WILLIAM HAWKINS,

Grievant,

v. **DOCKET NO. 02-DOE-386**

WEST VIRGINIA DEPARTMENT

OF EDUCATION,

Respondent.

DECISION

William Hawkins filed this grievance on August 28, 2002, stating: “I have been harassed due to being singled out and punished without cause. The case being I left early one day with permission and was suspended three days for it.” Grievant stated the relief sought as: “Reversal of suspension and restoration of back pay with interest.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on January 23, 2003. Grievant was represented by Gary E. Archer of the W. Va. Education Association, and Respondent was represented by Heather L. Deskins, Esq. This matter became mature for decision upon the filing of the parties' proposed findings of fact and conclusions of law on February 24, 2003.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as an adult basic education teacher at Anthony Correctional Center. 2. On June 7, 2002, at approximately 1:20 p.m., Grievant told Tammy Alderman, Associate Warden of Programs and Educational Officer on duty that day, that he was leaving for the day. He did not say why. He was in the middle of teaching a class at the time, and she told him to place his class in the library. Normally, when a teacher is absent, the students go to the library, where the educational officer does a roll call. Grievant also told a fellow teacher, Helen Igo,

that he was leaving, saying, "I just can't take things any more. I have to get out of here." Level II Transcript, p. 129.

3. The educational officer is an employee of the correctional center, not of the school, and is there to make sure the inmates attend classes when they should, are always where they should be, and generally to provide security for the education unit. Ms. Alderman is not Grievant's supervisor and is not in Grievant's chain of command.

4. Earlier in the day, Ms. Alderman had been walking through the area, and saw students in Grievant's classroom with their heads down. She assumed they were sleeping, and reported her observation to Principal Rowena Harmon because sleeping in class is contrary to the school's disciplinary policy, which requires "attentiveness" in class. When Ms. Harmon asked Grievant about the incident, he stated the students had just finished taking a test and he told them they could put their heads down. Grievant later told Ms. Alderman she should not have told Ms. Harmon about it, as they had been having problems.

5. Grievant exited the building via the office, passing by Secretary Ann Toney, also telling her he was leaving. When she asked if he had informed Ms. Harmon, he simply gestured, which Ms. Toney took as an indication he didn't know where Ms. Harmon was. 6. Ms. Harmon was outside the building at the front entrance supervising the unloading of several computers that had been ordered. Grievant, passing that way out of the facility, encountered Ms. Harmon as she was coming in with a computer. He held the door for her. When she asked if he was leaving, he said, "It's not you." She asked if his family was okay, and he said, "Yes," and continued out.

7. On June 11, 2002, David Stewart, State Superintendent of Schools, notified Grievant he was being suspended for three days beginning June 12, 2002. Dr. Stewart charged that Grievant's actions in abandoning his teaching duties constituted willful neglect of duty.

8. This grievance was filed August 28, 2002, 53 working days after the June 12 beginning of Grievant's three-day suspension. Respondent asserted at Levels I and II and in its Level IV brief that this grievance was untimely filed.

9. On June 13, 2002, Grievant's representative, Mr. Archer, sent a letter to Respondent's representative requesting an extension of the timelines for a previously-filed grievance concerning an earlier suspension of Grievant. (See footnote 1) He further stated in the letter,

> Also, I would like to request that consideration be given to consolidating the issues of

> the grievance and the subsequent suspensions of Mr. Hawkins into one hearing. If such a consolidation is possible, I feel it would hasten the resolution of the disputes and minimize the disruption to the education program at Anthony Center.

Level II Grievant's Exhibit No. 1.

DISCUSSION

Respondent bears the burden of proof since this is a disciplinary action, and also bears the burden of proving its timeliness assertion. 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). Because the timeliness assertion, if proven, would defeat the grievance without addressing its merits, it will be addressed first.

Grievant was notified of his suspension on or about June 11, and served the suspension June 12-14, 2002. The grievance was filed August 28, 2002, far outside the 15-day time limit for filing a grievance. Grievant asserts that his representative's June 13, 2002 letter about his prior grievance, suggesting the issues be consolidated, constitutes filing a grievance over the second suspension. Respondent contends it was no such thing, and there was never an agreement to consolidate the issues.

I agree with Respondent; the letter from Grievant's representative to Respondent's representative did not satisfy the requirements for filing a grievance. W. Va. Code § 18-29- 2(a) defines "Grievance" as:

> [A]ny claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

The June 13 letter contained none of those elements, intended to give the Respondent notice of the claim and what it was about, and an opportunity to resolve it atthe lowest possible level. The letter

mentions no violation, misapplication or misinterpretation of any rules, laws or policies, or any other basis for being aggrieved. Further, W. Va. Code §§18-29-4(a)(1)(2) and (3) require:

> 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.
>
> The immediate supervisor shall respond to the grievance within ten days of the conference.
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> 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, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

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).

The letter did not mention a conference with Grievant's immediate supervisor, and there is no evidence even a copy of the letter was sent to Grievant's supervisor. At no time within the fifteen-day time limit after Grievant was unequivocally notified of his suspension did Grievant file a written grievance or in any other way make known to his supervisor that he wished to grieve the suspension. At best, his representative notified Respondent's representative that a grievance would likely be filed, but in the absence of actually initiated proceedings Respondent had no duty to give consideration to Grievant's vague allusionto an unfiled grievance. While the Grievance Board has found improper filings to meet the requirement when they demonstrate substantial compliance with the filing requirements, Grievant made no filing at all, and hence did not even substantially comply.

Respondent has met its burden of proving this grievance was untimely filed. The following conclusions of law support the decision reached herein:

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 § 18-29-4(a)(1).

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. The grievance process requires the grievant, within the allowed time limit, to schedule a conference with his immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought, and if the grievant is not satisfied with the outcome of the conference, the process requires the grievant to file a written grievance with his supervisor. W. Va. Code §§18-29-4(a). 5. This grievance was not timely filed, and Grievant did not demonstrate he should be excused from meeting the timelines for filing nor did he demonstrate substantial compliance with the filing requirements.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Greenbrier 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: March 12, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

That grievance proceeded to Level IV, where it was denied. See Hawkins v. W. Va. Bd. of Educ., Docket No. 02-DOE-325 (Jan. 31, 2003).