SARAH EGAN,

Grievant,

v. Docket No. 05-46-376

TAYLOR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Sarah Egan ("Grievant"), employed by the Taylor County Board of Education ("TCBE") as a teacher, filed a level one grievance on June 22, 2005, in which she alleged that she should have been allowed to transfer to a principal's position during a reduction in force. For relief, Grievant requests an administrative position held by a person with less seniority, or to be compensated as a teacher at the same rate as a principal or assistant principal. The grievance was denied at levels one and two. TCBE waived consideration at level three, and a level four appeal was filed on October 7, 2005. A hearing to supplement the lower-level record was conducted in the Grievance Board's Westover office on November 10, 2005. Grievant represented herself, and TCBE was represented by Peter J. Conley, Esq. of Siegrist & White, PLLC. The grievance became mature for decision at the conclusion of the hearing when both parties declined the opportunity to file proposed findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by TCBE for approximately fourteen years, and held the position of teaching principal at Flemington Elementary School ("FES") during the 2004-2005 school year. 2. TCBE Superintendent Jane Reynolds advised Grievant in February 2005, that due to a reduction in force of professional positions, she would likely be "bumped" from her position. There are no teaching principals employed by TCBE with less seniority than Grievant.

3. On February 23, 2005, TCBE approved Grievant's request to transfer from teaching principal at FES to a kindergarten teaching position at West Taylor Elementary School, effective the 2005-2006 school year.

4. In March 2005 Grievant was bumped from the kindergarten position by a displaced teacher with more seniority. Grievant's contract of employment was then terminated, and replaced with a half-time contract to teach kindergarten at FES. Eventually, Grievant bid into another full-time teaching position at Anna Jarvis Elementary School prior to the beginning of the school year.

5. On May 24, 2005, TCBE approved the Superintendent's recommendation that Pam Gallaher be hired as Assistant Principal at Taylor County Middle School. Grievant had applied, but was not selected, for this position.

6. Grievant advised Superintendent Reynolds on June 3, 2005, that she planned to file a grievance because she had not been allowed to bump into the position of assistant principal at Taylor County Middle School. Superintendent Reynolds responded that their meeting would serve as the informal grievance conference. Grievant did not file a level one grievance until June 22, 2005.

Discussion

Initially, TCBE argues this grievance should be dismissed because it was not timely filed. Timeliness is an affirmative defense, and the burden of proving the affirmativedefense 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). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch, supra. Because timeliness may be dispositive of the grievance, it will be addressed first.

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). However, the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), stated "W. Va. Code, 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Grievant testified at level two that she began grievance proceedings within days oflearning that Pam Gallaher had been hired by TCBE on May 24, 2005, as Assistant Principal at Taylor County Middle School. While it is true that the grievance was filed after Ms. Gallaher was hired, it was not that action which constitutes the grievable event in this case. Grievant's underlying complaint is not her nonselection for that position, but rather, that as a teaching principal she should have been permitted to bump into a position of principal or assistant principal. TCBE denied her request since it would constitute a promotion, not a lateral transfer.

It is fair to say that Grievant knew "of the facts giving rise to [her] grievance," in February when Superintendent Reynolds informed her that another teaching principal would most likely bump into her position, and suggested that she may want to bid on teaching vacancies which would allow her some control over her assignment, rather than waiting to be placed through the reduction in force process. Certainly, when she was bumped from the kindergarten position in March, Grievant was aware that she was not going to bump into a full-time administrative position. There is no evidence that Grievant's late 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." Thus, TCBE has proven that the grievance was untimely filed.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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 Taylor 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: DECEMBER 16, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE