WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

REX TONEY,

Grievant,

v.

Docket No. 2008-0534-LinEd

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Rex Toney ("Grievant") filed this grievance against the Lincoln County Board of Education on November 15, 2005, alleging that the "area supervisor job not bid out" and for relief requested "[t]o post job so I can bid on Job, most seniority." The grievance was denied at level one on November 15, 2005, and level two on November 16, 2005. Thereafter, the procedural history of this grievance becomes murky at best. The record does not reflect any other filings in this matter until September 24, 2007, when the Grievance Board received a request to transfer the grievance to the new Public Employees Grievance Procedure as set out at W. Va. Code §§ 6C-2-1, *et seq*. (See footnote 1) However, this form is not signed by a representative of the Lincoln County Board of Education, and is not datedby the Grievant. In addition, it appears to have the wrong date for the filing of the original grievance.

Nevertheless, in accordance with the request to use the new procedure, a level one conference was held with Superintendent David Roach. (See footnote 2) Superintendent Roach denied the grievance by decision issued on November 16, 2007. Grievant appealed this ruling on November 20, 2007, and a level two mediation session was held on March 19, 2008. Level two was unsuccessful. Grievant's level three appeal, filed on March 27, 2008, altered the Statement of Grievance to read

"[c]hanged the area supervisor job significantly after building new high school, adding duties and $1,000 in pay thus creating a new position which was not posted as required by 18A-4-8b" and for relief requested that the Respondent "[p]ost Area Supervisor Position." A level three hearing was conducted before the undersigned Administrative Law Judge on August 13, 2008, at the Board's Charleston Office. Grievant appeared in person and by his counsel, William McGinley, West Virginia Education Association. The Lincoln County Board of Education ("Respondent") appeared by its counsel, Rebecca Tinder, Bowles Rice McDavid Graff & Love LLP. The matter became mature for consideration on September 15, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

This is an old grievance that has its genesis in November of 2005. During that time, Respondent planned to consolidate individual high schools into one large high schoolnamed Lincoln County High School in Hamlin, West Virginia. Two area bus supervisors were employed by Respondent prior to the opening of the new high school and had identical duties for two sections of the county. One of the two area bus supervisors retired on September 30, 2005. It was determined that there was no longer a need for two area bus supervisors, and the position of the retired area bus supervisor was not posted. The remaining area bus supervisor agreed to perform the duties of the position for the whole county. Grievant initiated this grievance in November 2005, and requested that the area bus supervisor position be posted so he could bid on it.

That grievance was denied at level one on November 15, 2005, and Grievant appealed the decision on that date. The grievance was thereafter denied at level two by letter dated November 16, 2005. By letter dated November 16, 2005, Grievant requested that the time lines be extended until after the Thanksgiving holidays. Grievant initiated no appeal of the level two decision following Thanksgiving of 2005. Given the undisputed facts of this grievance, it is not timely.

Following a thorough review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is employed by the Respondent as a school bus operator, and has been in that position for more than twenty years.

2. Two area bus supervisors, Gary Nelson and Jimmie Skeens, were employed by Respondent prior to the opening of the county's new high school, and had identical duties for two sections of the

county. Mr. Skeens retired on September 30, 2005. 3. In light of the completion of the new single high school to be opened for the 2006-2007 school year, it was determined that there was no longer a need for two area bus supervisors, and the position of the retired area bus supervisor was eliminated.

4. The remaining area supervisor, Mr. Nelson, agreed to perform the duties of area bus supervisor for the whole county after the retirement of Mr. Skeens.

5. This grievance was initiated in November 2005, when Grievant complained that the area bus supervisor job was not posted to allow for bidding on the position.

6. That grievance was denied at level one on November 15, 2005, and Grievant appealed the decision on the same date.

7. The grievance was thereafter denied at level two by letter dated November 16, 2005, from the superintendent. Grievant was notified that, due to a decrease in runs and streamlining call outs as a result of the four individual high schools being consolidated into one high school, the decision was made to abolish one of the area bus supervisor positions.

8. By letter dated November 16, 2005, Grievant, through his representative, communicated that "[a]s for Mr. Toney's grievance related to filling the position of area supervisor, I would request that timelines be extended until after the Thanksgiving holidays."

9. No action was taken by Grievant on this grievance until September 8, 2006, almost ten months later, when Grievant's representative asked for an informal conference to discuss the hiring of an area supervisor.

Discussion

Respondent contends that this grievance is not timely; specifically, it was not appealed to level three in a timely fashion. 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. 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. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995). *See Ball v.*

Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS- 524 (May 14, 1991). The Respondent asserts that the grievance is untimely pursuant to West Virginia code § 18-29-4 on the following grounds; (1) There was no timely appeal of the 2005 grievance following the denial at level two on the issue of posting the position of area supervisor; (2) The request for the informal conference was ten months after the retirement of the area supervisor and the decision not to post the second area supervisor position, and; (3) The informal conference was held on January 23, 2007, and the level one grievance was not filed until some nine months later.

Grievant has provided one excuse for his untimely appeal (which does not address the failure to fill a level three appeal in the fall of 2005). Grievant asserts that Respondent failed to prove that his request for a level one conference, after the informal conferenceheld in January 2007, was not timely since no decision was rendered following the informal conference. Grievant argues that his request for a level one conference was in compliance with the time lines established in West Virginia code § 18-29-3(a). (See footnote 3) While the undersigned agreed with Grievant in a companion case with this analysis, this case is in a much different posture. (See footnote 4) Unlike the companion case, this matter involves two lower level decisions communicated in writing denying the grievance.

West Virginia Code § 18-29-4(c) requires that an appeal to level three must be instituted within five days of receiving the decision of the chief administrator. Without question, Grievant's appeal was not filed within that time period. It is undisputed that this grievance was initiated in November 2005, when Grievant complained by way of a level one grievance form that the area supervisor job was not posted to allow for bidding on the position. Grievant received a written level one decision on November 15, 2005. Once again, Grievant received a written level two decision on November 16, 2005. This correspondence, to both Grievant and his Representative, made it clear that Respondent was eliminating the position of area bus supervisor and no posting would occur.

Grievant did not present any reasons or arguments that would excuse his failure to appeal this level two decision within some reasonable time lines. Grievant has pursued at least eight previous grievances through levels one through four of the grievance procedure, so he should be familiar with the appeal process. In addition, Grievant'sRepresentative, Gary Archer, was aware of time deadlines after receiving the level two decision. This is evidenced by his letter dated November 16, 2005,

wherein he requested that “timelines [for appeal] be extended until after the Thanksgiving holidays.” Accordingly, Respondent has proven by a preponderance of the evidence that this grievance is untimely.

Although the grievance was not timely appealed, a brief discussion of the merits may assist Grievant in understanding that Respondent was under no obligation to post the eliminated position. Grievant asserts that the change in duties of the area bus supervisor, coupled with an increase in pay, resulted in the creation of a new position. Grievant has correctly pointed out that West Virginia Code § 18A-4-8b(g) requires boards of education to “post and date notices of all job vacancies of established existing or newly created positions[.]” However, in the instant grievance, when the remaining area supervisor agreed to assume the duties of the retiring area supervisor for the new high school, a new position was not created. The retiring area supervisor's position was eliminated. “A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests requires the elimination of some service personnel jobs.” *See Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 S.E.2d 487 (1994).

The following conclusions of law support the decision reached.

Conclusion of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting thegrievance was not timely filed. 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. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95- MCHD-435 (Dec. 29, 1995). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20- 384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. West Virginia Code § 18-29-4(c) requires that an appeal to level three must be instituted within five days of receiving the decision of the chief administrator.

3. “A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests requires the elimination of some service

personnel jobs." *See Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 S.E.2d 487 (1994).

4. This grievance was not timely appealed to level three, and Grievant offered no proper basis to excuse the late filing.

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 (*See* Footnote 1*, supra*). 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 31, 2008

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Ronald L. Reece

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

This transfer only applies to the procedure of the matter, the substantive law in effect at the time of filing the grievance continues to control the outcome of this matter. (See footnote 1, supra). This is not contested by the parties, as evidenced by their respective proposals which continue to reference the old statutory provisions.

Footnote: 3

West Virginia code § 18-29-4 states in part, "if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level . . ."

Footnote: 4

See Toney v. Lincoln County Bd. of Educ., Docket No. 2008-0533-LinEd (Oct. 31, 2008).