THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BEVERLY VAN SCYOC

Grievant,

v.

Docket No. 07-30-328

MONONGALIA COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant is employed by Respondent as a Family Services Specialist. She filed this grievance on March 1, 2007, alleging:

During the Fall Semester of 2005, I asked to be allowed to complete an Internship (sic) while performing my regular duties. That request was denied. I had to take a semester without pay. I recently discovered that another Monongalia County employee was allowed to complete her Internship during that same semester while completing her regular duties. She did not have to take the time without pay. This is a violation of WV Code 18-29-2(o).

For relief Grievant seeks “to be paid for the semester that I had to take off work to complete my Internship. I am seeking back pay, with interest, and all benefits to which I am entitled.”

The Level 1 grievance was denied on March 12, 2007. Grievant then filed a Level 2 appeal, and a hearing was held on June 5, 2007. Grievant was represented by Mary Snelson, West Virginia Education Association, and Respondent was represented by Harry Rubenstein, Esq., Dinsmore & Shohl, LLP. The grievance was denied at Level 2. Grievant agreed to bypass Level 3 and appealed

to Level 4. This case was scheduled for a hearing on three separate dates. On each date Grievant sought and was granted a continuance. As a result of the numerous requests forcontinuances, Respondent filed a Motion to Dismiss for failure of Grievant to take action. Grievant's representative responded in writing. The parties later agreed to submit the case on the record and submit Proposed Findings of Facts and Conclusions of Law. This case became mature for decision on July 31, 2008.

Synopsis

Grievant asserts she has been discriminated against because in 2005 she was denied permission to adjust her work schedule as a Family Service Specialist under a 230-day contract to fulfill the requirements of a counseling certification which required 600 hours of time with a school counselor. She argues that shortly before filing the grievance she learned that other employees were allowed to adjust their work schedules to pursue additional certifications.

Respondent avers first that the grievance is not timely filed, as the alleged events occurred in 2005 and the grievance was not filed until 2007. Secondly, Respondent asserts there was no discrimination. Grievant's request that she be allowed to adjust her work schedule to accommodate the 600 hours required for her internship would have impacted her job and interfered with her duties and responsibilities. The employees who were allowed to adjust their work schedules did so because the adjustment did not interfere with their job duties. This grievance is denied as untimely. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1.

Grievant is employed as an Early Head Start Family Service Specialist under a 230-day contract.

2.

As part of Grievant's job requirements, she performs home visits with families throughout the county. She is also required to attend group sessions and team meetings with regard to her duties as a Family Service Specialist.

3.

In 2005, Grievant requested permission to adjust her work schedule so as to complete the requirements for her counseling certification which required 600 hours of work supervised by a school counselor.

4.

Grievant suggested several different ways her work schedule could be amended, including working 3 days a week and doing home visits on the weekend or working the entire summer and taking off in September.

5.

Grievant's request to adjust her work schedule was denied.

6.

Grievant decided to take a leave of absence to complete the requirements for the counseling certification. She requested a leave of absence from Respondent and was granted the same.

7.

Grievant was on an approved leave of absence from July 1, 2005, until January 2006.

8.

On January 23, 2007, Grievant learned that another employee, Ashley Martucci, was allowed to do an internship without taking a leave of absence. However, Ms. Martucci was not working on a counseling certification, butinstead a Masters in Administration which required an hour or two a day with a school principal.

Discussion

I. Respondent's Motion to Dismiss

Because Respondent's Motion to Dismiss is currently pending, this issue will be addressed first. Respondent asserted that Grievant had taken no action on this grievance for 11 months, given that the Level 4 hearing was set three times and each time Grievant sought and was granted a continuance.

Grievant responded that various reasons contributed to these continuance requests. The first time this case was scheduled Grievant requested a continuance because there was little time to prepare for the hearing as Grievant's representative had been out of town. The two other continuances were sought due to good cause. Given that Grievant remained in contact with the Grievance Board and offered compelling reasons for the continuances, Respondent's Motion to Dismiss is denied.

II. Timeliness

Respondent asserts timeliness as a defense. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of

the most recent occurrence of a continuing practice. W.Va. Code §18-29-4(a)(1). *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). Timeliness is an affirmative defense, and theburden 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). (See footnote 1) If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory guidelines. *Kessler v. W.Va. Dep't of Transp*., 96- DOH-445 (July 29, 1997).

As to when a grievance must be filed, *West Virginia 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. *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.

* * * * * *

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 . . .

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 Trans*., 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). *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "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."

Grievant did not discover Ms. Martucci's internship until January 23, 2007, while engaging in a conversation with a fellow worker. It was on that date that she became aware of the facts giving rise to a grievance and it is from that moment that her time for filing a grievance began to run. Grievant had fifteen days from January23, 2007, within which to file her grievance. Yet, she waited until March 1, 2007, which was clearly outside the time frame, thereby making her grievance untimely.

However, even were the undersigned to address the merits of the grievance, Grievant has not proven discrimination or favoritism.

III. Discrimination and Favoritism

In a non-disciplinary matter, it is incumbent upon the grievant seeking relief, pursuant to W.Va. Code §§18-29-1 *et seq*. to prove all allegations of the grievance by a preponderance of the evidence. *Holly v. Logan Co. Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). In other words, the grievant has the burden of proving that each element of her claim is more likely to have occurred than not. *Petry v. Kanawha Co. Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997); Black's Law Dictionary (6th Ed. 1991). Grievant has failed to present sufficient evidence that she is entitled to the requested relief.

Discrimination is statutorily defined as any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W. Va. Code §18-29-2(m). To prevail in a claim for discrimination, an employee must show differential treatment from other employees, that the different treatment is not related to the actual job responsibilities of the employees, and that the difference in treatment was not agreed to in writing by the employee. Once a claim is established, an employercannot escape liability be asserting justification such as financial necessity for the discriminatory treatment. *Board of Educ. v. White*, 216 W.Va. 252, 605 S.E.2d 814 (2004). Favoritism as defined by W.Va. Code §18-29-2(o) “means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

Respondent did not engage in discrimination or favoritism. Grievant's desire to obtain her counseling certification required a significant number of hours be spent away from her position as Family Services Specialist. That time would have greatly impacted her job duties, while other employees who were allowed to adjust work schedules to obtain various certifications did so with little

to no interference with their position. Therefore, the different treatment alleged by Grievant was related to the actual job responsibilities. The undersigned, therefore, makes the following Conclusions of Law.

Conclusions of Law

1.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W.Va. Code §18-29- 4(a)(1). *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). 2.

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 the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory guidelines. *Kessler v. W.Va. Dep't of Transp*., 96-DOH-445 (July 29, 1997).

3.

As to when a grievance must be filed, *West Virginia 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.

4.

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 Trans*., 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). *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. SyllabusPoint 1 states, "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."

5.

Grievant's time period for filing a grievance began on January 23, 2007. She did not file until March 1, 2007, making her filing untimely.

WHEREFORE, based upon the foregoing, the 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. W. Va. Code § 18-29- 7. (See footnote 1). 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 7, 2008

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 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 being 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. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.