KATHRYN LANE,

Grievant,

v. **Docket No. 03-RS-245**

DIVISION OF REHABILITATION SERVICES,

Respondent.

DECISION

Kathryn Lane ("Grievant") initiated this proceeding on May 19, 2003, alleging discrimination regarding the filling of a Rehabilitation Services Associate ("RSA") position. Grievant's immediate supervisor lacked the authority to grant relief at level one, as stated in a decision dated May 20, 2003. A level two conference was conducted on June 19, 2003, and the grievance was denied at that level on July 7, 2003. Upon appeal to level three, a hearing was held on July 21, 2003, and the grievance denied in a decision dated August 1, 2003. Grievant appealed to level four on August 12, 2003. A level four hearing was convened in Westover, West Virginia, on September 29, 2003, at which time the parties decided to submit this matter for a decision based upon the lower level record. This matter became for mature for consideration upon receipt of Respondent's fact/law proposals on November 18, 2003. (See footnote 1)

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

Findings of Fact

1. Grievant has been employed by the Division of Rehabilitation Services ("DRS") since October of 1989.

2. Grievant's most recent assignment has been in the Clarksburg branch office as an Office Assistant II.

3. On November 21, 2002, the Clarksburg District II office posted a position for RSA, to be filled by reallocation of a current employee's position within District II.

4. Grievant was the only applicant for the RSA position within the posting period.

5. Because there was already insufficient clerical staff in the Clarksburg District, William McDonnell, District II Manager, determined that he could not afford to lose Grievant's Office Assistant position. Therefore, he decided not to fill the RSA position that was posted in November of 2002.

6. On January 29, 2003, Respondent again posted an RSA position for the Clarksburg District Office. This posting specified that it would be filled by reallocation of an existing position from within any of the District offices in Beckley, Charleston, Clarksburg, Huntington, Lewisburg, Martinsburg, and Wheeling.

7. Until the new posting appeared on January 29, 2003, Grievant was unaware that the first RSA position was not going to be filled.

8. Grievant and Tempia Ann White applied for the second RSA position within the posting period.

9. Grievant's application for the second position was signed for by a DRS employee on February 11, 2003, the application deadline. 10. Although he did not personally receive Grievant's application for the second RSA position, Mr. McDonnell interviewed Grievant and Ms. White.

11. At the time of her application, Ms. White was employed as an RSA in the Elkins District office.

12. Based upon her qualifications, Ms. White was selected to fill the RSA position.

13. Grievant filed this grievance five days after she was informed that Ms. White was selected to fill the position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

As a preliminary issue, Respondent contends that, as to the November posting, Grievant's claim

is untimely. Grievant argues that DRS is barred from raising a timeliness defense because it did not raise the defense at or before the level two conference pursuant to W. Va. Code § 29-6A-3(2). Specifically, the Code provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." There is no dispute that the timeliness defense was first raised by Mr. McDonnell in his level two decision dated July 7, 2003. (See footnote 2) As the appropriate person to handle the level two appeal, Mr. McDonnell raised the timeliness defense on behalf of Respondent in his written level two decision, thus satisfying the statutory time limit for raising that defense. See Greathouse v. W. Va. Div. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000) (aff'd, Circuit Court of Kanawha County, CA No. 00-AA-148, May 16, 2003). Moreover, as noted in Greathouse, supra, the grievance statutes are inconsistent regarding level two of the grievance procedure for state employees. W. Va. Code § 29-6A-4(b) commands the employer's administrator or his designee to hold a "conference" at level two. However, W. Va. Code § 29-6A-3(a)(2) states the employer must raise the timeliness defense at or before the level two hearing. State employers are not required to hold a level two hearing by statute. Therefore, it is impossible for the employer to raise the timeliness defense "at or before the level two hearing", as there is no such step in the grievance procedure for state employees. Thus, it was held in Greathouse that, in state grievances, the holding of the level two grievance evaluator in his written decision that the grievance was untimely filed serves to raise the timeliness defense on behalf of the employer in conformance with W. Va. Code § 29-6A-3(2). This was based, in part, on the observation that the legislature seems to have contemplated having the defense raised at an evidentiary hearing, as in the statute governing education employees.

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 apreponderance o f the evidence. Once the employer has demonstrated 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 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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).

W. Va. Code § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Grievant contends that, because she was the only applicant for the November posting, she should have been placed in the position. By her own testimony, Grievant knew at least by the time the position was reposted on January 29, 2003, that she had not been selected and that the original position was not being filled. Accordingly, there is noquestion that the filing of this grievance on May 19, 2003, approximately four months later, was untimely.

Grievant's argument in this grievance is that the position should not have been re- bid in January of 2003, and the relief she seeks is to “return to the original posting” of November, 2003, and have the position filled from the applicants for that position. She has made no arguments regarding her qualifications for the position as compared to Ms. White, who was selected pursuant to the second posting.

The standard of review of the selection process of a state employee is whether the decision was arbitrary and capricious. Pursuant to that standard, if a grievant can demonstrate the selection process was so significantly flawed that she might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault v. W. Va. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). In the instant case, Grievant has made no arguments pertinent to the second posting and the selection decision which resulted from it, and she has introduced no evidence of her qualifications as compared to the successful applicant's. Accordingly, she has not established that the selection of Ms. White was arbitrary and capricious. Since her

grievance is untimely as to the first posting, she has failed to state a claim for which any relief is available.

The following conclusions of law support the decision reached.

Conclusions of Law

1. W. Va. Code § 29-6A-3(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."

2. District Manager McDonnell, as the appropriate person to handle the level two appeal, raised the timeliness defense on behalf of DRS in his written level two decision, thus satisfying the statutory time limit for raising that defense. See Greathouse, et al. v. W. Va. Div. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000) (aff'd, Circuit Court of Kanawha County, CA No. 00-AA-148, May 16, 2003).

3. In state grievances, the holding of the level two grievance evaluator in his written decision that the grievance was untimely filed serves to raise the timeliness defense on behalf of the employer in conformance with W. Va. Code § 29-6A-3(2). Greathouse, supra.

4. A level one grievance must be filed within .ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .. W. Va. Code §29-6A-4(a).

5. Timeliness is an affirmative defense, and the burden is upon the party asserting the grievance was not timely filed to prove that defense by a preponderance of the evidence. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

6. This grievance was filed approximately four months after Grievant became aware of the event upon which it was based, so it is untimely.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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: December 19, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented at all levels by counsel, Michael Niggemyer, and Respondent was represented at levels three and four by Warren Morford, Training and Employee Relations Coordinator. Grievant did not submit a brief at level four.

Footnote: 2

The timeliness defense was also asserted at level three and ruled upon by the hearing evaluator.