KAREN VANCE,

Grievant,

v. **Docket No. 02-19-123**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Karen Vance ("Grievant") filed a written grievance on February 27, 2002, alleging she was denied the opportunity to bid on an aide position at Jefferson High School. She seeks to have the position posted and the opportunity to bid on it. The grievance was denied at level one on March 7, 2002. A level two hearing was held on April 3, 2002, followed by a written undated decision, denying the grievance. Level three consideration was bypassed, and Grievant appealed to level four on April 30, 2002. A level four hearing was held in the offices of the Jefferson County Board of Education ("JCBOE") in Charles Town, West Virginia, on July 15, 2002. Grievant was represented by counsel, Nancy A. Dalby, and Respondent was represented by counsel, Claudia W. Bentley. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 28, 2002.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by JCBOE as an aide for approximately nine years. 2. Due to financial difficulties, in the spring of 2001, JCBOE placed many of its employees on the transfer list to provide flexibility in assigning them where needed for the upcoming school year.

3. Grievant was placed on the transfer list in the spring of 2001. She did not grieve this action.

4. Deborah Delauney was employed as a "supervisory" aide at Jefferson High School during the 2000-2001 school year. She had been employed in the same position since 1995. Her duties

involved supervision of students during in-school suspension for part of the school day, and work in the attendance office during the remainder of the day.

5. Ms. Delauney was also placed on the transfer list in the spring of 2001.

6. Cindy Sokel was employed in the library of Jefferson High School as a supervisory aide/computer operator during the 2000-2001 school year. Her duties included assisting the librarian with the computer lab, helping students with the computers, and working at the circulation and periodical desks

7. Ms. Sokel transferred to another position in January of 2001. A substitute aide performed her duties in the library during at least some of the remainder of the school year, likely in excess of thirty days.

8. Grievant was classified as an itinerant aide (See footnote 1) for the 2001-2002 school year, and she was assigned to Jefferson High School and the central office. 9. At the JCBOE meeting on August 21, 2002, Ms. Delauney's transfer was rescinded.

10. Beginning with the 2001-2002 school year, the duties previously performed by Ms. Sokel were divided between the librarian and Ms. Delauney. Ms. Delauney assisted the librarian with the periodical desk and occasionally supervised small groups of students for two periods a day. She continued to work in the attendance office and in-school suspension for the remainder of each workday. The library duties were assigned to Ms. Delauney with her consent and without additional compensation.

11. Grievant did not discover that Ms. Delauney's transfer was rescinded and her duties altered until January 14, 2002, when she was researching another grievance.

12. Grievant requested an informal conference with her immediate supervisor on February 1, 2002. The record does not reflect when the informal conference was actually held.

13. A written grievance was filed on February 27, 2002.

Discussion

Respondent contends that this grievance was not filed within the statutory timeframe, so it should be denied on that basis alone. 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 he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). As to when a grievance must be filed, W. Va. Code § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. Code § 18-29-4(a) 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.

* * * * * *

> 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 . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. 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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Respondent does not contest that Grievant did not discover the facts giving rise to her grievance until January 14, 2002. However, it is obvious that the request for aninformal conference on February 1, 2002, occurred within fifteen working days of January 14, 2002. As to whether the written grievance was filed in a timely fashion, Respondent has failed to introduce evidence establishing

when the informal conference was actually held, so it is unknown whether the grievance was filed within ten days of that date. Accordingly, Respondent has failed to meet its burden on this issue, and the grievance is timely.

Although she has asserted several theories related to Respondent's alleged mishandling of various transfers of employees in the spring of 2001, the relief Grievant has requested is to be allowed to bid upon the alleged library aide vacancy which she believes Ms. Delauney now fills. Grievant contends that Ms. Delauney received “favored” treatment by having her transfer rescinded, which she and other employees did not receive, and that the rescission of Ms. Delauney's transfer resulted in her being placed in the library position, which should have been posted.

Grievant points to W. Va. Code § 18A-4-8b, which provides as follows in subsection (k), regarding rescission of transfers:

> If, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular . . . transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the . . . transfer and shall notify the affected employee[.] Within five days of being so notified, the affected employee shall notify the board of his or her intent to return to his or her former position of employment[.]

Grievant contends that this provision requires a board of education to take action to rescind an unnecessary transfer by August 1, which it obviously did not do in Ms. Delauney's case. However, the statute's clear language states that the reason for the transfer must cease to exist by August 1; there is no mention of the board actually votingto rescind the transfer by August 1. Nevertheless, even if Grievant's argument were correct, she still has not established entitlement to the relief she has requested. Even if Ms. Delauney's transfer had not been rescinded, Respondent was not required to post the library aide position. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). When a position is vacated, it is within the board's discretion to determine whether or not the position is still needed, and, if not, to assign duties previously performed by that individual to qualified employees with their consent and without additional pay. Richardson v. Putnam County Bd. of Educ., Docket No. 97-40-189 (Oct. 15, 1997). Respondent had no obligation to post a vacancy for a position which no longer existed. See Id.

Grievant also contends that Ms. Delauney, by working in the library and assisting the librarian, is

not working within her assigned classification, which is “ISS Supervisory Aide,” per the job posting for her position. However, this Grievance Board has previously found that W. Va. Code § 18A-4-8 does not differentiate between types of aides, and "an aide may perform any duties assigned to him or her, as long as they are within the scope of the classification." Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); See also Moore v. Mercer County Bd. of Educ., Docket No. 01-27-558 (Feb. 20, 2002). The duties currently performed by Ms. Delauney are clearly those of an aide.

Grievant also introduced testimony from several other employees of JCBOE who were placed on the transfer list in 2001, but did not receive the alleged preferential treatment granted to Ms. Delauney, whose transfer was rescinded. Once again, although Grievant has attempted to demonstrate that Respondent allegedly mishandled the 2001transfer list in numerous ways, even if these claims were proven true, she would not be entitled to the requested relief of having Ms. Delauney's position posted. As discussed above, Respondent acted within its discretion when it determined that the position was no longer needed and reassigned some of Ms. Sokol's duties to other employees.

The following conclusions of law support the decision reached.

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 he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4a.

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. 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).

4. This grievance was timely filed.

5. 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.

6. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests requires the elimination of some service personnel jobs. See Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994).

8. When a position is vacated, it is within the board's discretion to determine whether or not the position is still needed, and, if not, to assign duties previously performed by that individual to qualified employees with their consent and without additional pay. Richardson v. Putnam County Bd. of Educ., Docket No. 97-40-189 (Oct. 15, 1997).

9. Grievant has failed to prove by a preponderance of the evidence that Respondent acted improperly by not posting the position of library aide/computer operator previously held by Cindy Sokel, or that she is entitled to the requested relief of having that position posted.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Jefferson 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: September 20, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It is not clear from the record whether Grievant bid upon a new position as an itinerant aide for the 2001-2002 school year, or her status was changed by some other method. Nevertheless, that is not an issue presented in this grievance.