WEST VIRGINIA PUBLIC EMPLOYEE GRIEVANCE BOARD

AVERY RAY BAILEY,

Grievant,

v.

Docket No. 07-33-399

MCDOWELL COUNTY BOARD OF EDUCATION,

and WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondents.

DECISION

Avery Ray Bailey ("Grievant") grieves the 2002 decision of Respondents West Virginia Department of Education ("WVDOE") and McDowell County Board of Education ("BOE") selecting Suzette G. Cook to the position of Assistant Superintendent of McDowell County Schools. The grievance in this matter was filed on June 8, 2007. (See footnote 1) The Statement of Grievance provides that

> [t]he McDowell County Board of Education violated West Virginia Code 18A- 4-7a when it hired an assistant superintendent who did not possess the requisite certification and licensure.

As relief, Grievant seeks "[i]nstatement to the position, back-pay and benefits." The grievance was denied at Level One and Level Two. A Level Three hearing was waived byall parties.

At Level Four, the Grievant is represented by Ben Barkey with the West Virginia Educational Association. Respondent BOE appears by and through its counsel, Kathryn R. Bayless, Esquire. The WVDOE appears by and through its counsel, Heather L. Deskins, Esquire. (See footnote 2) The parties agreed that a decision on this grievance could be made on the lower level record and any

additional testimony would be redundant. August 8, 2008, *Order Reflecting Telephone Conference*.

This grievance was reassigned to the undersigned Administrative Law Judge (ALJ) for administrative reasons. The matter became mature for consideration on or about September 15, 2008, the date proposed findings of fact and conclusions of law were due. All parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant alleges that the WVDOE erred when it failed to select him for the position of Assistant Superintendent in 2002. Grievant claims that the WVDOE hired an individual without the proper certification or licensure. (See footnote 3)

Respondents argue that this grievance was not timely filed because the Grievant knew or should have known of the grievable event at the time of the 2002 hiring. Respondents further argue that there was no requirement that an Assistant Superintendent hold a particular certification or licensure. This grievance, as filed in 2007, was not timely filed as the Grievant knew or should have known of the grievable event in 2002. The merits of this grievance need not be reached. For the reasons set forth below, this grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. The Grievant, Avery Ray Bailey, is currently employed as an elementary school principal at Iaeger Elementary in McDowell County, West Virginia. Mr. Bailey was employed by the BOE from 1967 through 1975. After a stint in private industry, Grievant was re-employed by the BOE in 2000. Grievant holds a certification for “Superintendent,” which he obtained in 1987. (See footnote 4)

2. The WVDOE intervened into the operation of McDowell County Schools in approximately November, 2001, and took over the operations of finance, facility and personnel matters.

3. Shortly after the WVDOE intervention, in the spring of 2002, the BOE/WVDOE posted a position for Assistant Superintendent of Schools. Grievant, along with several other applicants, applied for the position. In the spring of 2002, (See footnote 5) Grievant was unequivocally informed that he did not receive the position of Assistant Superintendent.

4. Suzette G. Cook was hired as Assistant Superintendent of McDowell County inthe spring of

2002. (See footnote 6) Effective July 1, 2002, Suzette G. Cook obtained a First Class Permit (See footnote 7) with the specialization of “Superintendent Major K-12." Ms. Cook received Professional Administrative Certificates endorsed for both Superintendent and Supervisor General Instruction, effective July 1, 2005. These certificates were endorsed on December 12, 2003.

5. In May of 2007, Ms. Cook assumed the position of Superintendent of McDowell County Schools.

6. Grievant made no inquiry into or effort to determine Ms. Cook's certification prior to filing this grievance. September 11, 2007, *Level Two Transcript*, 11.

Discussion

Respondents assert this grievance should be dismissed because it was not timely filed. The burden of proof is on a respondent to prove the affirmative defense of untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets its burden ofproof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timeliness. *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 and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH- 060 (July 16, 1997). West Virginia Code § 18-29-3(a) states that:

> 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. West Virginia 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.

(Emphasis added). “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). In this grievance, there is no argument that the Grievant's delay was a result of “deliberate design”or caused by the Respondents. *Id*. Rather, the Grievant maintains that he heard rumors that Ms. Cook did not have the appropriate certificate/license and decided to file a grievance.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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). When discussing the discovery rule of West Virginia Code § 18-29-4, the West Virginia Supreme Court, in Syllabus Point 1 of *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), stated that "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." (See footnote 8) This grievance is untimely because it was not filed within fifteen days of Mr. Bailey being denied the position of Assistant Superintendent. He should have known of the facts giving rise to this grievance well before June 8, 2007.

Unjustified ignorance of the facts is insufficient to toll the required time period for filing a grievance. In *Strader v. Monongalia County Board of Education*, Docket No. 05-30- 114 (Aug. 19, 2005), a bus operator filed a grievance alleging that she should have been paid additional monies for extra-duty bus runs she previously made. She filed the grievance one year after she received her final paycheck because she overheard aconversation between co-workers discussing a statute she believed entitled her to more compensation. The *Strader* ALJ dismissed the grievance for untimeliness, recognizing that ignorance of the *law* is not a valid excuse for untimely filing. *See also Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991)(ignorance of the grievance procedure is not a valid excuse to toll the filing requirement). The underlying axiom of *Strader* is that a grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event. *Compare Kiger v. Monongalia County Bd. of Educ.*, Docket No. 05-30-062 (May 31, 2005)(finding a grievance

timely where grievant made inquiries concerning her paycheck in mid-August, received an answer to her inquires in October, and filed a grievance in November). (See footnote 9)

Where there is no evidence establishing justified (See footnote 10) delay, the date of the incident must be examined to determine if the statutory fifteen day requirement has been met. The grievable event occurred in 2002. In the spring of 2002, Grievant applied for the position of Assistant Superintendent of Schools. He was not chosen for the position. Instead, Ms. Cook was selected. Approximately five years later, Mr. Bailey heard rumors that Ms. Cook did not have the appropriate certificate/licence to receive the position. The Grievant does not allege fraud. He simply avers that after hearing rumors, he decided to file a grievance. The grievable event in this case was the Respondents' failure to hire Mr. Bailey in 2002. Mr. Bailey knew or should have known of the alleged certification/licensure issue at this time. Certifications/licenses are public record and some quantum of diligence must be exercised by a Grievant who wishes to challenge his non-selection. The Respondents have met their burden and established, by a preponderance of the evidence, that the grievance was not timely filed. The Grievant has not offered a viable explanation for his untimely filing. He should have known or inquired into the underlying facts if he wanted to challenge his non-selection in 2002.

Given this grievance was not timely filed, the merits need not be addressed. However, upon cursory review of the facts, the grievant still should not prevail. The 2002 filling of the Assistant Superintendent position is not directly guided by West Virginia Code § 18A-4-7a because the BOE was taken over by the WVDOE. West Virginia Code § 18- 2E-5(p) specifically grants the power to fill the positions of administrators and principals in school systems under State intervention to the State Superintendent. Furthermore, West Virginia Code §18-2E-5 indicates this authority is not subject to West Virginia Code §§ 18A-4-1, *et seq*. *See Mahone v. Mingo County Bd. of Educ*., Docket No. 07-29-126 (April 25, 2008).

The actions of the State Superintendent shall stand unless they are found to be arbitrary and capricious. “An action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16,

1996)." *Trimboli v. Dep't ofHealth and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads*, *supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01- 20-470 (Oct. 29, 2001).

In this case, the evidence presented by the Grievant is scant. Grievant has provided several of his certifications. There is no direct evidence of the specific requirements contained within the 2002 job posting for Assistant Superintendent. The precise dates of the posting, hiring and the date Ms. Cook began the duties of the position are not established in the record. Nor was it established that Mr. Bailey would have been offered the position had Ms. Cook not been selected.

The burden is upon the Grievant to prove that the WVDOE's selection of Ms. Cook was arbitrary and capricious. It is not the province of this tribunal to assume facts that were not presented into evidence. *See generally Board of Educ. of Mercer v. Townsend*, 207 W. Va. 285, 531 S.E.2d 664 (2000) (*per curiam*); *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993). The Grievant has not met his burden.

In summation, this grievance was not timely filed. The Grievant knew of the grievable event in 2002. The Grievant has not presented an appropriate reason to excuse the untimely filing and the evidence indicates the matter was filed untimely because of the Grievant's own neglect. The following Conclusions of Law support the decision reached.

Conclusions of La

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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 timeliness. *Kessler v. W. Va. Dept. of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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).

3. This grievance, filed nearly five years after the hiring decision at issue, is untimely. In the spring of 2002, the Grievant was unequivocally informed that he was not selected for the position of Assistant Superintendent. He has not presented a viable reason why his five year delay in filing should be excused.

Accordingly, this grievance is **DENIED**.

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. *See* W.Va. Code § 18-29-7 (repealed). *See* Footnote 1*, supra*. Neither the West 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 alsoprovide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 24, 2008

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Mark Barney

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, 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, which continue to control the proceedings in this case.

Footnote: 2

The WVDOE was joined as an "indispensable party" by an Order of Joinder and Order of Continuance dated April 10, 2008.

Footnote: 3

Throughout this Decision, certification and license are used interchangeably. Technically, certification is a category of license. See generally 126 C.S.R. § 136.5

Footnote: 4

Mr. Bailey holds several administrative professional certifications with endorsements for principal elementary/junior high, supervisor general instruction, middle/junior/ senior high school principal and vocational administration. His highest degree earned is a masters degree and he is in the "masters degree plus 45" salary classification.

Footnote: 5

The exact date is not established in the record.

Footnote: 6

The exact date Ms. Cook accepted the position is not established in the record. Likewise, the date upon which Ms. Cook began the duties of Assistant Superintendent was not established. Ms. Cook holds numerous authorizations and certifications. She has professional administrative certifications with endorsements for "supervisor general instruction" and principal. She holds professional teaching certificates in mathematics and "multi-subjects." She holds permanent authorizations with endorsements for remedial reading. Ms. Cook holds a masters degree and is in the "masters degree plus 45" salary class.

Footnote: 7

A "permit" is a category of "license." 126 C.S.R. § 136.5. "The permit may be issued to an individual who does not meet the requirements for the Professional or Career/ Technical Education Certificate, but who has been determined by the County Superintendent to be the most qualified applicant for the position." 126 C.S.R. § 136.5.6.

Footnote: 8

At the time of the Level Two hearing, Mr. Bailey still did not have knowledge as to whether Ms. Cook held the appropriate certification or license. The discovery rule is not a mechanism to reward those who are not vigilant in protecting their rights. There is no indication of vigilance by Mr. Bailey.

Footnote: 9

This axiom parallels cases discussing the discovery rule and the statute of limitations in civil actions. See generally Merrill v. W. Va. Dep't of Health & Human Res., 219 W. Va. 151, 632 S.E.2d 307 (2006)(per curiam).

Footnote: 10

Grievant in this matter summarily argues that because the WVDOE intervened, he assumed it would hire qualified applicants. Therefore, Grievant argues, his grievance is timely. This rationale is unpersuasive. Trust is not a valid defense to untimely filing. Casto v. Mason County Bd. of Educ. and Doyle, Docket No. 03-26-214 (Sept. 2, 2003).