THE WEST VIRGINIA EDUCATION & STATE EMPLOYEES GRIEVANCE BOARD

SCOTT HENNEN,

Grievant,

v. **Docket No.06-52-273**

Sue Keller

Senior Administrative Law Judge

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Scott Hennen ("Grievant"), employed by the Wetzel County Board of Education ("WCBE") as a Mechanic, filed a level one grievance on May 24, 2006, in which he alleged violations of *W. Va. Code* §§ 18A-4-8b and 18A-4-15, when a position of regular, full-time bus operator had been filled by a substitute for more than twenty days. Grievant stated no requested relief. The grievance was denied at levels one and two. Grievant waived consideration at level three, and filed an appeal to level four on August 10, 2006. Grievant's counsel, Eric Gordon, and WCBE counsel Kimberly Croyle of Bowles, Rice, McDavid, Graff & Love, PLLC, agreed to submit the grievance for decision based on the lower-level record. The grievance became mature for decision on October 31, 2006, the due date for filing proposed findings of fact and conclusions of law. (See footnote 1)

The following facts have been derived from a preponderance of the evidence admitted into the record at level two.

Findings of Fact

1. Grievant has been employed by WCBE as a Mechanic for approximately four and one-half years. Prior to his employment as a regular, full-time Mechanic, Grievant had been employed by WCBE as a substitute Bus Operator for three years.

2. By posting dated August 15, 2005, WCBE advertised the position vacancy for "Extra-

Curricular/Shuttle Bus Run [for each attendance area: Riverfront, Hundred, or Short Line]." Notwithstanding the wording of the posting, there were numerous shuttle run assignments to be filled. Qualifications for the position included that the applicant be "presently employed as a regular bus operator in Wetzel County." Compensation was stated to be $40 per day for a full-day run, and $20 for a partial day.

3. The shuttle run in question leaves the PRT center at 2:30 p.m., and arrives at Magnolia High School between 3:00 and 3:15 p.m.

4. Because no regular bus operator whose schedule accommodated this run bid on the position, it has been filled by substitute employees.

5. Grievant had been aware of this situation for approximately two years prior to filing this grievance.

6. WCBE raised the issue of whether the grievance was timely filed at the level two hearing.

Discussion

Grievant argues that because the assignment extended approximately four and one- half hours daily, with pre-and post-trip inspections, WCBE was required to post it as a regular, full-time position. Grievant additionally argues that the application for the position was improperly limited to regular drivers. WCBE asserts that Grievant has known thatsubstitute employees are assigned to the run for at least two years, therefore, the grievance is untimely filed. WCBE further argues that when regular bus operators choose not to bid on extracurricular assignments, using substitute employees is permissible.

As a preliminary issue, WCBE contends that this grievance is untimely. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If WCBE meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997). 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).

The statutory time lines for filing a grievance are provided in *W. Va. Code* § 18-29-4(a), which provides in 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.

* * * * * *

Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

By his own admission, Grievant had been aware of this practice for at least two years prior to filing this grievance, and offered no explanation for the delay in filing this grievance. Accordingly, the filing of the grievance is untimely. (See footnote 2)

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. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If WCBE meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997).

2. A grievance must be initiated by an employee 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. Because Grievant had been aware of WCBE's use of substitute employees for at least two years, and offered no explanation for the delay, this grievance is untimely filed.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Wetzel 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.

DATE: NOVEMBER 14, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Neither party elected to file proposals.

Footnote: 2

Although it is unnecessary to address the merits of the grievance, it is noted that Grievant stated he was unaware that the run had been posted. He appears to assert that the a.m. and p.m. runs should be posted as one, full-time regular position; however, he did not state he had any interest in the position. Grievant is basically asking for an advisory opinion from this Grievance Board as to whether the a.m. and p.m. runs should be posted as one regular position. The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory. Champ v. Pendleton County Bd. of Educ., Docket No. 01-36-419R (July 14, 2003).