ERNEST QUATTRO, JR.,

Grievant,

v. **DOCKET NO. 04-34-207**

NICHOLAS COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On or about January 22, 2004, Grievant Ernest Quattro, Jr. filed his grievance against his employer, the Nicholas County Board of Education ("Respondent"), alleging "I did not receive the proper transfer letter to be transferred from my work place at Fenwick to [Summersville]." Grievant requested as relief "I want to be returned to Fenwick Bus Garage, my work place for the past seven years."

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on July 9, 2004. Grievant appeared in person and by John E. Roush, Esq. of the West Virginia School Service Personnel Association. Respondent was represented by counsel, Erwin L. Conrad, Esq. This matter became mature for decision on August 2, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

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 regularly employed by Respondent as a Mechanic currently assigned to the Summersville garage.

2. Grievant had previously worked out of the Fenwick garage for approximately eight years up until the 2002-2003 school year.

3. In the springs of 1998, 1999, 2000, 2001, 2002 and 2003 Grievant received Notices of Transfer, each essentially identical, that stated, in part, that the Superintendent was considering him for “Transfer to the transportation system garages at Fenwick and Summersville. Based upon needs and recommendation of the Transportation Director.” Up until 2002, he stayed at the Fenwick garage.

4. On April 29, 2002, Superintendent Gus Penix advised Grievant by letter that the Board had approved his transfer for the 2002-2003 school year.

5. On March 21, 2003, Grievant was sent a notice that he was being considered for transfer for the 2003-2004 school year, and had a right to a Hearing on the proposed transfer, and on April 25, 2003, he was sent a Notice of Board Action, advising he had been transferred for school year 2003-2004.

6. Grievant signed the certified mail receipts for both items. After examining the receipts, Grievant admitted he had received the notices.

7. Grievant admitted he received the July 21, 2003 letter from Transportation Director Baber advising him that “changing needs” of the Nicholas County School Transportation system required the assignment of Grievant to the Summersville Bus Garage for school year 2003-2004. This letter specifically stated,

> [T]o better serve the changing needs of the Nicholas County School Transportation System, you will be assigned to the Summersville Bus Garage for the 2003-2004 school term. The largest majority of our fleet ofbuses and maintenance vehicles are serviced from this location. Your knowledge, experience and work abilities will be a great asset to the Summersville Garage and will assist in providing a safer and more efficient transportation for the students of Nicholas County. Per our conversation today, you agreed to the change of your work station for reasons previously stated with one stipulation. That stipulation was to access [sic] progress of this change at a later time with the possibility of again being assigned to the Fenwick Bus Garage. I will not make any promises, however, I will be accessing [sic] this change in the future.

8. Between July 21, 2003, and August 29, 2003, Grievant worked twenty-four days at the Summersville garage.

9. Grievant's first informal grievance request was January 8, 2004, wherein he claimed that the transfer was illegal for “failure to receive proper notice.”

10. Grievant's initial transfer to Summersville followed an injury that made it unsafe for him to work alone. He agreed to that transfer, and in 2003 believed he would be returned to Fenwick in September after a reassessment of his physical limitations.

11. Contrary to Grievant's belief, he was made no promises to return to Fenwick for any reason, but was to remain in Summersville based on the needs of Respondent. (See footnote 1)

DISCUSSION

In a non-disciplinary grievance, Grievant has the burden of proving his grievance by preponderance of the evidence. Procedural Rules of the W. Va. Education & State Employees Grievance Bd., W. Va. Code St. R. § 156-1-4.21; *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (April 30, 1997). See W. Va. Code § 18-29-6. “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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). However, at the beginning of the level four Hearing, Respondent properly raised the issue of timeliness, as it had at level two. When an 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. *Casey v. Mason County Bd. of Educ.*, Docket No. 01-26-394 (Sept. 25, 2001). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Loudermilk v. Greenbrier County Bd. of Educ.*, Docket No. 04-13-025 (April 14, 2004).

An untimely filing, if proven, 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); *Loudermilk*, *supra*.

W. Va. Code § 18-29-4(a)(1) provides in pertinent part:

> 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 with 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 running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *Kessler v. Dep't of Transp./Div. of Highways*,

Docket No. 96-DOH-445 (July 28, 1997). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220 483 S.E. 2d 566 (1997). *See also Loudermilk, supra*. In *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990),the Court stated that there is a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke a grievance procedure does not begin to run until the Grievant knows of the fact giving rise to the grievance. Respondent noted that Grievant was aware of the change of assignment and worked pursuant to the change from July 21, 2003, through August 28, 2003.

In this case, Grievant knew he was being considered for transfer as early as March 28, 2003, as is evident from his signature on the return receipt card which accompanied the Notice. Grievant did not file the grievance until after the initial phase of the informal conference on or about January 4, 2004. Grievant was also properly advised therein of his right to a hearing. Grievant did not seek a hearing. Likewise, he was further advised of his transfer pursuant to the Notice as early as April 28, 2003, when the Board of Education approval of his Transfer Notice was received by him. Additionally, Grievant undertook to work pursuant to his new assignment right after a Notice of the New Assignment on July 23, 2003, and continued through August 28, 2003, when he had to then leave active work on a Worker's Compensation filing.

Grievant did not file this grievance until January 2004, nine months after notice that he was being considered for transfer and eight months after notice that he was being transferred. Likewise, the informal request for a grievance conference did not occur until five months after he undertook his assignment pursuant to the transfer. Accordingly, this grievance is untimely filed.

In order to overcome Respondent's evidence, Grievant must demonstrate a proper basis to excuse his failure to file in a timely manner. Grievant cannot assert that this is a continuing violation as this was a seminal event (the transfer). Further, he was aware ofthe events giving rise to the grievance by the earliest of April 8, 2003, and the latest of July 21, 2003. His belated claim in the hearing that he had been promised that it was a temporary assignment is not supported by his actual grievance filing wherein he only states that he “did not receive a notice of his transfer.” Accordingly, Grievant has failed to demonstrate a basis to excuse his failure to file in a timely manner.

Even if Grievant's filing of his claim was timely, he now admits he did receive the notices that he claimed in his statement of grievance not to have gotten. On this basis alone, he could not prevail on the merits of his grievance, as he states no other grounds for a complaint.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievant has the burden of proving his grievance by preponderance of the evidence. Procedural Rules of the W. Va. Education & State Employees Grievance Bd., W. Va. Code St. R. § 156-1-4.21; *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (April 30, 1997). See W. Va. Code § 18-29-6. "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The employer has the burden of demonstrating an untimely filing by a preponderance of the evidence. *Casey v. Mason County Bd. of Educ.*, Docket No. 01-26- 394 (Sept. 25, 2001). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file ina timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Loudermilk v. Greenbrier County Bd. of Educ.*, Docket No. 04-13-025 (April 14, 2004).

3. An untimely filing, if proven, will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Department of Transp.*, Docket No. 97-DOH-060 (July 16, 1997); *Loudermilk*, *supra*.

4. A grievance must be 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 with fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. W. Va. Code § 18-29-4(a)(1).

5. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *Kessler v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-445 (July 28, 1997). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220 483 S.E. 2d 566 (1997). *See also Loudermilk, supra*.

6. Grievant did not file his grievance within fifteen days of the date he was unequivocally

notified of his transfer, hence his filing is untimely.

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 Nicholas 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 andState 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: August 13. 2004

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Apparently, Grievant's excellent mechanical ability would be wasted in Fenwick where there is less critical work to be done.