WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DONNA MURPHY,

Grievant,

v.

Docket No. 2008-0310-PleED

PLEASANTS COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant Donna Murphy filed this grievance on August 28, 2008, following her termination based upon lack of certification by the Pleasants County Board of Education on August 21, 2007. Grievant requests the West Virginia Public Employees Grievance Board "to find that under the circumstances of this case the County Superintendent's refusal to endorse Grievant's said applications was arbitrary, capricious, and an abuse of authority; and to order the Pleasants County Board of Education to direct the Superintendent to endorse said applications and submit the same to the State Superintendent. Your Grievant further respectfully requests the Public Employees Grievance Board to order the Pleasants County Board of Education to reinstate the Grievant to her teaching position with all back pay and benefits upon the granting of her licensure by the State Superintendent."

On February 4, 2008, Respondent filed a Motion to Dismiss this grievance. The Grievant filed a response to the motion on February 18, 2008. The parties filed additional pleadings setting forth further legal argument on the question of dismissal. Administrative Law Judge Thomas J. Gillooly conducted oral argument on the motion to dismiss on June11, 2008. (See footnote 1) The parties agreed to submit any supplemental written argument by July 9, 2008. Only the Respondent elected to do so. A phone conference was conducted in the matter on July 28, 2008. Following this

conference, Administrative Law Judge Gillooly entered an Order on August 1, 2008, placing the grievance in abeyance. Thereafter, on August 25, 2008, Respondent filed a motion requesting that this grievance be reopened. Due to Mr. Gillooly no longer being an employee of the West Virginia Public Employees Grievance Board, the grievance was reassigned to the undersigned Administrative Law Judge. Grievant appeared by Rebecca E. Mick, Esquire. Respondent appeared by Rebecca M. Tinder, Esquire. The motion to dismiss is mature for decision.

Procedural History

Grievant, a special education teacher, filed this grievance on August 30, 2007, grieving the August 21, 2007, decision of Respondent Pleasants County Board of Education to terminate her employment. The County Superintendent recommended her termination on the basis that her teaching certificate had expired. This action was preceded by the State Department of Education's failure to renew Grievant's application for certification which was prepared and submitted on or about June 20, 2007. The County Superintendent refused to make the necessary endorsement of Grievant's renewal application because it was submitted during the period of Grievant's unpaid suspension for illegally using corporal punishment on nonverbal special education students. The Respondent suspended Grievant for that incident involving the use of corporal punishment in December 2006, for the remainder of that school year. On September 27, 2007, the Grievance Board issued its decision on Grievant's challenge to her suspension. *Murphy v. Pleasants County Bd. of Educ.*, Docket No. 06-37- 480 (Sept. 27, 2007). That decision reduced the suspension from the balance of the school year to two weeks, with an improvement plan “to assist [Grievant] in developing and utilizing alternative methods of responding to the students.” The decision concluded that “the discipline imposed was disproportionate to the specific facts of the offense.” *Id*.

The Respondent appealed that decision to the Kanawha County Circuit Court, which stayed the above Grievance Board decision pending a ruling on the appeal. The instant grievance was placed in abeyance by Order entered on August 1, 2008, by Administrative Law Judge Gillooly “pending the filing of an order by the Circuit Court of Kanawha County disposing of the Respondent's appeal of this Board's Docket No. 06-37-480 . . .” On August 20, 2008, Judge Irene Burger entered a Final Order in Circuit Court Case No. 07- AA-149, reversing the decision of Administrative Law Judge Sue Keller, affirming and reinstating the discipline imposed by the Board, that being a suspension for the remainder of the 2006-2007 school year. (See footnote 2) Respondent filed a Renewed Motion to

Dismiss on August25, 2008, requesting that the matter be reopened.

Synopsis

Grievant seeks to challenge the action of the County Superintendent's failure to sign her application for certification. Grievant asserts that the County Superintendent's refusal to endorse her applications was arbitrary, capricious, and an abuse of authority. Respondent asserts that the grievance is not timely. In addition, Respondent argues that the relief requested by Grievant is unavailable as speculative or premature. Finally, Respondent points out that the Grievance Board does not have jurisdiction over the State Superintendent of Schools to order that Grievant be issued a certification to teach. For reasons more fully set out below, the Motion to Dismiss is GRANTED.

After a detailed review of the entire record, including the transcript of the pre- termination hearing, and all available recordings of the proceedings, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Prior to her termination, Grievant had been employed as a Special Education teacher at St. Mary's Elementary School since the 2004-2005 school year.

2. The County Superintendent elected not to make the necessary endorsements to Grievant's application for certification which were prepared and submitted on or about June 20, 2007. At that time, Grievant was on unpaid suspension for illegally using corporal punishment on nonverbal special education students. (See footnote 3) 3. The County Superintendent communicated to the State Department of Education by correspondence dated June 21, 2007, his apprehension in endorsing the submitted certifications of Grievant due to the investigation into her behavior that resulted in her suspension.

4. Grievant was advised by letter dated July 9, 2007, of the State Department of Education's denial of her applications for certification which was based in part on the lack of the signature of the County Superintendent. (See footnote 4)

5. By correspondence dated August 6, 2007, the County Superintendent advised Grievant that because her applications had been denied, she lacked the necessary credentials to perform her assignments as a special education teacher. The County Superintendent communicated to Grievant that he was compelled to recommend the termination of her employment on the grounds of incompetence.

6. On August 21, 2007, the Pleasants County Board of Education approved the recommendation of the County Superintendent to terminate the employment of Grievant based upon her lack of certification to perform her duties.

Discussion

Initially, Respondent contends that this grievance was not filed within the statutory time frame, and should be dismissed on those grounds. 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. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

The first issue which needs to be addressed is whether this defense was timely raised by Respondent. W. Va. Code § 6C-2-3(c) requires the respondent to raise the issue of timeliness at or before level two. However, this grievance was filed directly to level three pursuant to W. Va. Code § 6C-2-4(a)(4). This Grievance Board has previously reviewed similar statutory inconsistency under the old grievance procedure and determined, applying principles of statutory construction, that, in a case where the lower level was conducted as a conference, the timeliness defense must be raised at or before the first level in the grievance procedure (level three under the old procedure). *Greathouse v. Dep't of Transp.*, Docket No. 99-DOH-413 (Aug. 21, 2000). In the instant grievance, timeliness is raised by Respondent at the first level of this grievance proceeding, as a result, Respondent timely raised the defense for the first time at level three.

As to when a grievance must be filed, W. Va. Code § 6C-2-4(a)(1) requires the grievance process to be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler*, *supra.* ; *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997). The County Superintendent choosing not to sign Grievant's applications was the occurrence of the event upon which the grievance is based. As such, it is that event from which the time to calculate the filing of this grievance began to run. Under the undisputed

facts of this case, it is clear that Grievant was aware of the County Superintendent's refusal to sign the application within days of June 21, 2007. Yet, this grievance was not filed until August 28, 2007, more than two months following Grievant's notice of the actions of the County Superintendent. Additionally, it is clear that Grievant was aware of the denial of her certifications, resulting from incomplete applications which lacked the signature of the County Superintendent, within days of the letter to her dated July 9, 2007. Grievant acknowledges in her grievance form that the County Superintendent, by letter dated August 6, 2007, clearly communicated that he was compelled to recommend the termination of her employment because she did not possess the minimum qualifications to perform under her contracts.

Grievant counters that the Respondent discharged her on or about August 21, 2007. Grievant filed her grievance on August 28, 2007. Thus, Grievant's filing is clearly within the time frame enunciated in the grievance statute. The undersigned disagrees. Grievant's termination by the Board, and the County Superintendent's decision not to sign the applications for licensure are separate events. In this grievance, Grievant is not arguing that as an unlicensed teacher she should not be terminated, instead she is attempting to challenge the County Superintendent's refusal to sign her applications for certification. This fact pattern is not a case of first impression for the Grievance Board. In the grievance of *Wade, et al. v. Division of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001), Grievant Wade and his co-workers were supposedly challenging the manner in which merit increases wereawarded based on performance evaluation scores. The Respondent successfully argued that Grievants could not challenge the validity of their performance evaluations within that grievance because those claims were time barred.

In the instant case, the decision of the County Superintendent not to sign the Grievant's applications is the event upon which this grievance is based, just as in *Wade*, *supra.*, it was the scores on prior performance evaluations. The relief requested by Grievant confirms this with the language, “Grievant respectfully requests the West Virginia Public Employees Grievance Board to find that under the circumstances of this case the County Superintendent's refusal to endorse Grievant's said applications was arbitrary, capricious, and an abuse of authority.”

With regard to Grievant's challenge to the actions of the County Superintendent, the grievable event occurred when Grievant received the notifications that her application for certification lacked the necessary endorsement on or about July 9, 2007, and on or about August 6, 2007

(correspondences attached to Grievant's level three form). All dates outside the fifteen-day filing requirement. Accordingly, the grievance was not timely filed.

Even if the grievance had been timely filed, Grievant could not prevail because the relief requested is speculative or premature. “When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, her claim must be denied.” *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 89-20-671 (Jan. 17, 1990). The relief of reinstatement into a teaching position if the State Superintendent should happen to grant Grievant a teaching license is speculative relief. As previously noted, Grievant's appeal of the denial of her certification is pending before the State Superintendent of Schools. Another controlling factor in granting the motion is the lack of any authority on the part of the Grievance Board to order the State Superintendent to issue a certificate or license to teach. The instant grievance is similar to *Titus v. Dept. of Health & Human Resources/Wm. Sharpe, Jr. Hospital*, Docket No. 06-HHR-188 (Mar. 14, 2007), wherein Grievant's name was placed on the Abuse Registry which prohibited his continued employment. Grievant was a state hospital employee who was involved in an incident with a patient resulting in allegations of mistreatment or abuse of a patient. Federal law “prohibits state facilities from employing individuals who have been placed on the Abuse Registry.” Administrative Law Judge Denise Spatafore wrote:

> Respondent asserts that even if Grievant were to win his grievance, DHHR would still be prohibited from employing Grievant because of his placement on the Abuse Registry.
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> [t]he undersigned Administrative Law Judge is without authority to require DHHR to employ Grievant. Thus, even if Grievant were to prevail in his grievance, the relief sought _ reinstatement to his previous position _ is not a remedy the undersigned could grant.

In the instant grievance, Grievant requested “the West Virginia Public Employees Grievance Board to find that under the circumstances of this case the County Superintendent's refusal to

endorse Grievant's said applications was arbitrary, capricious, and an abuse of authority." However, such a finding is within the exclusive purview of the State Superintendent of Schools since the core purpose of the Grievant is to obtain certification. W. Va. Code § 18A-3-1(h) provides that:

> The state superintendent may issue certificates to graduates of educator preparation programs and alternative educator preparation programs approved by the state board. The certificates are issued in accordance with this section and rules adopted by the state board after consultation with theSecretary of Education and the Arts and the Chancellor for Higher Education. (1) A certificate to teach may be granted only to any person who is: (A) A citizen of the United States, except as provided in subdivision (2) of this subsection; (B) Is of good moral character; (C) Physically, mentally and emotionally qualified to perform the duties of a teacher; and (D) At least eighteen years on or before the first day of October of the year in which his or her certificate is issued.

It was explained to Grievant that the challenge to the County Superintendent is the issue to be addressed before the Department of Education. Quoting from the July 9, 2007, letter to Grievant, "Please note that the focus of the hearing, if so requested, will be your conduct as a teacher, not whether the county superintendent was correct in his understanding of your eligibility based on education credits or waivers to certification." The legislative intent of the above statute is clear that the state superintendent makes the determination as to whether an applicant has the appropriate qualifications to be issued a teaching certificate. As such, an appeal before the State Superintendent of Schools is the proper venue for challenging a denial of certification. (See footnote 5) Grievant has requested a remedy which is wholly unavailable to her through the grievance procedure. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1- 6 6.11(2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." Under these particular circumstances, the grievance is not timely because Grievant is attempting to challenge the action of the County Superintendent in refusing to sign her applications for certification. This grievance was filed well outside the fifteen-day statutory period of that event. The remedy sought by Grievant is contingent upon the granting of her licensure by the State Superintendent. A determination on that matter has yet to be made. Accordingly, the relief requested by Grievant is unavailable as speculative or premature. Finally, the Grievance Board does not have the authority to issue or order the State Superintendent to issue a certificate or license to teach. Therefore, Grievant has requested a remedy which is wholly unavailable to her through the grievance

procedure.

The following Conclusions of Law support the decision reached.

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 she 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. W. Va. Code § 6C-2-4(a)(1) requires the grievance process to be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. 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 28, 1997); *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997).

4. "When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, her claim must be denied." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 89-20-671 (Jan. 17, 1990).

5. Under these particular circumstances, the grievance is not timely because Grievant is attempting to challenge the action of the County Superintendent in refusing to sign her applications for certification. This grievance was filed well outside the fifteen-day statutory period of that event.

6. The remedy sought by Grievant is contingent upon the granting of her licensure by the State Superintendent, a determination on that matter has yet to be made. Accordingly, the relief requested by Grievant is unavailable as speculative or premature.

7. The Grievance Board does not have the authority to issue or order the State Superintendent to issue a certificate or license to teach. Therefore, Grievant has requested a remedy which is wholly unavailable to her through the grievance procedure.

Based upon the foregoing, the Respondent's Motion to Dismiss is **GRANTED** and the above-styled action is **DISMISSED** from the Grievance Board docket.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must

be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code §6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: September 26, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

This proceeding was not recorded.

Footnote: 2

Judge Berger notes in her order that, "[I]t is clear from the record that Ms. Murphy was aware of the existing policy prohibiting corporal punishment. W. Va. Code § 18A-5- 1(e). The question then is whether her failure to comply with the policy was sufficiently knowing and intentional to be insubordinate. Both of the aides in Ms. Murphy's classroom testified that she told them 'what happens in the classroom, stays in the classroom.' They both interpreted that statement to encompass the direction that the use of corporal punishment in the classroom was not to be discussed outside of the classroom. This indicates that she was not only aware of the policy against corporal punishment, but that she knowingly violated it. . . Murphy's use of corporal punishment in the classroom was in violation of a known policy and constituted insubordination. As such, the Board's decision to suspend her should be disturbed only if [sic] was arbitrary or capricious. The record does not support a finding that the Board acted arbitrary or capriciously in voting unanimously to adopt the recommendation of the superintendent and suspending Ms. Murphy for the remainder of the school year."

Footnote: 3

The level four decision in Murphy v. Pleasants County Board of Education, Docket No. 06-37-480 regarding the length of the suspension was not issued until September 27,2007, well after the Grievant's licenses to teach expired.

Footnote: 4

Grievant's appeal of her certification status is pending before the West Virginia Department of Education.

Footnote: 5

W. Va. Code § 18A-3-3(e) provides, "If the applicant seeking renewal has cause to believe that the county superintendent refuses to give a recommendation without just cause, the applicant shall have the right, in such case, to appeal to the State Superintendent of Schools, whose responsibility it shall be to investigate the matter and issue a certificate if, in the opinion of the state superintendent, the county superintendent's recommendation was withheld arbitrarily."