GLENDA TUCKER,

Grievant,

v. Docket No. 05-17-121

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Glenda Tucker ("Grievant"), employed by the Harrison County Board of Education ("HCBE") as a secretary, filed a level one grievance on July 9, 2004, in which she alleged a violation of HCBE Policy 3305 when she was denied credit for prior work experience. For relief, Grievant requested that she be given the credit, back pay for June 7 - 30, 2004, and for any future employment. The grievance was denied at levels one and two, and HCBE waived consideration at level three. Grievant advanced her claim to level four on April 13, 2005. An evidentiary hearing was conducted in the Grievance Board's Westover office on June 21, 2005. Grievant was represented by Bill White of the West Virginia Education Association, and HCBE was represented by Nancy Brown, Esq., of Steptoe & Johnson. The grievance became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or before August 3, 2005.

The essential facts of this grievance are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant was first employed by HCBE as a substitute secretary on December 6, 2000. She was granted a "Continuing Contract of Employment for Substitute Service Personnel" for the school year commencing July 1, 2003. 2. Grievant was employed for an eighteen-day period under a "Probationary Contract of Employment for Service Personnel" from June 7 - 30, 2004. Grievant became a temporary, regular employee again in October 2004, when she was assigned as half-time secretary at Washington Irving Middle School.

3. Prior to working for HCBE, Grievant was employed by the West Virginia Department of

Health & Human Resources from 1971 - 1991, and the West Virginia Department of Vocational Rehabilitation from 1991 - 1993.

4. HCBE adopted Policy 3305, effective on November 5, 2003, which limited prior work experience credit to that "earned while a regular, full time employee of any public school system or the West Virginia Department of Education."

5. Prior to November 2003, HCBE granted experience credit "for state and county government service to the secretarial classifications."

6. Regularly employed secretaries who had been given credit under the former guidelines were grandfathered in under the new policy, and did not lose their experience credit for salary purposes.

7. During periods of employment as a temporary, regular employee, Grievant was not given credit for her prior work experience.

8. At level two, HCBE raised the issue of whether the grievance was timely filed.

Discussion

At the level two hearing, HCBE properly raised the issue of timeliness. This issue will be reviewed first because 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). Respondent asserts that Grievant stated on her grievance form that she was aware that she would not receive prior work experience on June 3, 2004, but did not file this grievance until July 9, 2004, well beyond the fifteen days allowed by statute. Grievant argues that the grievance was timely filed because she found she was not being paid for her experience when she received her first paycheck on June 18, 2004. She discussed the matter with her immediate supervisor on June 24, 2004, thereby completing the informal conference, and ten working days later filed the grievance on July 9, 2004.

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); Hawranick v. W. Va. Dep't of Health & Human Res., Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't

of Health & Human Res., Docket No. 96-HHR-501 (Sept. 30, 1997). 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); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv.,Docket No. 90-DHS-524 (May 14, 1991). 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 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 running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; 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); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant asserts that her grievance was timely initiated when she had an informal conference with her immediate supervisor on June 24, 2004. Given that June 20, 2004, was a state holiday, this meeting took place fourteen days after Grievant learned that she would not receive the experience credit, the grievance was pursued within the statutory time frame.

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. "The preponderance standard generally requires proof that a reasonable person would acceptas 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). Grievant argues that by denying her the prior experience credit previously granted for work with state agencies, HCBE has violated the uniformity requirement of W. Va. Code § 18A-4-5b, and engaged in discrimination. HCBE asserts that it has acted properly by separating classes of employees by a change in policy that was applied prospectively.

Grievant presents a seemingly contradictory argument regarding her right to the prior experience credit. While she asserts that she should be grandfathered in under the prior practice, she concedes that she was not entitled to the benefits of that practice until she became a regular employee. Since Grievant had not become a regular employee prior to the adoption of Policy 3305, she had no entitlement to be grandfathered.

W. Va. Code § 18A-4-5b provides in part that:

The county board of education may establish salary schedules which shall be in excess of state minimums fixed by this article.

These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.

To accept Grievant's argument would deny a board of education the opportunity to ever change a policy or practice limiting benefits to new employees. In the current cost- cutting era, that simply is not feasible. When changing a policy to limit a benefit, a board of education must be mindful of W. Va. Code § 18A-4-8(m) which states as follows:[n]o service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

To simply rescind the credit awarded to regular employees, without their consent, is

prohibited by this "non-relegation clause." See Crock v. Harrison County Board of Education, 211 W. Va. 40, 560 S.E.2d 515 (2002). HCBE Policy 3305 does not violate the non-regulation clause since it grandfathered in the employees previously granted the credit. All employees hired in regular assignments after November 2003, are granted experience credit for prior employment in other school systems or the State Department of Education. Employees who retain the previously-granted broader experience credit under the grandfather provision of the policy are exceptions to the new rule, and do not violate the uniformity requirement.

Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Because Grievant had not accrued the experience credit prior to the implementation of Policy 3305, she was not similarly-situated to those employees who were grandfathered in when the new policy was adopted, and HCBE did not engage in discrimination.

In addition to the foregoing findings of fact, the above discussion will be supplemented by the following conclusions of law.

Conclusions of Law 1. 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., Docket No. 97-DPS-018 (Mar. 31,

1997); Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995). 2. 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). 3. Grievant completed an informal conference with her immediate supervisor within fifteen days of the date she was unequivocally notified she would not receive priorexperience credit; therefore, the grievance was initiated in compliance with the time lines set forth in W. Va. Code § 18-29-4.

4. A county board of education may offer prior experience credit for salary purposes; however, "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." W. Va. Code § 18A-4-5b.

5. HCBE did not violate W. Va. Code § 18A-4-5b when it adopted a policy to be applied prospectively, and grandfathered in employees who had been given prior credit.

6. Grievant was not entitled to be grandfathered in under the old guidelines, since the work experience credit had not yet been granted to her prior to the adoption of Policy 3305.

7. Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

8. To establish a prima facie case of discrimination a grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). 9. Because Grievant had not accrued the experience credit prior to the implementation of Policy 3305, she was not similarly-situated to those employees who were grandfathered in when the new policy was

adopted, and HCBE did not engage in discrimination.

Accordingly, this grievance is hereby DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Harrison 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 7, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE