not passed the Aide competency test when she was assigned the position; however, Personnel Director Richard Williams testified at level two that the situation had been cured since Intervenor passed the test in August 2001, before this grievance was filed.