THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

MATTHEW MILLS,

Grievant,

v. **Docket No. 06-50-180**

Janis I. Reynolds

Senior Administrative Law Judge

WAYNE COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Matthew Mills, filed this grievance on February 25, 2006, against his former employer, the Wayne County Board of Education ("WCBOE"). This grievance originally dealt with the payment of substitute teachers, but at Level IV Grievant also challenged the way long-term substitutes positions were filled. The relief sought is back pay and other benefits due and placement into a position. (See footnote 1)

A Level IV hearing was held at the Grievance Board's Charleston office on August 21, 2006. Grievant represented himself, and Respondent was represented by David Lycan, Esq. The matter became mature for decision on October 10, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

This grievance is quite confusing as Grievant has changed the focus over time, and the Statement of Grievance is poorly written and rambling. At the Level II hearing, Grievant did not make an opening statement or present any testimony or witnesses. (See footnote 2) He also had difficulty clarifying the relief sought. He testified he had filed a previous grievance on similar issues in September 2005, and he had requested that grievance be held in abeyance. Grievant presented little evidence of his qualifications to support his argument that he should have filled the identified positions.

It also appeared Grievant was grieving the amount substitutes were paid, and asserting he was discriminated against. He then stated he was grieving "all appointments for the 2003-2004, 2004-2005, and 2005-2006 school years on the grounds of discrimination . . . [and] the favoritism shown to 'permanent' substitute for the same time period." Grievant did not clarify this statement, and it was unclear how these assertions all fit together.

At the start of the Level IV hearing, the undersigned Administrative Law Judge asked Grievant to clarify his grievance, as he had not submitted his original grievance form when he appealed to Level IV. Grievant asserted his grievance was about the filling of eight, long-term, substitute positions during the 2003-2004, 2004-2005, and 2005-2006 school years. He believed several positions were filled incorrectly, and that he should havebeen hired to fill these positions. (See footnote 3) He did not mention the issues of pay for substitutes or favoritism or discrimination. As no evidence of discrimination/favoritism was presented, this issue will be deemed abandoned.

Respondent asserts this grievance is untimely, and Grievant was well aware, for several years, that other employees received 100% of their salary if they started the year in a long-term substitute position, as his wife was in one of those positions, and he wrote letters to WCBOE administrators expressing his concern about this discrepancy. Respondent also notes Grievant was well aware others were hired to fill positions in his endorsement areas, as demonstrated by his filing a grievance on this same issue (different positions) in September 2005. In the alternative, Respondent avers Grievant did not meet his burden of proof and demonstrate the positions were incorrectly filled or substitutes were paid incorrectly.

Grievant did not timely file this grievance on the issue of substitute pay. Additionally, Grievant has not met his burden of proof and established he was entitled to any of the identified positions.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant had been employed by WCBOE as a probationary substitute teacher for the past three years. He is not a certified professional educator, but workedas a substitute pursuant to a long-term, substitute permit issued by the West Virginia Department of Education. The shorthand term for Grievant's status was a "RESA Sub." Grievant has specializations in chemistry, 9-12; physics, 9-12; and mathematics, 5-12, and is to teach only these subjects and grade levels. Grievant is not employed by WCBOE for the 2006-2007 school year.

2. Until this last school year, WCBOE selected employees from the substitute list to fill positions that were vacant at the start of the school year. These positions were never posted, and the individual served in the position for the entire school year. This practice has ceased. See Mills v. Wayne County Bd. of Educ., Docket No. 06-50-451 (May 12, 2006)(Grievant's wife, a certified professional educator, grieved this practice and although her grievance was ruled untimely, the Decision addressed the incorrectness of this past practice. Grievant was his wife's representative in that case.)

3. Grievant was aware as early as mid-2004 that WCBOE paid long-term substitute teachers, who began the year in a teaching position, 100% of their salary instead of waiting the number of days specified in W. Va. Code § 18-4-7. (See written complaints authored by Grievant on June 25, 2004, and June 28, 2005. Grt. Nos. 1 & 2 at Level IV.) As of the 2006-2007 school year, Respondent has ceased to pay long-term substitutes, who start the school year in a teaching position full pay and now follows the formula outlined in W. Va. Code § 18-4-7.

4. Grievant filed a grievance on August 29, 2005, over the appointments of several teachers to fill long-term, substitute positions for which he believed he was more qualified. This previously filed grievance contained the same issues as this grievance, but about different positions. See Mills v. Wayne County Board of Education, Docket No. 06-50-234. The first grievance was placed in abeyance at Grievant's request, but it was at Level IV at the time of the hearing in this grievance. (See footnote 4) This instant grievance concerns eight, different positions over the past three school years. Grievant was asked if he wanted to consolidate these grievances, and he declined.

5. All the positions grieved by Grievant in this grievance were filled in August of each school year. One of the positions was for the 2003 - 2004 school year, three were for the 2004 - 2005 school

year, and four were for the 2005 - 2006 school year.

6. All the substitute positions identified by Grievant were filled by individuals who were at least as qualified as Grievant, and in most cases were more qualified. The positions identified were filled for the school year only, as the individuals were not certified professional educators, and therefore not entitled to continue in these positions. Many of the individuals who were in the positions were taking courses in education, working toward their certification, and/or completing certain educational requirements. Grievant, who is a chemical engineer, has never taken any educational courses. (See footnote 5) Grievant did not list his qualifications for these positions other than submitting his teaching permit.

7. Although Grievant may not have been aware who filled these specific positions, he was aware months before filing this grievance that there were other permitted individuals, similar to him, who were filling long-term substitute teaching positions. 8. Pursuant to WCBOE Policy Manual Chapter 4 A. "Professional Personnel," Section 4.02, Grievant does not possess the "Minimum Professional Requirements" to apply for a posted, professional, permanent teaching position with WCBOE, as he does not have even a "Provisional Professional Certificate." Resp. No. 2 at Level IV.

9. During the 2005 - 2006 school year, Grievant only worked as a day-to-day substitute and did not fill a substitute teaching position long enough to qualify for any additional benefits pursuant to W. Va. Code § 18-4-7. Resp. No. 1 at Level IV. During the 2003-2004 and 2004-2005 school years, Grievant did work longer than thirty days in several positions, but he never worked 133 days in any one school year. (See footnote 6)

10. During the time Grievant worked as a substitute, he received all compensation to which he was entitled pursuant to statute. Test. Grievant, Level IV Hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 accept as sufficient that a contested fact is more likely true than not."

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).I. Timeliness

At the Level II hearing, WCBOE properly raised the issue of timeliness. At Level IV Respondent asserted: 1) Grievant was aware of the difference in payment for long-term substitutes who started the school year since 2004; 2) Grievant was aware long-term substitutes were used in his areas of specializations because he filed a grievance about this issue in August 2005; and 3) Grievant did not work in a long-term substitute position during the 2005 - 2006 school year. Grievant did not file this grievance until February 25, 2006.

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). An untimely filing, if proven, will defeat agrievance, 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).

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 knew of the facts giving rise to his grievance about payment of long-term substitutes in June of 2004. He did not file this grievance until February 25, 2006. Accordingly, this portion of the grievance is untimely filed.

On the issue of filing another grievance on the filling of long-term substitute positions Grievant believed he should have received, Grievant's testimony is confusing. He states he found out about this practice at his wife's grievance hearing in February 2006, and thengrieved all appointments for the past three school years. (See footnote 7) However, he had filed a grievance about this same issue six months before. It may be Grievant meant he found out about additional positions at that time, but this is not what he said. Although this portion of the grievance appears untimely as well, and will be addressed in the other grievance, the undersigned Administrative Law Judge will address the eight positions Grievant believes he should have received.

II. Merits

As for the merits of this case, Grievant did not meet his burden of proof and demonstrate he was more qualified for these long-term, substitute positions than the individuals who received them. He did not list his qualifications, nor did he examine in any detail the qualifications of those he asserted were less qualified than he. He merely asked Dinah Ledbetter, Director of Personnel, about the people who filled each of the eight positions. In each case, she stated to the best of her knowledge why each was selected and what qualifications they had. (Ms. Ledbetter was not the Director of Personnel during the entire time period of this grievance.) Her testimony was unrebutted. While he could have been offered some of these positions, Grievant did not demonstrate any violation of any statute, policy, rule, or regulation associated with WCBOE's failure to select him to fill these positions.

Grievant asserts these positions must be posted, he is correct, and WCBOE is now taking this action. But, pursuant to WCBOE Policy, Grievant cannot receive any of theseposted positions, as he is not a certified professional educator, and, at this time, he is no longer a substitute employee of WCBOE.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2000); 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 accept as 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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. 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).

3. 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. Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002); W. Va. Code § 18-29-4(a)(1). The time period forfiling 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. Respondent met its burden of probing this grievance was untimely concerning the substitute compensation. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed." Lynch, supra.

4. Grievant did not meet his burden of proof and establish he was entitled to any of the eight

positions he identified.

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 Wayne 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.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: November 30, 2006

Footnote: 1

Grievant also asserted he would have earned the right to preferred recall if he had held these positions. Since Grievant does not have a teaching certification and can only be hired on a yearly, as needed, basis, when no certified professional educator applies for a position, he is not entitled to these benefits. It is also unclear how the undersigned Administrative Law Judge could place Grievant into a current position, as he no longer employed by WCBOE.

Footnote: 2

Although not required to do so in this case because Grievant had the burden of proof, WCBOE did present testimony and witnesses at Level II.

Footnote: 3

Grievant argued that a February 25, 1991, State Superintendent's opinion supported his assertions. Grt. No. 6 at Level IV. This assertion will not be addressed in this grievance as there was no evidence the individuals placed in the identified positions did not have the required certification or permit.

Footnote: 4

A Decision in this grievance has not yet been issued.

Footnote: 5

As explained by Dinah Ledbetter, Director of Personnel, Grievant can receive an endorsement to teach math if he has taken 12 class hours of college math, and met the other RESA requirements. For a certified professional educator to be qualified to teach math, they must have the course work, as well as classes to learn how to teach math to students.

Footnote: 6

This is the number of days is necessary to obtain a year of seniority for a certified professional educator. W. Va. Code § 18A-4-7a (7)(g).

Footnote: 7

Grievant would not be qualified to substitute in the majority of these positions.