THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DANIEL FROST,

Grievant,

v.

Docket No. 07-HE-349

BLUEFIELD STATE COLLEGE,

Respondent,

and

DIANA GIBSON,

Intervenor.

DECISION

Daniel Frost, Grievant, employed by Bluefield State College ("BSC") as an educational counselor specialist with the Veterans Upward Bound Program, filed a level one grievance on May 7, 2007. His Statement of Grievance is, "WV § 18B-1-6; WV Higher Education Policy Commission Title 133, Series 8 (including but not limited to 2.1.3, 2.8, 2.10, 2.27, 2.28, 10.1, 11.1 through 11.6 and 13.1); Subcontracting statutory positions." Grievant is seeking the following relief, "Position of Director of Physical Plant posted, Dan Frost to be temporarily placed in Position until posted, Removal of unqualified personnel from position, removal of supervisory duties form [sic] current administrative assistant and review of administrative assistants [sic] duties to comply with title."

Grievant elected to bypass level one. The grievance was denied at levels two and three. Diana Gibson requested to intervene by letter dated June 7, 2007, addressed to the Human Resource Director at BSC. Grievant appealed to level four on July 5, 2007, and a level four hearing was

conducted before the undersigned on January 31, 2008, at the Board's Beckley location. Grievant appeared in person, and by Derrick W. Lefler, Esq.,and Ben Barkey, WVEA. Respondent appeared by Elaine L. Skorich, Assistant Attorney General. Diana Gibson, Intervenor, appeared by Fred Hardee, Advisory Council of Classified Employees. This matter became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law filed on March 31, 2008.

Synopsis

In March of 2007, Clyde Harrison, Director of the Physical Plant at BSC, retired. Instead of posting the position as a vacancy, the college continued to employ Mr. Harrison as Acting Director of the Physical Plant under a contractual arrangement. On the days that Mr. Harrison is not present on campus, the physical plant is directed by Administrative Assistant, Sr., Ms. Diana Gibson. Grievant seeks the posting of the position of Director of the Physical Plant. Grievant became aware of Mr. Harrison's appointment as Acting Director on April 11, 2007. Grievant did not file this grievance until May 5, 2007. The statute in effect at the time of filing this grievance provided that the filing be done within ten days of the date on which the event became known to Grievant. Grievant offered no reason for the delay in filing. Therefore, this grievance must be denied for untimeliness.

After review of the record, the undersigned Administrative Law Judge makes the following findings of fact.

Findings of Fact

1. Grievant is employed at BSC as a Counselor 2, Pay Grade 17. Grievant is qualified as a Master Electrician and Master Plumber, and possesses several other technical qualifications. Grievant worked in the physical plant for a number of years, however, he is currently performing the duties of an educational counselor specialist with the Veterans Upward Bound Program. 2. Grievant expressed to BSC an interest in the position of Director of the Physical Plant, upon the retirement of the Director, Clyde Harrison.

3. Mr. Harrison retired from BSC on March 1, 2007. At that time, Intervenor Diana Gibson held the position of Administrative Assistant, Senior, Pay Grade 17, in the Physical Plant at BSC. Ms. Gibson had previously served in the Physical Plant as Administrative Assistant, Pay Grade 15.

4. Instead of posting the position as a vacancy, BSC employed Mr. Harrison to continue in his role, but at a reduced rate of pay and at a reduced number of hours. This contractual arrangement between Mr. Harrison and BSC has saved the institution more than $32,000.00 a year.

5. BSC Board of Governors Policy No. 24 grants the President of BSC wide latitude in making personnel decisions, such as the re-employment of Mr. Harrison.

6. On the days that Mr. Harrison is not present on campus, the Physical Plant is directed by Intervenor Gibson. She has been fulfilling many of the Physical Plant Director's duties since assuming her current position, some ten years ago.

7. Grievant seeks the posting of the position of Director of the Physical Plant.

8. Grievant became aware of the appointment of Mr. Harrison as Acting Director of the Physical Plant on April 11, 2007.

9. A level one grievance was filed on May 7, 2007.

10. At level three, BSC raised the issue of whether the grievance was timely filed, and renewed the claim at the level four hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). (See footnote 1)

As a preliminary issue, BSC raised at level three the procedural issue of whether this grievance is timely filed. Grievant argues that the timeliness issue was not properly raised by BSC at or before level two, and therefore, they are barred from raising the issue at level three or four. Customarily, a state employer must raise a timeliness defense at or before the level two “hearing” in order to preserve the right to assert this defense. W. Va. Code . 29-6A-3(a)(2). However, W. Va. Code § 29-6A-4(b) requires that the employer's administrator or his designee hold a “conference” at level two, not a “hearing.” This Grievance Board has previously reviewed this statutory inconsistency and determined, applying principles of statutory construction, that, in cases involving state employees wherethere is no level two hearing, the timeliness defense must be raised at or before the level three hearing. *Greathouse v. Dep't of Transp.*, Docket No. 99-DOH-413 (Aug. 21, 2000). In this grievance, Grievant bypassed level one and a level two conference was held. Accordingly, BSC properly raised

the defense at the level three hearing.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

W. Va. Code § 29-6A-4(a) provides in pertinent part:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . (See footnote 2)

The running of the relevant time period is ordinarily deemed to begin 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).

Grievant acknowledges that he was aware of Mr. Harrison's appointment as Acting Director of the Physical Plant on April 11, 2007. Level Three Transcript at p. 36. Grievant waited eighteen days after he became aware of the decision being challenged before hefiled his grievance. By his own admission, Grievant did not initiate these proceeding until well beyond the statutory time limits.

Grievant offers no valid reason why the time lines should not apply in this matter. Grievant suggested at the lower level that the grievable event is continuing in nature, in that Mr. Harrison continues to work under a contract for a position that should be posted. When determining whether a grievance falls within the continuing practice exception, it is necessary to determine whether the violation is ongoing, or whether there was a single violation from which damage continue to accrue. “Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance . . . *See Spahr v. Preston Co. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).” *Garvin v. Webster County Bd. of Educ.*, Docket No. 01-51-616 (Apr. 23, 2002).

The current grievance involves a single act that occurred on July 1, 2007, when Mr. Harrison's contractual arrangement was formalized by correspondence. Grievant's Ex. 7. Grievant is challenging BSC's decision not to post the Director's position when Mr. Harrison's employment in that position

continued past his retirement. There is no continuing event in this matter, only the continuing "damage" of Grievant not being temporarily placed in the position. Once Grievant learned about the appointment of Mr. Harrison to provide management support for the Physical Plant, he had an obligation to initiate the grievance procedure. BSC has proven the grievance was untimely filed. Because the grievance was not timely filed, it will be dismissed, and the merits need not be addressed.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

2.

W. Va. Code § 29-6A-4(a) provides in pertinent part:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . .

3. Customarily, a state employer must raise a timeliness defense at or before the level two "hearing" in order to preserve the right to assert this defense. W. Va. Code . 29-6A-3(a)(2). However, W. Va. Code § 29-6A-4(b) requires that the employer's administrator or his designee hold a "conference" at level two, not a "hearing." This Grievance Board has previously reviewed this statutory inconsistency and determined, applying principles of statutory construction, that, in cases involving state employees where there is no level two hearing, the timeliness defense must be raised at or before the level three hearing. *Greathouse v. Dep't of Transp.*, Docket No. 99-DOH-413 (Aug. 21, 2000).

4. BSC raised the defense of timeliness at level three. BSC has proven that the level one grievance was not filed within the statutory time frame, and Grievant offered no reason for delay.

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 § 29-6A-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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 13, 2008

Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and Stat e 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

Only working days are counted in determining when the ten day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).