ROCHELLE HATCHER,

Grievant,

v. **Docket No. 05-41-389**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Rochelle Hatcher ("Grievant"), employed by the Raleigh County Board of Education ("RCBE") as a substitute teacher, filed a level one grievance on July 5, 2005, alleging a violation of W. Va. Code § 18A-4-7a, when she was not selected to fill the position of NCLB Title I teacher at the Alternative Education Center. For relief, she requested placement in the Title I position, back pay, and benefits. The grievance was denied at levels one and two, and RCBE waived consideration at level three. Upon appeal to level four, Grievant's WVEA representative Ben Barkey, and RCBE Superintendent, Dr. Charlotte Hutchens, agreed to submit the grievance for decision based upon the lower-level record. Proposed findings of fact and conclusions of law were filed by Grievant on December 15, 2005, while RCBE reaffirmed the findings/conclusions of the level two decision. The grievance was assigned to the undersigned on January 10, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the level two record.

Findings of Fact

1. Grievant has been employed by RCBE as a substitute teacher since January 2000, and has applied for a number of regular positions since that time.

2. By posting dated November 15, 2004, RCBE advertised a vacancy for the position of NCLB [No Child Left Behind] Title I teaching position at the AlternativeEducation Center ("AEC"). Remedial Reading authorization, or Reading Specialist Certification, was required.

3. Four individuals, including Grievant, applied for the Title I position. After the only certified applicant declined the position, and a second applicant accepted another position, only Grievant and Billie Jo Vandall were interviewed for the position. Neither applicant held

Reading Specialist certification.

4. Billie Jo Vandall was approved by RCBE for the position, effective December 10, 2004. Ms. Vandall was removed from the position by board action on February 8, 2005, after it was notified that the West Virginia Department of Education found her ineligible to receive a teaching permit for Reading.

5. Although Ms. Vandall was removed from the position effective January 31, 2005, AEC Principal Jeff McClung allowed her to remain in the position as a substitute for the remainder of the school year. This decision was based on the fact that the Title I position at the AEC was to be terminated at the end of the year, and a need for continuity of services.

6. At the level two hearing, RCBE properly raised the issue of whether the grievance was timely filed.

7. Grievant learned of the facts giving rise to this grievance on May 13, 2005, and filed the level one grievance on July 5, 2005.

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 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. 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 only learned that Ms. Vandall had been hired by RCBE when she substituted at the AEC in May 2005. While Grievant did not recall the exact date in May, Administration Exhibit #3, the computer printout of substitute activity report, indicates that she worked at the AEC on May 13, 2005. It is fair to say that because Grievant had been employed as a substitute and had applied for a number of positions over a four-year period, she knew prior to May 13, 2005, that she had not been selected for the Title I position. Therefore, a claim that she was more qualified than Ms. Vandall, and should have been hired in December, is clearly untimely. However, it appears Grievant's learning that Ms. Vandall had been removed from the position, but allowed to remain as a substitute, gave rise to this grievance. Grievant still delayed in filing this grievance for nearly two months. Grievant offers no reason for the delay, and there is no evidence that the late filing was the result of any action by the employer. Thus, RCBE has proven that the grievance was untimely filed. (See footnote 1) **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. Timeliness is an affirmative defense; thus, the burden of proof rests upon the respondent to show by a preponderance of the evidence that 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. A grievance must be initiated 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. W. Va. Code § 18-29-4(a). 3. 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). Accordingly, the statutory time frame contains a discovery rule exception, in which the time to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

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, supra.

5. Allowing Grievant's discovery of certain facts on May 13, 2005, to start the statutory time frames, this grievance was filed well beyond the fifteen-day requirement set forth in W. Va. Code § 18-29-4(a), and Grievant has failed to provide justification for the delay.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Raleigh 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 byW.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: JANUARY 24, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

[2]In any case, Grievant offered no evidence that she would have been entitled to the substitute position created when Ms. Vandall was removed as a regular employee.