NANCY JAMISON,

Grievant,

v. Docket No. 03-30-126

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Nancy Jamison ("Grievant"), employed by the Monongalia County Board of Education (MCBE) as a Secretary, filed a level one grievance on December 6, 2002, in which she alleged violations of W. Va. Code §§18-5-22 and 18-5-22a when she was not compensated for administering medication to students. For relief, Grievant requested an unspecified amount of compensation for the period of August through December 5, 2002, plus interest. Grievant's immediate supervisor lacked authority to grant the relief at level one. The grievance was denied at level two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c). Appeal was made to level four on May 8, 2003, and an evidentiary hearing was conducted on June 24, 2003. Grievant was represented by John E. Roush, Esq., of West Virginia School Service Personnel Association. MCBE was represented by Kelly J. Kimble, Esq., of Kay, Casto, and Chaney. 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 24, 2003.

The following findings of facts are derived from the record in its entirety, including the level two transcript and exhibits and the level four record.

Findings of Fact

1. Grievant was first employed by MCBE as a substitute Secretary in 1995, and has held regular employee status since August 12, 1996. She has been assigned as aSecretary III, half-time to the Gear Up program and half-time to Cheat Lake Middle School at all times pertinent to this grievance.

2. Pursuant to State Board of Education regulations, MCBE employs school Secretaries to administer medications. These assignments are posted, and effective July 1, 2002, these

individuals are compensated one pay grade higher for this work.

3. In August 2002, Grievant completed training to certify as a health care assistant. She completed this training on her own initiative, not at the request, or on the recommendation of the school nurse or principal. Grievant did not receive the more detailed, student-specific training from the school nurse which is required.

4. Grievant administered Ritalin to a student on at least three occasions in August and September, 2002, without the approval of MCBE.

5. Tracy Riffon and Sue Robinson, Secretaries at Cheat Lake Middle School, were responsible for administering medications in the morning and afternoon, respectively, until Ms. Robinson terminated her position as health assistant sometime in November 2002.

6. Grievant requested a pay grade increase based upon her assumption of duties as health assistant.

7. Grievant was directed to stop administering medications immediately.

Discussion

Initially, MCBE argues that Grievant failed to timely file an appeal to level two. 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). 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).

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. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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). Because

the timeliness assertion, if proven, would defeat the grievance without addressing its merits, it will be addressed first.

Under the time lines set forth in W. Va. Code §18-29-4(b), "(w)ithin five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator . . . ." In counting the time allowed for an action to be accomplished under the education employees grievance procedure, W. Va. Code § 18-29- 2(b) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. Lewis v. Harrison County Bd. of Educ., Docket No. 01-17-617 (Feb. 8, 2002).

Principal Ken Wolfe issued a level one decision dated December 11, 2002. The grievance form indicates that a level two appeal was filed on December 13, 2002. Respondent asserts this appeal was never received. (See footnote 1) **Grievant argues that it was timely placed in the board's mail system, and was apparently misdirected. MCBE suggests that the form could have been back dated. Although Grievant's testimony is self-serving, it is determined to be credible. Further, there is no evidence as to when Mr. Croston may have advised her the appeal had not been received. While MCBE has reason to question the appeal, the evidence simply does not support a finding that the level two appeal was not timely filed.**

Addressing the merits of the grievance, Grievant bears the burden of proving the non-disciplinary grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 W. Va. C.S.R. 1 § 4.21. "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).

Grievant asserts that she has received the requisite training and has distributed medications, therefore, she is entitled to the additional compensation. She further argues that because her principal was aware that she was performing the duties, and did not forbid her to do so, constitutes implied approval from the administration. MCBE argues that simply completing the initial training in dispensing medication does not entitle Grievant to a salary increase. Further, MCBE notes that Grievant was not trained or approved by the school nurse on site, and had not been contracted for the assignment. W. Va. Code § 18-5-22 provides, in pertinent part:

(d)Specialized health procedures that require the skill, knowledge and judgment of a licensed

health professional, shall be performed only by school nurses, other licensed school health care providers as provided for in this section, or school employees who have been trained and retrained every two years who are subject to the supervision and approval by school nurses. After assessing the health status of the individual student, a school nurse, in collaboration with the student's physician, parents and in some instances an individualized education program team, may delegate certain health care procedures to a school employee who shall be trained pursuant to this section considered competent, have consultation with, and be monitored or supervised by the school nurse: Provided, That nothing herein shall prohibit any school employee from providing specialized health procedures or any other prudent action to aid any person who is in acute physical distress or requires emergency assistance. For the purposes of this section "specialized health procedures" means, but is not limited to, catheterization, suctioning of tracheostomy, naso-gastric tube feeding or gastrostomy tube feeding. "School employee" means "teachers", as defined in . . . § 18-1-1, . . . and "aides", as defined in . . . § 18A-4-8 . . ., of this code. Commencing with the school year beginning on the first day of July, two thousand two, "school employee" also means "secretary I", "secretary II" and "secretary III", as defined in section eight, article four, chapter eighteen-a of this code: Provided, however, That a "secretary I", "secretary II" and "secretary III" shall be limited to the dispensing of medications.

(e)Any school employee who elects, or is required by this section, to undergo training or retraining to provide, in the manner specified in this section, the specialized health care procedures for those students for which the selection has been approved by both the principal and the county board, shall receive additional pay of at least one pay grade higher than the highest pay grade for which the employee is paid . . .

West Virginia Board of Education Policy 2422.7, "Standards for Basic and Specialized Health Care Procedures," 126 CSR 25A, was adopted in 1990 and amended in 1995. In the policy, the State Board of Education directed county school districts tofollow the "Basic and Specialized Health Care Procedure Manual for West Virginia Public School." The policy acknowledges that school employees may provide specialized health care procedures, but only if they are trained and supervised by the school nurse.

There was no posting for a health care assistant assignment. Grievant was not trained or supervised by the school nurse. School personnel assignments are not filled by implied consent. At best, Grievant became a volunteer with no reasonable expectation of receiving compensation. See Reed v. Kanawha County Bd. of Educ., Docket No. 99-20- 111 (May 27, 1999); Anderson v. Gilmer County Bd. of Educ., Docket No. 95-11-197 (Aug. 1, 1995); Vencill v. Kanawha County Bd. of Educ., Docket No. 93-20-196 (May 26, 1994). More accurately, Grievant undertook an assignment for which she was not completely trained or supervised, and the degree of possible harm was significant. Grievant is not entitled to additional compensation until she is employed, trained, and supervised by MCBE as a health care assistant.

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. 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).

2. MCBE failed to prove that the grievance was not appealed to level two, pursuant to the time lines set forth in W. Va. Code § 18-29-4.

3. Grievant bears the burden of proving the merits of her grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 W. Va. C.S.R. 1 § 4.21. "Thepreponderance 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).

4. School secretaries may dispense medications after they are trained, and determined to be competent, by the school nurse. W. Va. Code § 18-5-22.

5. Grievant failed to prove that she had been trained and approved by the school nurse, or that she had been employed by MCBE to act as a health care aide, thereby entitling her to additional compensation.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 thatthe record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JULY 29, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.In late December, Human Resources Administrator Rick Williams inquired of Grievant's then-representative, Paul Croston, whether an appeal would be filed. Mr. Croston stated that he would check with Grievant. MCBE received a copy of the appeal by telefax on January 10, 2003.