THOMAS HOFFMAN,

Grievant,

v. **Docket No. 05-29-200**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

KEVIN HATFIELD,

Intervenor.

D E C I S I O N

Grievant, Thomas Hoffman, filed this grievance against the Mingo County Board of Education ("MCBOE" or "Board") on March 19, 2005, over his non-selection for a coaching position and asserted the position was "given to a non-teacher certified person." Relief Sought was "I wish to be awarded the Boys Basketball coach (sic) of B.H.S." Grievant also averred he "did not receive a written response from Ms. J. Hunter prin. BHS."

This grievance was waived at Level I, and denied at Level II as untimely filed. Level III was by-passed. Grievant appealed to Level IV on June 10, 2005, and a Level IV hearing was held on October 25, 2005, at the Grievance Board's office in Charleston. At Level IV, Kevin Hatfield, the successful applicant, asked to intervene, and this request was granted. This case became mature for decision on November 10, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

While Grievant agrees Intervenor has more basketball coaching experience than he, Grievant asserts he should be hired because the successful applicant was not a certified

professional educator and he is.

Respondent avers this grievance was untimely and incorrectly filed. Intervenor also asserts the grievance was untimely and incorrectly filed, but also avers Grievant should not have been allowed to rescind his request to withdraw his application for the position after the posting date. Additionally, Intervenor maintains he is a professional employee, and is the most qualified person for the position.

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

Findings of Fact

1. Grievant has been employed MCBOE for many years as a teacher and administrator. He has served in administrative position for twelve years, six years of this time was as a principal. He is currently an assistant principal at Burch Elementary, and his immediate supervisor is Principal Margaret Fletcher. He has some experience in coaching in little leagues and at the middle school level.

2. Grievant has filed at least six grievances within the past fifteen years, and he is no novice to the grievance process.

3. Intervenor has been a professional employee since March 6, 2001. He is employed as the Health and Safety Officer. While he has a Masters' degree and has met the requirements to be a substitute, he is not a professional certified educator. Intervenor played basketball in high school, attended college on a basketball scholarship, and has served as a zero compensation coach for several years. Intervenor was hired as asubstitute in November 2004, but has never been called out. At time of the selection, he was serving as the acting basketball coach.

4. The basketball coaching position at Burch High School was posted from December 7 through 13, 2004. Both Grievant and Intervenor bid on the position within the required time frame.

5. On January 4, 2005, shortly before the interviews scheduled for the position, Grievant withdrew his application.

6. On January 5, 2005, Jada Hunter, Principal of Burch High School, was told Grievant had reapplied for the position, and she was to conduct interviews. Although Principal Hunter questioned if Grievant could reapply after the posting period, she conducted the interviews and recommended Intervenor for the position, on January 6, 2005.

7. Principal Hunter had many difficulties with Grievant while he was employed as a baseball coach at Burch High School during the 2001 - 2002 and 2002 - 2003 school years. Grievant received poor evaluations which he refused to sign and was placed on an Improvement Plan, which he also refused to sign. Grievant failed to follow county policy, and the West Virginia Secondary School Activities Commission ("SSAC") rules. Testimony, Hunter; Int. Exh. 3. Grievant's performance did improve and became satisfactory, but there were still problems. Grievant resigned after the 2002 - 2003 school year.

8. On January 6, 2005, MCBOE approved Intervenor for the coaching position, and Intervenor coached his first game as Head Coach the following day. Grievant learned about this selection on January 7, 2005. 9. January 19 and 24, 2005, were snow days.

10. On February 11, 2005, Grievant mailed Principal Hunter a grievance form about his non-selection. Grievant was using a very old grievance form, but this form still indicated on the front that the Level I decision was to be issued by his immediate supervisor. (See footnote 2)

11. Principal Hunter did not respond to the grievance as she was not Grievant's immediate supervisor.

12. On February 1, 2005, Grievant had a meeting with Assistant Superintendent Randy Keathley about another grievance. During this conference, Grievant complained

Principal Hunter had not scheduled a Level I conference in response to a grievance he had filed about the Burch High School basketball position.

13. Assistant Superintendent Keathley asked Grievant why he did not file this grievance with his immediate supervisor as required, and Assistant Superintendent Keathley indicated that is what the grievance process dictates. (See footnote 3) During this meeting, Assistant Superintendent Keathley gave Grievant a copy of the proper form.

14. Grievant filed this grievance with Principal Hunter because he believed she was the individual with the authority to change the coaching decision. (See footnote 4)

15. On February 11, 2005, the same day Grievant met with Assistant Superintendent Keathley, Grievant called to schedule a conference with Principal Hunter. When Grievant met with Principal Hunter about a baseball coaching position on February 28, 2005, he talked to her about this grievance, and she indicated she had received the form, but had not responded as she was not his immediate supervisor.

16. Even though Grievant was informed he had incorrectly filed his grievance on February 11, 2005, he still waited until March 16, 2005, more than one month after this discussion with Assistant Superintendent Keathley, to file this grievance with Principal Fletcher. This time Grievant used the new and correct grievance form which states on the back that the Level I grievance is to be filed with the immediate supervisor.

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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Because the issue of timeliness could be depositive of the case, it will be addressed first.

At the Level II hearing, MCBOE properly raised the issue of timeliness. Respondent and Intervenor assert Grievant knew of the selection on January 7, 2005, is familiar withthe grievance process, and did not file this grievance with his immediate supervisor until March 16, 2005.

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 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).

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 schedulea 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). See also Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Grievant knew "of the facts giving rise to his grievance," on January 7, 2005. He mailed a grievance form to Principal Hunter on February 1, 2005, which was within fifteen days, but he clearly sent it to the wrong person as specified by the grievance form itself. He was then informed on February 11, 2005, when he complained about Principal Hunter's failure to respond, that Principal Hunter had no duty to respond as Grievant had incorrectly filed this grievance, and it should be filed with his immediate supervisor.

After receiving notice on February 11, 2005, that he had not properly filed his grievance, it appears the next thing Grievant did, on February 11, 2005, was to call Principal Hunter and ask for a meeting about the grievance. He also talked to Principal Hunter on February 28, 2005, after an interview for a baseball coaching position. At that time Principal Hunter confirmed she had received the grievance, but had taken no action. Grievant still did not file this grievance with his immediate supervisor until March 16, 2005, two months after he had notice that the position was filled and over a month after he had been told the grievance was incorrectly filed. Accordingly, this grievance was untimely filed. If Grievant had corrected his error within fifteen days of being told theproper procedure, this grievance would be timely filed. Grievant offered no excuse for his untimely filing. (See footnote 5) Given this finding, the other issues raised by

the parties will not be addressed.

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 (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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. 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).

3. 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).

4. "[W]ithin fifteen days of the date on which the event became known to the grievant . . . the grievant . . . shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought." W. Va. Code § 18-29-4(a)(1). See Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). See also 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).

5. As Grievant filed this grievance more than fifteen days after he became aware that his first grievance was incorrectly filed, this grievance is untimely filed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Mingo County. Any such appeal must be filed within thirty (30) daysof 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

ADMINISTRATIVE LAW JUDGE

Dated: January 26, 2006

Footnote: 1

Grievant was represented by Gary Archer, from the West Virginia Education Association, Intervenor was represented

by Jane Moran, Esq., and MBCOE was represented by Howard Seufer of Bowles Rice McDavid Graff and Love.

Footnote: 2

Grievant and MCBOE are directed to make sure these old forms, with the incorrect address for the Grievance Board (from ten years ago), are not used.

Footnote: 3

At Level IV, Grievant indicated he always files his grievances with the central office. This statement was false, as Grievant filed this grievance with Principal Hunter, as well as filing another grievance with her over the evaluation discussed in Finding of Fact 7.

Footnote: 4

At the Level IV hearing, when closely questioned about this, he did agree that hiring decisions were the prerogative of MCBOE.

Footnote: 5

Grievant indicated at Level IV that this grievance should be considered timely filed because a prior grievance, Hoffman v. Mingo County Board of Education, Docket No. 05- 29-104 (June 14, 2005), was considered timely. The facts in that case indicate Grievant tried to file the grievance earlier and was prevented from doing so by his immediate supervisor. That is not the case in this grievance.