THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

EVELYN DOLIN,

Grievant,

v.

DOCKET NO. 07-13-013

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

This grievance was filed on December 6, 2006 by Grievant, Evelyn Dolin, Her statement of grievance reads:

> **State Codes**
>
> **18A-2-7** No due process - Mr. Callison, Greenbrier County Board of Education Personnel Director, informed me at White Sulphur Elementary School on Thursday, September 7, 2006, that I was to report to Lewisburg Elementary School on Wednesday, September 13, 2006. Transfer was completed without approval of Board of Education Directors and Superintendent of School[s]. The needs for Aides are at White Sulphur Elementary School as well as Lewisburg Elementary School. I was placed in a new position that had not been posted and it is still not posted. Aide Position at WSS that I was in was filled by 2 substitute aides for a short while because of child's behavior and now another aide has been hired for the position. I had asked for help for 2 years for the child's safety and educational needs, and was never given any assistance.

> **18A-4-8b** Evaluated by principal and renewed for employment at White Sulphur Elementary in June 2006. I was placed in a Special Education Classroom Position at Lewisburg Elementary School that was not posted and today, December 6, 2006, it still hasn't been posted. One Special Education Aide with less seniority was left at White Sulphur Elementary School.

> **18A-4-8a** On September 13, 2006, I was placed at LES in the Special Education Classroom and then On October 24, 2006, I was placed with an autistic child at LES and was told it was for 30 days, but as of today, December 6, 2006 it hasn't been posted at the Board of Education Office.

> **18A-4-8, 8a, 8b**

> Effective July 1, 1996, Section 8 B - Employee that holds an aide title and becomes employed as an autism mentor, the employee shall hold a multi- class statuses that includes aide and autism mentor titles, in accordance with Section 8-B of the article.

The relief sought by Grievant is “[p]lacement back at home school (White Sulphur Elementary) in a different position than the Autism Mentor Position.”

On December 18, 2006, Grievant's supervisor responded to the grievance in writing, stating she was without authority to grant the relief requested. Grievant appealed to Level II, where a hearing was held on December 22, 2006. A Level II decision denying the grievance was issued on January 4, 2007. Respondent waived Level III, and Grievant appealed to Level IV on January 17, 2007. A Level IV hearing was held before Chief Administrative Law Judge M. Paul Marteney on March 15, 2007, in the Grievance Board's Beckley office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Erwin L. Conrad, Esquire. This matter became mature for decision on April 16, 2007, the deadline for submission of Proposed Findings of Fact and Conclusions of Law, which Grievant declined to submit. Administrative Law Judge Marteney resigned his employment with the Grievance Board shortly thereafter, and this matter was reassigned to the undersigned Administrative Law Judge on October 26, 2007. (See footnote 1)

Synopsis

Respondent argued at Levels II and IV that this grievance should be dismissed as untimely filed, as the grievable event was known to Grievant on September 12, 2006, but she did not file this grievance until December 6, 2006. Alternatively, Respondent argued that as an Itinerant Aide,

Grievant could be reassigned at any time as the need arose. Grievant responded that she had tried to resolve this grievance in an informal manner, contacting various people, including the President of the Greenbrier County Board of Education, and finally appearing before the Greenbrier County Board of Education. She argued she had 15 days from the date she realized the Greenbrier County Board of Education was not going to take action to file this grievance.

This grievance was filed well past the statutory timelines for such a filing. No one ever represented to Grievant that the Greenbrier County Board of Education would try to resolve this matter. She had no reason to delay filing her grievance. This grievance is dismissed as untimely filed.

The following Findings of Fact are made based upon a preponderance of the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Greenbrier County Board of Education ("GBOE") as an Itinerant Supervisory Classroom/Bus Aide III/Autism Mentor. 2. At the beginning of the 2006-2007 school year, Grievant was assigned to an Aide position at White Sulphur Elementary School. Her assignment was to assist an autistic student at the school. She had held this assignment since 2002.

3. By letter dated September 12, 2006, Grievant was notified that she would be assigned to Lewisburg Elementary School effective September 13, 2006. The letter states, "[t]his relocation is due to your expressed concerns for student and your personal safety." GBOE's Personnel Director, Charlie Callison, and Special Education Director, Linda Nelson, met with Grievant at White Sulphur Elementary School on September 12, 2006, and told her she would be reassigned to Lewisburg Elementary School effective September 13, 2006.

4. Grievant was not happy that her location had been changed. Grievant contacted Sue King, President of GBOE sometime during the Fall of 2006. Ms. King told Grievant that she might want to take the issue to the Board at a meeting. Grievant did appear before GBOE sometime during the Fall of 2006.

5. This grievance was filed at Level I by Grievant on December 6, 2006. The record does not reflect that Grievant ever requested an informal conference.

Discussion

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 the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dept. ofTransp.*, 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. Dept. of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

As to when a grievance must be filed, *W. Va. Code* § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. *W. Va. Code* § 18-29-4(a) 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.
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> . . . . . .
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> 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 . . . .

Only working days are counted in determining when the time period runs for filing a grievance. Holidays are not counted. *W. Va. Code* § 18-29-2(b).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, 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). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of *W. Va. Code* § 18-29-4, stating "the time in which to

invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

This grievance challenges the reassignment of Grievant from White Sulphur Elementary School to Lewisburg Elementary School. This is the grievable event. Grievant was notified on September 12, 2006, that she was being reassigned, and that the reassignment would be effective the following day. She did not file a grievance until December 6, 2006. Respondent has demonstrated that this grievance was not filed in a timely manner.

At the Level IV hearing, Grievant argued that she was trying to resolve this matter informally by going to the Board of Education President and then to the full Board, and that she had 15 days from the time she realized GBOE was not going to take any action to file a grievance. She did not indicate what event had occurred which led her to the conclusion that the Board was not going to take action.

In *Steele v. Wayne County Board of Education*, Docket No. 50-87-062-1 (September 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to *W.Va. Code* §18-29-1, *et seq*., upon denial thereof." The Supreme Court of Appeals of West Virginia, in *Naylor*, *supra*, defined the types of representationsmade by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only 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."

There is no evidence that any GBOE official ever made any type of representation to Grievant regarding her complaint. Grievant has argued that she was misunderstood and she should not have been reassigned to a different school, “but the discussions which ensued after that time only consisted of Grievant's continued insistence that there was an error.” *Davisson v. Lewis County Bd. of Educ.*, Docket No. 05-21-112 (July 27, 2005). The delay in filing the grievance cannot be excused. *Id*.

The following Conclusions of Law support the Dismissal of this grievance.

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 the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dept. 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. Dept. of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001). 2. In a grievance involving an education employee, the grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. *W. Va. Code* § 18-29-4a.

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Harvey*, *supra*; *Kessler*, *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).

4. The event upon which this grievance is based is the reassignment of Grievant to a different school. Grievant was notified of her reassignment on September 12, 2006. Grievant knew of the events giving rise to the grievance on September 12, 2006, but did not request an informal conference or file a grievance within 15 working days of that date. The grievance was not timely filed.

5. “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*, 378 S.E.2d 843 (1989).” *Davisson v. Lewis County Bd. of Educ.*, Docket No. 05-21-112 (July 27, 2005).

6. No representative of GBOE made any statements to Grievant or took any other action that should have caused her to delay filing this grievance. Grievant did not provide justification for her delay in filing this grievance.

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days

of receipt of this decision. W. Va. Code § 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: November 28, 2007

Footnote: 1

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes andrules, which continue to control the proceedings in this case.