**ROBIN G. CASTO,**

**Grievant,**

**v.** **DOCKET NO. 03-26-214**

**MASON COUNTY BOARD**

**OF EDUCATION,**

**Respondent,**

**and**

**CHRYSTALLE DOYLE,**

**Intervenor.**

## DECISION

Robin Gail Casto, (Grievant) filed this grievance against Mason County Board of Education, (Board or Respondent) on April 30, 2003, stating:

> Policy 18A-4-7a states that RIF's are to be given to the least senior employee. It also states that employees under a temporary certificate are to be released prior to a fully certified employee. A phone call to the State Certification Board on April 22, 2003, clarified that I am certified to teach elementary music (K-6.) There is no “temporary certification,” and I am not the least senior music teacher, therefore, my RIF was improperly issued.

Grievant stated the relief sought as:

> I request that my RIF be rescinded and I be restored to my current music position.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on August 18, 2003. Grievant appeared *pro se,* Intervenor was represented by Susan Hubbard, and Respondent was represented bycounsel Greg Bailey. This matter became mature for decision on August 28, 2003, the deadline filing of the parties' replies to proposed findings

of fact and conclusions of law. (See footnote 1)

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, for the 2002-2003 school year, was regularly employed by Respondent as a half-time elementary Music teacher at Leon Elementary School. Grievant is certified to teach “Elementary Ed 1-6" and “Early Education N-K.”

2. Intervenor, for the 2002-2003 school year, was regularly employed by Respondent as a full-time Music teacher, splitting her time between Central and Roosevelt Elementary Schools. Intervenor is certified to teach Music in grades K-12. Central, Ordnance and North Point Elementary Schools were reconfigured, resulting in a .5 reduction in the number of Music teachers, and Intervenor's being placed on transfer.

3. On February 12, 2003, Mason County Superintendent of Schools Larry Parsons sent a letter by certified mail to Grievant notifying her that he would recommend that her contract of employment be terminated at the close of the 2002-2003 school year. He stated, “Based upon your seniority and certification your position has been identified to accommodate the placement of a more senior employee who is entitled to placement in connection to a reduction in force.” The letter further informed Grievant of her right to a hearing on the action, which could be scheduled on March 4 or 6, 2003.

4. Intervenor is the more senior employee who was mentioned in the letter. 5. Grievant did not accept delivery of the letter, and it was returned unclaimed to Respondent on March 13, 2003. On April 25, 2003, Grievant called the Board office and requested that the letter be faxed to her at Leon Elementary, and it was faxed to her that same day.

6. At a meeting on March 11, 2003, Respondent voted to terminate Grievant's contract and place her on the preferred recall list. Dr. Parsons informed Grievant of this by letter dated March 12, 2003, again sent to Grievant by certified mail. Grievant accepted delivery of this letter on March 13, 2003.

7. Grievant was unequivocally notified on March 13, 2003, that her contract had been terminated.

8. On or about April 21, 2003, Grievant called the state Board of Education an confirmed that she was fully certified to teach Music at her grade levels in her county due to her general elementary education certification. On March 25, 2003, Linda Heatherman, a Coordinator in the State Department of Education, Office of Professional Preparation, sent Grievant a fax stating Grievant "is certified to teach in all content areas in her grade level." Level four Grievant's Exhibit No. 2. Respondent had previously confirmed this for her in writing on June 13, 2001.

8. The position Grievant held, and all other elementary Music teaching positions in Mason County, was originally posted as requiring certification to teach Music for grades K-12. No applicants with Music certification applied, and Grievant was chosen as the most qualified applicant.

9. Grievant is not the least senior Music teacher in Mason County, but is the only Music teacher without Music-specific teaching certification. Vanessa Cochran, a less senior Music teacher, holds an elementary position which was posted requiring Musiccertification. Grievant was not permitted to bump into her position because she does not have Music-specific certification.

10. Maureen May is another less senior Music teacher, but her position requires her to teach secondary students.

11. Respondent asserted at level two and at level four that this grievance was not timely filed.

12. Grievant did not file a grievance within 15 days after receiving unequivocal notification of her contract determination because she "wanted to talk to the Board and [she is], by nature, a very trusting and understanding person and [she does not] like to cause waves and [she] accepted the comments that were made." Level two trans., pp. 8-9.

## DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. However, Respondent has asserted that this grievance was not timely filed. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of

Highways, Docket No. 97-DOH-060 (July 16, 1997). "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). Where the evidence equally supports both sides, theparty bearing the burden has not met its burden. Id. Since the timeliness issue is dispositive, it will be addressed first.

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). Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Seifert, *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 challenges the decision to terminate her contract to accommodate another Music teacher whose position was subject to a RIF. She was unequivocally notified of this decision on March 13, 2003. She did not file her grievance until April 30, 2003. Grievant offered no excuse for her delay in filing her grievance, except for the statement “I wanted to talk to the Board and I am, by nature, a very trusting and understanding person and I don't like to cause waves and I accepted the comments that were made.” She, however, did not even contact the state Board until April 21, 2003, at the earliest, 30 days after receiving the notice, even though she knew without doubt she was being affected by the RIF on March 13, 2003. She contacted Respondent, through Dr. Parsons, even later than that. She did not cite any promises by Respondent to resolve the issue without a grievance, or any statements by Respondent that she should not file a grievance.

Grievant lost her position due to a RIF, even though another, less senior Music teacher worked in the county. However, Respondent made the determination that since that employee held a certification in Music Education and Grievant did not, Grievant shouldbe the one who would be “bumped” by Intervenor. Grievant apparently thought the issue was the determination that she was not fully certified to teach Music, but the decision that she is grieving is the termination of her contract. In any event, Grievant knew about Respondent's decision 33 days before she filed her grievance, and 30 days before she called the state Department of Education to ask about her certification. Grievant was dilatory in filing her grievance, and the grievance procedure does not

permit the merits of a grievance to be heard after such an unexcused delay.

The following conclusions of law support this decision.

CONCLUSIONS OF LAW

1. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH- 060 (July 16, 1997).

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

3. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

4. 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 mostrecent occurrence of a continuing practice. W. Va. Code § 18-29-4(a). Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

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

6. Grievant was unequivocally notified of the decision being challenged 33 days before she filed her grievance.

7. Respondent met its burden of proving this grievance was untimely filed.

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 Mason 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: September 2, 2003** _____

**M. Paul Marteney**

**Administrative Law Judge**

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*Footnote: 1*

*Briefs were received from Respondent and Intervenor; Grievant elected not to file fact/law proposals.*