THELMA DAVISSON,

Grievant,

v. **Docket No. 05-21-112**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

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Thelma Davisson ("Grievant") initiated this proceeding on November 29, 2004, alleging entitlement to college credit hours obtained in an apprenticeship program. The grievance was denied at level one the same day it was filed, and Grievant did not appeal to level two until January 3, 2005. (See footnote 1) A level two hearing was conducted on February 10, 2005, and the grievance was denied in a decision dated March 21, 2005. Level three consideration was waived, and Grievant appealed to level four on April 6, 2005. A hearing was conducted in Westover, West Virginia, on June 8, 2005. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Harry M. Rubenstein. This matter became mature for consideration on June 15, 2005, the deadline for the parties' final post-hearing submissions.

The following pertinent facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by Respondent Lewis County Board of Education ("BOE") as a classroom aide. 2. In the fall of 1999, Grievant began participation in a child development apprenticeship program offered through the U.S. Department of Labor ("DOL"). This program is available only to individuals who are already working in positions where they have regular contact with young children, and these "on-the-job" hours are applied to obtaining the certification. The program requires 300 hours of classroom instruction and homework combined, along with an

additional 4000 hours of on-the-job training.

3. Grievant received approval from the BOE to participate in the apprenticeship program, and her school principal signed off on her time sheets, which were submitted to the DOL for on-the-job credit hours.

4. Grievant completed all requirements of the apprenticeship program and received her certification as of October 31, 2002.

5. Just prior to and after she completed the program, Grievant made inquiries of BOE officials and the State Department of Education regarding how she would receive credit for this program with regard to her salary as a BOE employee.

6. On March 14, 2003, Grievant was given credit for 28 college credit hours for completion of the apprenticeship program, which was added to her salary, retroactive to November 1, 2002. This was based upon the practice of West Virginia colleges which accept certificates from this program toward the earning of associate's degrees. The 300 “classroom hours” includes credit for 180 actual instructional hours, plus 120 homework hours. Therefore, based upon the state's method of allowing one credit hour for every 15hours of instruction, the 300 classroom hours entitle the individual to 20 credit hours, and an additional 8 hours of credit is given for the on-the-job training. (See footnote 2)

7. At the time Grievant's credit hours were granted, BOE officials and the State DOE did not realize that colleges gave credit for homework and on-the-job training. Pursuant to the state formula, Grievant was actually only entitled to credit for 180 hours of actual instruction time, or 12 credit hours.

8. After the credit was added to her salary, Grievant consulted with employees of the BOE's payroll office to determine how the credit was calculated. She sought additional credit for the 4000 hours of on-the-job training, but did not mention filing a grievance.

9. On November 1, 2004, Grievant appeared with her counsel before the BOE, requesting additional credit hours for her participation in the apprenticeship program.

10. In correspondence dated November 8, 2004, Monika Weldon, BOE Treasurer, explained how Grievant's 28 hours of credit were calculated, based upon the DOL and State DOE's practice of granting the equivalent credit awarded by state colleges, as explained above in Finding of Fact No. 6.

11. Grievant filed this grievance on November 29, 2004.

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 (2004); Holly v.Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

As a preliminary issue, Respondent contends that this grievance is untimely. 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). 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.

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."

Although it is clear that Grievant knew what her education credit was going to be when it was added to her salary in March of 2004, she did not file this grievance until November. Her justification for this delay is that she was seeking to have the BOE “change their minds” or have the problem “fixed” during this interim period. In Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1

(Sept. 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to W.Va. Code §18-29-1, et seq., upon denial thereof." The West Virginia Supreme Court of Appeals, in Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

There is no evidence in the instant case that any BOE official told Grievant to delay filing her grievance, nor is there any evidence that any official admitted that a mistake had been made which would be rectified. Grievant has contended, since her credit was initially awarded in March of 2004, that the credit was incorrect, but the discussions which ensued after that time only consisted of Grievant's continued insistence that there was an error and her seeking an understanding of how the credit was calculated. There is absolutely no evidence of any representation made to Grievant which should have led her to believe thatit was not yet necessary to file a grievance. Accordingly, her significant delay cannot be excused, and this grievance is untimely.

However, the undersigned does feel compelled to briefly address the underlying issue in this case. Pursuant to the provisions of W. Va. Code § 18A-4-8a, which provides that service personnel are entitled to additional monthly pay for college hours “or comparable credit obtained in a trade or vocational school as approved by the state board.” The additional pay is granted in increments according to the number of credit hours the employee holds, beginning with a minimum of 12 hours. The State Board of Education has adopted a legislative rule setting forth the requirements for receiving credit for vocational training. It has defined “approved trade, vocational, technical, business or similar institution” as “an institution approved by a state or national institutional or specialized accrediting agency or the Bureau of Apprenticeship and Training, U.S. Department of Labor.” 126 CSR 163 § 3.2. The State Board's legislative rule also requires that credit hours must be verified through an “official transcript of course work completed” or “a grade report of completed contact hours in . . . an approved trade, vocational, technical, business, or similar institution.”

Based upon the above definitions, the undersigned does not believe that Grievant's on-the-job

hours as an employee of the BOE were what was contemplated by the State Board in granting credit for “contact hours” in a graded instructional course of study. As this Grievance Board has previously held in similar cases, employees must comply with the specific mandates of the State Board's rules, and “more than on-the-job training and in service is required.” Sexton v. Boone County Bd. of Educ., Docket No. 00-03-373 (Mar.29, 2001); See Neil v. Lincoln County Bd. of Educ., Docket No. 02-22-210 (Nov. 21, 2002). The following conclusions of law support this Decision.

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).

2. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). 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).

3. A grievance must be initiated within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4(a).

4. A grievant is excused for his delay in filing a grievance when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (1989).

5. Grievant filed this grievance well beyond the fifteen-day requirement set forth in W. Va. Code § 18-29-4(a), and she has failed to provide sufficient justification for this delay.

Accordingly, this grievance is **DISMISSED** as untimely.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Lewis 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: July 27, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This was apparently due to Grievant's mistaken belief that her supervisor would file the appeal for her.

Footnote: 2

No explanation was given as to how the number 8 was arrived at as the appropriate amount of credit for the on-the-job training time.