PERRY ESTEP,

Grievant,

v. **DOCKET NO. 05-40-073**

PUTNAM COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Perry Estep filed this grievance against his employer, the Putnam County Board of Education ("PCBOE" or "Respondent") on November 8, 2004, alleging violations of W. Va. Code §§ 18-29-2(a) (See footnote 1) and 18A-4-16 with regard to a teaching assignment for Saturday school. He stated, "There is a misinterpretation regarding terms and conditions of employment with regard to rotation of grievant and another teacher." Grievant stated the relief sought as: "[T]o be assigned for every Saturday students are present and any compensation and back pay due."

Having been denied at levels one and two, level three was waived by PCBOE, and by agreement of the parties, the matter was submitted to level four for consideration based on the lower-level record. Grievant was represented by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by counsel, Gregory Bailey of Bowles Rice McDavid Graff & Love, LLP. This matter became mature fordecision on March 21, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

PCBOE asserts, as it did at level two, that this grievance was not timely filed, because it was not filed within fifteen days of the date Mr. Estep was notified that the Saturday teaching assignment would be rotated between two teachers instead of having one or both teachers teach every Saturday. Mr. Estep contends the grievance was timely because he filed within fifteen days of the first Saturday he was told not to work. As discussed below, this grievance was timely filed, maintaining the vitality of

Mr. Estep's other claims. He claims that his contract for Saturday School teaching does not include any provisions for rotation of the assignment between two teachers. PCBOE asserts the contract is silent on a number of issues, and does not prohibit teacher rotation.

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. Mr. Estep is a classroom teacher employed by PCBOE at Hurricane Middle School.

2. PCBOE had run a Saturday School for the past 10 or 15 years, and in the spring of 2004 it posted one position for a Saturday School teacher for the 2004-2005 school year.

3. Mr. Estep and Jeanne Leadman applied, and both were hired. Prior to the 2004-2005 school year, only one Saturday School teacher was hired.

4. PCBOE offered Mr. Estep an extra-duty contract, which he signed, that specified the period of the assignment as the 2004-2005 school year, that the contractwould terminate at the end of the school year. Under “Minimum Hours” and “Compensation,” it simply stated, “As Per Contract.”

5. Allen Messenger, Principal of Hurricane Middle School, decided to rotate the two teachers, so each would teach every other Saturday, or when the other was unable to teach due to coaching duties. However, because Ms. Leadman was coaching the first few Saturdays of the year, Mr. Estep taught every weekend.

6. In early September, 2004, after he had signed the contract, Mr. Estep met with Principal Messenger to discuss the Saturday School assignment, and Principal Messenger informed Mr. Estep that the duties would be rotated between him and Ms. Leadman.

7. Mr. Estep objected to the arrangement and stated he should be permitted to teach every Saturday. He stated he would file a grievance the first Saturday he was not permitted to work. Mr. Estep's representative, by memorandum dated September 22, 2004, requested that Principal Messenger put the rotation plan in writing. This was never done.

8. This grievance was filed November 8, 2004.

9. Mr. Estep was told not to teach on two Saturdays. The parties have since arranged for Ms. Leadman to tutor students after school and for Mr. Estep to teach every Saturday unless he has coaching duties.

Discussion

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. (See footnote 3) The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision beingchallenged. *(See footnote 4)* 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. (See footnote 5)

Grievant was unequivocally notified by Principal Messenger in early September, 2004, that the Saturday School assignment would be rotated. Although the exact date of their meeting is not certain, it was at least prior to September 22, when Mr. Estep's representative sent a memorandum to Principal Messenger requesting that the rotation scheme be reduced to writing. Mr. Estep admitted at the level two hearing that he did not immediately file his grievance after being notified he would not teach every Saturday. He stated, “The first time I found they were going to be rotating teachers was the day before the first Saturday school.” (See footnote 6) When asked, “We have had testimony that you did not file a grievance within fifteen working days of the date you were informed that the rotation would be observed. Is that accurate?” Grievant replied “That's accurate.” (See footnote 7)

Despite the delay in filing the grievance, Mr. Estep nevertheless contends this grievance is timely because it was filed within fifteen days of the first Saturday he was not permitted to teach. What he complains of is that PCBOE essentially breached its contract with him by implementing a rotation plan that was not set out in the contract. Leaving aside for the moment a discussion of the contract's vague terms on hours to be worked and pay to be paid, Mr. Estep definitely knew that Principal Messenger planned to rotate the assignment long before he actually did. This, in contract terms, is known as an “anticipatory breach.” In *Mollohan v. Black Rock Contracting,* *(See footnote 8)* the Supreme Court of Appeals of West Virginia said this about a complainant's ability to seek redress for an anticipatory breach of contract:

> The standard rule for determining whether a party may sue for damages because of another party's anticipatory breach (or defend against a suit by the breaching party) appears in *Fayette-Kanawha Coal Co.*, 91 W. Va. at 141-142, 112 S.E. at 226.

> "It has been held frequently that the renunciation of an executory contract by one party thereto, which would excuse performance by the other, must be unequivocal and deal with the entire performance to which the contract binds the party which it is claimed has renounced the same."

See also Roehm v. Horst, 178 U.S. 1, 20 S. Ct. 780, 44 L. Ed. 953 (1900).

> So we find it well established that when an obligee sues for contract damages because of breach of contract before the time for performance is due, the anticipatory breach must be positive, absolute and unequivocal.

In other words, since Principal Messenger did not tell Grievant he planned to entirely ignore the extra-duty contract and disallow Mr. Estep from any Saturday teaching, Mr. Estep was right in waiting until what he viewed as an actual breach of the contract occurred.

Mr. Estep's arguments as to the merits of the grievance do not challenge a disciplinary action, so he bears the burden of proof. Mr. Estep's allegations must be proven by a preponderance of the evidence. (See footnote 9) His sole basis for relief is founded on the terms of his extra-duty contract with PCBOE. He correctly points out that the contract does not state he will rotate teaching duties with another teacher. As PCBOE argues, however, neither does the contract prohibit such an arrangement. In fact, the contract is silent asto which days, what hours and what pay Mr. Estep will receive, even when read in *pari materia* with the job posting.

West Virginia Code § 18A-4-16 requires employer and employee to agree on the terms and conditions of extracurricular or extra-duty employment, and to put the agreement in a written contract. It states, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval.
>
> . . .
>
> (2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.

> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.

Grievant contends there was a misinterpretation of the contract, Respondent contends there never was a complete understanding of what was expected of either party and that the contract is not complete. Mr. Estep's understanding of the contract is quite understandable: PCBOE had in the past several years hired one Saturday teacher who taught each Saturday there was students. Also, PCBOE only posted one Saturday School teacher position. Mr. Estep's belief that he was hired to teach every Saturday was reasonable, up to the point, after the contract was signed, that he was explicitly told otherwise. PCBOE, on the other hand, knew before it offered the contract to Mr. Estep that it was not complete -- the plan to rotate teachers existed before either Mr. Estep or Ms. Leadman were offered Saturday teaching jobs.

West Virginia Code § 18-29-5(b) allows for “relief found fair and equitable.” In this case, since PCBOE was the source of the confusion over the terms of the contract it offered, and knowingly offered an incomplete contract, and provided no opportunity for Mr.Estep to discuss or negotiate the questionable terms, it seems fair and equitable that he be provided the relief he seeks.

The following conclusions of law support this decision:

Conclusions of Law

1. 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).

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 § 18-29-4a. *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).

3. When a grievant anticipates that his employer will breach a contract term in the future, the time period for filing a grievance begins to run when the breach actually occurs, unless the contract is entirely repudiated. See *Mollohan v. Black Rock Contracting*, 160 W. Va. 446, 235 S.E.2d 813 (1977).

4. This grievance does not challenge a disciplinary action, so 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. "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 andHuman Res.*, 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.*

5. West Virginia Code § 18A-4-16 requires employer and employee to agree on the terms and conditions of extracurricular or extra-duty employment, and to put the agreement in a written contract.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to compensate Grievant for the two Saturdays on which he was contracted to work and work was available, but he was not permitted to work.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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.

April 1, 2005

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Since this is the statutory definition of "grievance," and not a statute that can be violated, that particular claim will not be discussed.

Footnote: 2

PCBOE declined to file additional proposals, and relied on the ones it filed at level two.

Footnote: 3

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

Footnote: 4

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).

Footnote: 5

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).

Footnote: 6

Level two transcript, p. 25.

Footnote: 7

Level two transcript, p. 29.

Footnote: 8

160 W. Va. 446, 235 S.E.2d 813 (1977).

Footnote: 9

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.