DAN BREWER,

Grievant,

v. **DOCKET NO. 05-27-310**

MERCER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Dan Brewer filed a grievance on June 2, 2005, challenging a transfer for the 2005-2006 school year, and seeking reinstatement to a previous run.

A level four hearing was scheduled at the Grievance Board's Beckley office on October 19, 2005. Although the hearing was scheduled as a default hearing because Grievant had indicated when he appealed to level four that no level two decision had been received, Grievant had not actually claimed a default had occurred. (See footnote 1) At the hearing, the parties agreed to submit the matter for a decision on the merits, based on the lower level record, with a stipulation as to the dates of Spring Break. Grievant was represented by Ben Barkey of the West Virginia Education Association, and Respondent Mercer County Board of Education (MCBOE) was represented by counsel, John Shott. The matter became mature for decision on November 21, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

At level four, the issue is procedural: whether this grievance was timely filed. Given that it was not timely filed, as is discussed below, the merits of the case, whether MCBOE violated W. Va. Code §§ 18A-4-8b and 18-29-2, are not addressed herein.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Mr. Brewer is a School Bus Operator employed by MCBOE, and he filed a written, level one grievance on June 6, 2005, regarding a transfer for the 2005-2006 school year.

2. In its written responses at both levels one and two, Respondent asserted the grievance was untimely.

4. Grievant was placed on transfer for the 2005-2006 school year by MCBOE, and he received notification of the transfer on March 26, 2005. Prior to that time, Grievant had been notified of the proposed transfer, and he was granted a hearing before the Board on March 21, 2005. The Board decided to implement the proposed transfer on March 22, 2005.

5. Spring Break was March 28 through April 1, 2005.

6. On April 21, 2005, Mr. Barkey requested an informal conference with Grievant's immediate supervisor as the initial step in the grievance procedure.

7. Taking into account Spring Break, April 21 was the fourteenth working day after March 26.

8. After the informal conference, Grievance waited until June 6, 2005, to file a level one grievance form. This was the 31st day after the request for an informal conference.

Discussion

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 wasnot timely filed. (See footnote 2) The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 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 being challenged. (See footnote 4)

Although Grievant was earlier notified about his transfer, which prompted the previous hearing on the matter, the actual transfer decision was not made until March 22, 2005, and he did not receive unequivocal notification of the transfer until Saturday, March 26, 2005. The following week was Spring Break, and school was closed from March 28, 2005 through April 1, 2005. "Days" means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with [W. Va. Code § 18A-5-2]. (See footnote 5) Friday, April 22, 2005 was the fifteenth “Day” after March 26, 2005.

At level one, the grievance process begins with the filing of a written grievance with the Grievant's immediate supervisor, following an informal conference with the supervisor. The informal conference

must be scheduled within fifteen days after the Grievant learns of the facts giving rise to the grievance, and the written grievance must be filed within tendays after receiving the supervisor's response to the informal conference. (See footnote 6) Grievant did request the informal conference within fifteen days, but his duties at level one were not complete - he still had to file a written grievance within ten days of his supervisor's response to that conference. The record does not reflect the date of the conference, which the statute requires be held within ten days of the request. Similarly, there is no evidence in the record when Grievant received his supervisor's response the conference, but the statute requires a response within ten days of the conference.

Given that Grievant did not claim his supervisor defaulted on either of these obligations, there was a maximum of twenty days within which the time limit for filing a level one written grievance began to run, and thirty days within which the written grievance must be filed. The thirtieth day was June 3, 2005 (allowing for the Memorial Day holiday). Although the Grievance form was signed and dated by Mr. Barkey on June 2, the form indicates that Mr. Hopkins, Grievant's immediate supervisor, did not receive it until June 6 (the thirty-first day). Even making all inferences of fact in a manner most favorable to Grievant, this was outside the maximum amount of time in which the grievance should have been filed.

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. (See footnote 7) Grievant offered no excuse for his untimely filing, but instead relied on the fact that his initial request for an informal conference was timely. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *(See footnote 8)* Respondent has met its burden of proving this grievance was untimely filed, because Grievant did not complete his dual obligations for perfecting the grievance filing at level one in a timely manner. This finding therefore precludes any discussion or consideration of whether Grievant's transfer was proper.

The following conclusions of law support this discussion:

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 15 days following the occurrence of the event upon which the grievance is based, or within 15 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).

3. 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). 4. At level one, the grievance process begins with the filing of a written grievance with the Grievant's immediate supervisor, following an informal conference with the supervisor. The informal conference must be requested within fifteen days after the Grievant learns of the facts giving rise to the grievance, and the written grievance must be filed within ten days after receiving the supervisor's response to the informal conference. *See* W. Va. Code § 18-29-4(a). To make a timely filing at level one, Grievant must meet both time limits for filing.

5. Grievant did not timely file his written grievance at level one.

6. 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).

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty 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.

December 30, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Please note the revised Docket Number indicated above.

Footnote: 2

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).

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.

Footnote: 5

W. Va. Code § 18-29-2(b).

Footnote: 6

See W. Va. Code § 18-29-4(a).

Footnote: 7

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).

Footnote: 8

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).