FRANK SABATINO,

Grievant,

v. Docket No. 04-35-231

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Frank Sabatino ("Grievant"), employed by the Ohio County Board of Education ("OCBE") as a teacher, filed a level one grievance on May 4, 2004, in which he alleged a violation of W. Va. Code § 18A-2-7 when he was transferred from Warwood Middle School to Wheeling Middle School. For relief, Grievant seeks reinstatement at Warwood, and the opportunity to obtain the required certification. At level one, M. Andy Garber, Principal of Wheeling Middle School, responded that Grievant had been transferred to a position for which he held certification, and that the grievance was not timely filed. The grievance was denied on the merits at level two, and an appeal was filed at level four on June 14, 2004, Grievant by-passing consideration at level three. A level four hearing was conducted in the Grievance Board's Wheeling office on August 5, 2004, at which time Grievant was present and represented by Owens Brown of the West Virginia Education Association, and OCBE was represented by General Counsel, Kathy M. Finsley. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 24, 2004.

The essential facts of this case are undisputed, and may be set forth as findings of fact.

Findings of Fact

1. Grievant has been employed by OCBE for thirty-one years. He received aBachelor's Degree from Ohio University in 1973, and a Master's degree from that institution in 1988. He is certified by the Ohio Department of Education to teach Developmentally Handicapped, Specific Learning Disabled, and Severe Behaviorally Handicapped, Grades K-12. Prior to 2003, Grievant's West Virginia special education certification was limited to Mentally Impaired (MI).

2. In August 2001, OCBE granted Grievant's request to transfer from a position of

Special Education (Mentally Impaired) at Wheeling Park High School to a Special Education position at Warwood Middle School. During the 2001-2002 school year Grievant held a Temporary Teaching Certificate (Reciprocity Certificate) from the West Virginia Department of Education (WVDE), with specializations in Behavior Disorders (BD), excluding Autism, and Specific Learning Disabilities (LD), K-12.

3. By letter dated February 28, 2002, Joyce O'Dell, Coordinator of Certification for the WVDE, notified Grievant that his application for an additional endorsement could not be approved because he had provided no verification that he had completed the required licensure test (Praxis test) in the specialties of learning disabilities and behavior disorders.

4. In response to an inquiry from Grievant, Dr. David Stewart, State Superintendent of Schools, reminded Grievant that by letter of March 28, 2002, that he had been advised in September 2001, it was necessary for him to successfully complete the Praxis tests to obtain endorsements in LD and BD. Because he had not passed a content licensure exam in another state, and had not taught three of the last seven years out of state in those areas of licensure, Grievant did not meet either of the exemptions for testing required to obtain additional endorsements. However, Dr. Stewart granted Grievant asecond temporary certificate endorsed for LD/BD, effective the 2002-2003 school year, to allow him the opportunity to complete the testing requirements or appeal the decision. 5. In March 2003, OCBE Superintendent Lawrence M. Miller notified Grievant by certified letter that he was being considered for transfer, effective the 2003-2004 school year. The reason stated for the recommendation was "the position to which you are currently assigned requires multiple special education certifications." Grievant acknowledges receipt of the letter, and did not file a grievance at that time.

6. Grievant did not appeal the decision of Dr. Stewart, but took the Praxis tests for LD and BD in April 2003. Grievant did not achieve a passing score on the BD content test. Grievant did not take the Praxis test administered in June 2003, because he was on vacation.

7. On April 15, 2003, OCBE approved the recommendation that Grievant be transferred. Grievant was reassigned to teach LD/MI at Wheeling Middle and Bethlehem Elementary Schools for the 2003-2004 school year.

8. By posting dated July 29, 2003, OCBE advertised a vacancy for the position of BD/LD/MI teacher at Warwood. The position was subsequently filled with an applicant who did not have the requisite certification, but holds a valid permit in the subject areas.

Discussion

Initially, OCBE contends that this grievance was not filed within the statutory time frame, and should be denied on that basis. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by apreponderance 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 time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). 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).

As to when a grievance must be filed, W. Va. Code § 18-29-4(a) 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 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.

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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 . . . .

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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery ruleof W. Va. Code § 18-29-4,

stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievant was given notice of his proposed transfer on March 11, 2003, his placement on the subsequent assignment list on April 16, 2003, and his assignment to Wheeling Middle School on July 21, 2003. Because the level one grievance was not filed until May 4, 2004, OCBE asserts that it was untimely filed. Grievant argues that he was on medical leave most of the 2003-2004 school year, but that the grievance was filed in less than ten days of his learning the individual placed in the Warwood position lacked certification.

The grievable event in this case was Grievant's transfer, which he did not contest, but now claims to be improper. The qualifications of the individual hired for Grievant's prior position is not the issue. Grievant was on notice of the recommended transfer, and should have requested a hearing in April 2003, and filed a grievance after the board of education approved the transfer. The grievance was not timely filed.

Even if the grievance had been timely filed, Grievant could not prevail on the merits of the grievance. The record confirms there may have been some confusion regarding the type of licensure held by Grievant during the 2001- 2002 and 2002-2003 school years. The evidence establishes that Grievant held a First Class Temporary Teaching Certificate, not a teaching Permit. WVDE Policy 5202, Section 14.7 addresses the Temporary Certificate, and provides in part:

A Temporary Teaching or Service Certificate may be issued to a person who has completed: 1) the minimum of a bachelor's degree or master's degree if specified in Appendix A through an accredited college or university as defined in §126-136-4.2or an equivalent degree through a college or university in a foreign country; 2) the general requirements, with the exception of citizenship, specified in §126.136-13.1; 3) the minimum grade point average specified in §126-136-13.2; and 4) the conditions for issuance identified in §126-136-14.5.3. A Temporary Certificate may be issued in the teaching or student support services specializations identified in Appendix A. The Temporary Certificate shall be endorsed to indicate the specialization(s) and grade levels in which the holder can be legally assigned within the public schools. Experience gained on the Temporary Certificate may be used for conversion purposes.

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The Temporary Teaching or Service Certificate shall be valid for one school year and shall expire on June 30. An educator who graduates in December or whose Temporary Certificate is effective on or after January 1 may be issued a Temporary Certificate valid until June 30 of the following school year.

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For the Applicant Lacking Only Tests in Pre-professional Skills, Content and/or Professional Education. - The Temporary Certificate granted to an individual who is lacking only the required test(s) in Pre-professional Skills, Content and/or Professional Education may not be renewed. The applicant must pass all required tests and upgrade the Temporary Certificate to the Provisional Professional Certificate. The required test scores are identified in Appendix B.

Emphasis added.

First Class permits, are addressed in Section 15 of Policy 5202, in pertinent part:
Initial Full-Time Permits may be issued for any specialization recognized on the Professional Teaching or Service Certificate. An initial Full-Time Permit may be granted to an individual employed for a specific assignment who has completed: 1) a minimum of a bachelor's degree through an accredited institution of higher education as defined in §126-136-4.2; 2) the general requirements specified in §126-136-13.1; 3) theminimum grade point average specified in §126-136-13.2; and 4) the conditions for issuance specified in §126-136-15.1.3.
A Permit is also valid for one school year but is renewable.
Five Year Limit. - requirements for the Professional Teaching or Service Certificate must be completed within five years of the original issuance of the Full-Time Permit. The position held by an educator issued a Full-Time Permit is not subject to posting provided the educator meets the annual renewal requirements specified in §126-136-15.2 and completes the state approved program within five years.

Grievant argues that he should have received another Temporary Teaching Certificate for

the 2003-2004 school year, and be given the same opportunity to acquire certification as his replacement who holds a First Class Permit. Policy 5202 is quite clear that a Temporary Teaching Certificate is nonrenewable, and Superintendent Stewart made an exception by giving Grievant a second Temporary Certificate due to exceptional circumstances. There is no evidence that Grievant requested, or would have been eligible for a Permit. Of course, he may still take the Praxis test for BD certification.

The following conclusions of law support the decision reached.

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 time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). 2. The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4(a)(1).

3. Grievant was aware on March 11, 2003, that he would be recommended for transfer, and was notified in April 2003, when the recommendation was approved. This grievance, filed in May 2004, was not filed within the statutory time limits.

Accordingly, the grievance is DENIED.

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

DATE: SEPTEMBER 15, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE