DEBBIE LIVELY,

Grievant,

v.

DOCKET NO. 03-DOE-204

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Debbie Lively, filed this grievance against her employer, the West Virginia Department of Education ("DOE"), on or about April 29, 2003:

> Grievant wishes to receive credit and any and all benefits for the time she was employed part-time but worked full-time. WV Code 18-29-2. Discrimination.
>
> Relief sought: Any and all benefits for time she was employed part-time but worked full-time.

The grievance was denied at level one on May 8, 2003, by Stanley Hopkins, Assistant State Superintendent. Grievant appealed to level two on May 15, 2003, and a level two hearing was held on June 4, 2003. Grievance Evaluator Jack McClanahan denied the grievance by decision dated June 23, 2003. Grievant by-passed level three, and appealed to level four on July 16, 2003. A level four hearing was held on September 9, 2003, and this matter became mature for decision on October 14, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievantwas represented by Anita Mitter, West Virginia Education Association, and DOE was represented by Heather Deskins, Esq.

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

Ex. 1 -

June 26, 1996 WV-11.

Ex. 2 -

Chart of Staff Responsibilities.

Ex. 3 -

Grievant's Time Sheets from July 1996 through May 2001.

Ex. 4 -

Handwritten calculation of hours worked by Grievant.

Ex. 5 -

May 27, 1998 WV-11.

LII DOE Exhibits

Ex. 1 -

February 13, 2003 letter from David Stewart to Anita Mitter.

Ex. 2 -

April 9, 2002 letter from Anita Mitter to David Stewart.

Ex. 3 -

1997 Employee Handbook.

Ex. 4 -

Personnel Action Forms.

Ex. 5 -

Calculations of hours worked by Grievant for Fys 1997 through 2001.

Ex. 6 -

Calculation of hours worked by Grievant for FY 2002.

LIV Grievant's Exhibits

Ex. 1 -

August 4, 1994 memorandum from James Slamick to Selected Staff re: part- time employees.

LIV DOE Exhibits

Ex. 1 -

2004 PEIA Summary Plan Description, Eligibility.

Ex. 2 -

Calculation of hours worked by Mark Moore in FY 2003.

Ex. 3 -

Calculation of hours worked by Mark Moore in FY 2002.

Ex. 4 -

Calculation of hours worked by John Hill for Fys 2002-2003.

Ex. 5 -

1998 Employee Handbook, pp. 12, 16, 18.

Testimony

Grievant testified in her own behalf, and presented the testimony of James Slamick. DOE presented the testimony of Bill Wilcox, Tony Smedley, and Teresa Conner.

Based upon a review of the evidence in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant was a part-time, hourly employee of DOE from 1996 until May, 2001, when she applied for and received a full-time position.

2. During the time she was employed as a part-time employee, Grievant was paid at a rate of $8.00 an hour.

3. During the time she was employed as a part-time employee, Grievant was aware she was not eligible to receive any of the benefits of full-time employment.

4. Grievant worked two or three days a week at first, but this changed over time in response to the needs of her division, and there were times when Grievant worked 40 hours a week within a fiscal year.

5.

Grievant was paid for all hours worked.

6. The first time Grievant questioned anyone at DOE about whether she should have been receiving benefits in the past was on May 16, 2001, when she received her full- time position. Mr. Tony Smedley, Executive Director of Human Resources, told her unequivocally that she was not entitled to benefits during the time she was employed as an hourly part-time employee.

7. There are no minimum or maximum number of hours that hourly part-time employees work at DOE.

8. There are at least two other hourly part-time employees at DOE who have worked at least as many hours as Grievant worked, who also do not receive the benefits of regular employment. 9. In November 2001, Perry Bryant of WVEA and Grievant's representative met with State Superintendent David Stewart and Tony Smedley concerning Grievant's seniority with DOE. No adjustments were made to Grievant's seniority at this meeting.

10. Subsequently, in response to an inquiry by Grievant's representative regarding her seniority and experience credit, Dr. Stewart informed Grievant, in writing, on February 13, 2003, that she would not be granted the seniority and experience credit which she sought. LII DOE Ex. 1.

11. An informal conference was held concerning the instant grievance on March 7, 2003. Afterward, Assistant Superintendent Stanley Hopkins denied Grievant's requests for relief in writing. The denial was sent to Grievant's representative on March 17, 2003, but a copy was not provided to

Grievant.

12. Grievant filed a formal level one grievance on April 29, 2003.

DISCUSSION

Grievant has the burden of proving each element of 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); 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. 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievant alleges she is entitled to all benefits afforded full-time employees for the period 1997 through 2001, because, even though she was classified as a part-timeemployee, over the course of her employment, she was required to work a full-time schedule of 37-1/2 hours a week. DOE denies Grievant is entitled to any full-time benefits, or that it violated any statutes, rules, policies, or regulations in compensating Grievant as a part-time employee. Moreover, DOE contends this grievance should be dismissed because it was untimely filed.

The timeliness issue will be addressed first as it may be dispositive of the entire grievance. 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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).

A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin 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).

Grievant testified that the first time she ever questioned whether she should have been receiving benefits as a part-time employee was on May 16, 2001, when she received her full-time position. Grievant was aware at all times during her part-time employment that she was an hourly part-time employee, and that she was not eligible for benefits afforded regular full-time employee of DOE. Even after talking with Mr. Smedley about the issue on May 16, 2001, Grievant did not file a grievance over this matter until April 29, 2003.

Ms. Mitter maintains Grievant did not file her grievance before this date because she believed DOE was working on the issue and that it would be resolved. There is no testimony or evidence that anyone at DOE told Grievant not to file a grievance, or in any way prevented her from doing so from May 16, 2001 until April 29, 2003.

Further, an informal conference regarding this grievance was held on March 7, 2003, and a response sent to Grievant's representative on March 17, 2003. W. Va. Code § 18-29-4(a)(3) provides that a written grievance may be filed within ten days after the informal conference. The grievance was not filed until April 29, 2003, outside this ten day time limit. Clearly, this grievance is untimely filed and will be dismissed. However, even were it timely filed, Grievant has failed to produce any evidence that she is entitled to benefits during her employment as an hourly part-time employee.

There are no statutory provisions requiring that Grievant be awarded the same benefits as regular full-time employees. DOE's Employee Handbook addresses employee benefits and employment status, and the version in place when Grievant was hired in 1996 demonstrates she was not entitled to sick and annual leave. With respect to annual leave,the Handbook clearly states that, “[a]nnual leave shall not be accorded emergency, hourly, per diem, temporary or irregular part-time employees.” LII DOE Ex. 3. Likewise, with respect to sick leave, the Handbook provides that “each regular full-time employee (37 ½ hours per week) shall earn one and one-half (1 ½) days sick leave for each completed calendar month of service . . . sick leave accorded regular salaried part-time employees each month shall be earned on a pro rata basis.” LII DOE Ex. 3. Again, Grievant was not

a regular employee, nor was she a *salaried* part-time employee. Thus, pursuant to the Employee Handbook, she was not entitled to annual or sick leave.

Under the provisions of the Employee Handbook adopted on December 10, 1998, Grievant continued to be ineligible for annual or sick leave. The revised Handbook states that "[o]nly full-time (261 day) employees are eligible to earn annual leave," and that "[e]ach regular full-time employee (37 ½ hours per week) earns one and one-half (1 ½) days sick leave for each month of service." LIV DOE Ex. 5.

Grievant's claim of entitlement to PEIA benefits also fails. The PEIA 2004 Summary Plan Description states, under the heading "Who Is Eligible," that "[t]emporary and part- time employees are not eligible." Grievant introduced an August 4, 1994 memorandum from James E. Slamick, Assistant Director of Internal Operations, to support her contention that she was entitled to these benefits. LIV G. Ex. 1. That memo states, in part, that "part- time employees should not be asked to work more than 1,404 hours per calendar year." It goes on to state that, "[i]f you expect to use someone more than 1,040 hours, you will need to establish a full-time position because at that point, they become eligible for all fringe benefits." Id. Mr. Slamick testified at level four that he had written that memorandum in response to concerns about employee eligibility for insurance and retirement benefits. He affirmatively stated the memo was not intended to address an employee's entitlement to annual leave or sick leave in any way. But even if it were to be construed as addressing all types of benefits, the memorandum only states that if a part-time employee is working more than 1,040 hours, a full-time position should be established. It does not serve to automatically convert that part-time employee into a full-time employee. To do so would circumvent the normal hiring processes, and permit temporary part-time employees to be promoted to full-time status without the benefit of competitive posting. The remedy is simply not compelled by the terms of the Handbook or by any legal argument set forth by Grievant. See Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996). Thus, with respect to PEIA benefits, the memo must be construed together with PEIA's own regulations concerning entitlement to insurance benefits. Mr. Slamick's memorandum cannot bestow benefits upon employees that are not provided by PEIA's own regulations. Therefore, this memorandum cannot be construed as giving Grievant an entitlement to PEIA benefits.

Finally, Grievant claimed she has been discriminated against by DOE. W. Va. Code § 18-29-2(m)

defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievant must show: (a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of Grievant and/or the other employee(s) and were not agreed to by Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant has failed to establish a prima facie case of discrimination. Grievant claims she worked as many hours as full-time employees, but did not receive the same benefits. Grievant simply was not similarly situated to full-time employees during the period of time she was employed as a part-time employee, and cannot be simply converted to a full-time employee by virtue of working the same number of hours. Additionally, there are at least two other part-time employees who worked at least the same number of hours she worked while a part-time employee, and neither of these employees received any full-time benefits. Consequently, Grievant's claim of discrimination must fail.

Finally, Grievant points to the Ninth Circuit Court of Appeals cases known as the Vizcaino cases, in support of her claim to entitlement of full-time benefits. See Vizcaino v. Microsoft Corp., 97 F.3d

1187 (9th Cir. 1995)("Vizcaino I"), *aff'd* 120 F.3d 1006 (9th Cir.1997)(en banc)("Vizcaino II"). In the Vizcaino cases, the Ninth Circuit considered the issue of whether certain employees, who had originally been considered to be independent contractors and temporary agency employees, were eligible for retroactive benefits in Microsoft's employee stock purchase plan pursuant to the terms of that plan and the terms of the federal Employee Retirement Income Security Act of 1974. This analysis has no bearing on the issue at hand and has no precedential authority in this matter. Unlike the independent contracts and temporary agency employees involved in Vizcaino, there is no dispute that Grievant was, at all times, an employee of DOE; part-time, but nonetheless, an employee. The analysis between part-time and full-time employees versus independent contractor versus employee is totally different, and Grievant's reliance on Vizcaino is misplaced.

The above findings and discussion are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of 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); 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.

2. 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin 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. DOE has proven by a preponderance of the evidence that this grievance was untimely filed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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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MARY JO SWARTZ

Administrative Law Judge

Dated: October 21, 2003