GLORIA TRIPLETT,

Grievant,

v. **Docket No. 05-22-399**

LINCOLN COUNTY BOARD OF EDUCATION

and WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondents.

D E C I S I O N

Grievant, Gloria Triplett, filed this grievance against the Lincoln County Board of Education ("LCBOE" or "Board") over comments made in her observations and evaluations and requests these documents be redacted and/or removed.

This grievance was denied at Level I and granted in part at Level II. (See footnote 1) Level III was waived, and Grievant appealed to Level IV on October 28, 2005. A Level IV hearing was held on December 20, 2005, at the Grievance Board's office in Charleston. This case became mature for decision on January 23, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) 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 by LCBOE since 1993. She is currently assigned as a Title I Reading Teacher at Ranger Elementary.

2. As required, Grievant's personnel file contains observations and evaluations for the 2000 to 2004 school years completed each year by her current principal.

3. On or about February 14, 2005, Grievant and her attorney met with

Superintendent William Grizzell, perhaps as the informal conference portion of a prior grievance. (See footnote 3) Grievant requested a successfully completed Improvement Plan be removed from her file. Superintendent Grizzell agreed to the removal of this document and attachments, but it took about six months for the actual removal of the document to occur.

4. Grievant reviewed her personnel file on May 6, 2004, June 16, 2004, June 16, 2005 (twice), July 1, 2005, August 8, 2005, and August 9, 2005, and saw her prior observations and evaluations in this file. (See footnote 4) She had seen these prior observations andevaluations, at issue in this grievance, when she met with her principal, Chris Baker, to discuss them, shortly after they were completed. She had added addendums to the documents as she saw fit and noted her disagreement with many of Principal Baker's assessments.

5. In August 2005, Grievant asked Superintendent Grizzell to remove additional documents, and he refused. 6. At Level IV, Grievant requested the following, additional documents be removed and/or redacted: 1) observation of April 10, 2003; 2) evaluation of May 29, 2003; and 3) observation of January 13, 2004, as they are false, contain negative comments, are intentionally vague, and/or infer prior negative performance.

7. The observation of April 10, 2003, was during Grievant's lunch duty, and Principal Baker noted Grievant spent her time with a parent and grandparent, instead of assisting the students as she was required to do. Principal Baker's observation noted he had been informed Grievant had been discussing a violation of SAT 9 testing procedures with these non-employees, as well as acknowledging Grievant's neglect of her lunch duties. (See footnote 5) Principal Baker sent Grievant a copy of this observation, and Grievant reviewed it, but she would not sign it. She also refused to concede to Principal Baker's request to discuss the lunch room incident. (See footnote 6) Resp. Nos. 2, 3, 4, 5, 6, & 7 at Level IV.

8. The evaluation of May 29, 2003, noted Grievant had problems in the areas of "Communication" and "Professional Work Habits." The problems observed on April 10, 2003, that Grievant refused to talk to Principal Baker about, were also noted. Additionally, Principal Baker noted Grievant sent unauthorized registered mail to several parents, and basically refused to accept the responsibility for teaching two children who were havingsevere learning problems. (See footnote 7) Grievant also did not want to follow Principal Baker's directive to refer these students for possible assessment for special education, as this would be a stigma. (Grievant, as the Title I Reading teacher, is the one assigned to assist students with these types of difficulties. Another Title I teacher agreed to tutor the students after school.) Test. Baker & Grizzell; Resp. No. 1 at Level IV.

9. Grievant received a copy of this evaluation on June 10, 2003, and attached an addendum indicating she did not agree with the evaluation as it contained false statements.

10. Grievant received the January 13, 2004 observation on January 19, 2004, when she and Principal Baker met to discuss the observation. All areas were rated as satisfactory, but Grievant took issue with Principal Baker's comment under "Identified Deficiencies and Recommendation" that said, "None noted at this observation." This statement is correct, but Grievant believed, as stated in her Addendum and testimony, that these statements were intentionally vague, showed biased, and inferred past problems.

11. Principal Baker is currently employed by another board of education.

12. On August 19, 2005, Grievant filed this grievance asking for the removal of documents dating from 2001 - 2004. Grievant provided no reason for her delay in filing thisgrievance, and when asked at the Level IV hearing why she did not file sooner she stated, "I'm sure I should have."

13. The issue that this grievance was not timely filed was asserted by LCBOE at

the Level II hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

At the Level II hearing, LCBOE properly raised the issue of timeliness. Respondent noted Grievant's own signature and statements established Grievant was aware of the April 10, 2003 observation, the May 29, 2003 evaluation, and the January 13, 2004 observation either on the day of the event or a few days shortly thereafter. Grievant did not file this grievance until August 19, 2005, over a year and a half after the last event.

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 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 her grievance and was unequivocally notified at the time of each observation and evaluation. The documents Grievant wanted redacted and/or removed were dated April 10, 2003, May 29, 2003, and January 13, 2004. She did not file this grievance until August 19, 2005. Accordingly, this grievance

was untimely filed.

Grievant may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham, supra. Grievant's excuse, offered in her post hearing proposals, was the following statement:

> This grievance should be deemed timely based on the totality of the evidence before the Grievance Board. Superintendent Grizzell agreed to remove the improvement plan that was improperly placed in the grievant's file. It took several months for the documents to be removed. However, after the improvement plan documents were removed during the first week of August 2005, the Grievant had a basis for removing all related documents. After she made a request of Mr. Grizzell to remove the other items in her permanent file, which were objectionable, he refused. Based on that refusal this grievance was initiated on August 19, 2005.

There are several problems with this explanation for untimely filing. First and foremost, when Grievant filed the first "grievance" in February 2005, it was untimely, but Superintendent Grizzell, in the interest of keeping the peace, agreed to the removal of Grievant's Improvement Plan and an attachment about the Improvement Plan. Second, since Grievant was clearly aware of the documents in her personnel file and had copies of these observations and evaluations, there was no reason not to ask for the removal ofall documents she found objectionable at the same time. Third, not all the statements on the observations and evaluation were the subject of Grievant's Improvement Plan, which dealt only with the testing issue. Finally, Grievant's assertions are attempts to bootstrap her request for the removal of more documents to a prior agreement dealing with a specific issue.

Grievant's excuse is not really an excuse and her explanation cannot overcome the fact that she knew of the events comprising this grievance and did not file until 1½ to 2½ years after the events occurred. The reason offered does not demonstrate a proper basis to excuse her failure to file in a timely manner.

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

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving her case by a preponderance of the evidence." Baker v. Fayette County Bd. of Educ., Docket No. 94-10- 427 (Jan. 24, 1995).

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. Grievant did not offer a proper basis to excuse her failure to file in a timely manner. Higginbotham, supra.

6. As Grievant filed this grievance more than fifteen days, and in actuality 1½ to 2½ years, from the last event giving rise to this grievance, 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 Lincoln 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

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2006

Footnote: 1

At Level II, additional documents were removed, and the parties agreed that the X's on the Fall of 2003 evaluation, placed between "Unsatisfactory" and "Meets expectations" should be placed as "Meets expectations." Grievant also sought the removal of a 2001 evaluation stating the signature of the principal was forged, indicating she had a copy of the original at home and would bring it to the Level IV hearing. This issue was not mentioned during the Level IV hearing and is deemed abandoned.

Footnote: 2

Grievant was represented by Katherine Dooley, Esq., LCBOE was represented by Rebecca Tinder, Esq. of Bowles Rice McDavid Graff and Love, and the West Virginia Department of Education ("DOE") was represented by Heather Deskins, Esq. DOE intervened in the operations of the Lincoln County Board of Education, limiting its authority.

Footnote: 3

Superintendent Grizzell did not view the meeting as an informal conference portion of the grievance procedure, as he was not Grievant's immediate supervisor, but saw the meeting as an attempt to resolve an issue and "keep the peace." Grievant's attorney viewed the meeting as an informal conference.

Footnote: 4

Grievant may have reviewed her personnel file before this time, but previously LCBOE had no sign in sheets for viewing these files.

Footnote: 5

Principal Baker conducted an investigation of this issue and did not find a testing violation, but did find miscommunication and misunderstanding on the part of the parents and grandparent. Interestingly, Grievant did testify she had been told by the students of possible testing irregularities, but did not report these concerns to Principal Baker or anyone else. Resp. Nos. 2, 3, 4, 5, 6, & 7 at Level IV.

Footnote: 6

At the Level IV hearing, approximately three years later, Grievant produced witnesses to contradict the statements in this observation in support of her request for removal of documents.

Footnote: 7

Grievant disagrees that she refused to teach these students. Her statement in the letter to Principal Baker stated she, "I assume no liability, for the past, present, or future, for the said mentioned student's failure to be placed in the appropriate reading group to best serve his particular needs." Superintendent Grizzell testified that Grievant, as the Title I teacher, was the "additional help provided to students with extra needs. Additionally, although Grievant noted she was willing to have an additional reading group if that could be arranged, this was not a possibility.