THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL R. BENNETT,
Grievant,

v. **Docket No. 2009-0652-RanED**

RANDOLPH COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant Michael R. Bennett filed this grievance against his employer, Randolph County Board of Education, on November 6, 2008. His statement of grievance reads:

> RCBOE added an additional duty to my Harman Area/Vo-Tech route by placing a special needs student on my bus without an aide.

His relief sought reads:

> 1) Place an aide on this route or 2) for RCBOE to acknowledge in writing that they have instructed me to transport a special needs student without proper personnel.

This grievance proceeded directly to level three by mutual agreement of the parties. Level one and level two proceedings were waived in this matter. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was conducted before the undersigned Administrative Law Judge on April 8, 2009, at the Grievance Board's Office in Elkins, West Virginia. The Grievant represented himself. The Respondent appeared by its counsel, Kimberly S. Croyle, Bowles Rice McDavid Graff & Love, LLP. This matter became mature for consideration upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law on May 7, 2009.

Synopsis

Grievant alleges a violation of policy because a special needs student was placed on his bus route without an aide or without providing him with proper training. The special needs student's mother signed off on the IEP for her child not to ride the special needs bus; however, Grievant argues this does not change the fact that the student needs properly trained staff to supervise the student while he is in the care of Randolph County Schools. Respondent counters that Grievant has failed to timely file his grievance as a matter of law. In addition, Respondent argues that Grievant has failed to assert a grievable event upon which relief can be granted. The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed.

After a thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact:

Findings of Fact

1. Grievant has been employed by the Randolph County Board of Education as a full-time bus operator for sixteen years.

2. During the 2008-2009 school year, Grievant has operated a regular "Vo-Tech" route between the cities of Elkins, West Virginia and Harman, West Virginia. The bus run is approximately 25 miles.

3. During this route, Grievant transports various students between the Harman School and the Randolph County Vocational Technical Center in Elkins. The route consists of a morning run and an afternoon run.

4. In August of 2008, Respondent added one student with special needs (T.C.)[1] to Grievant's afternoon route. Grievant began transporting T.C. the first week of October 2008.

5. An aide does not accompany T.C. during the afternoon run, nor is an aide required to do so by T.C.'s Individual Educational Plan (IEP). Grievant is not required to assist T.C. either onto or off of the bus.

6. T.C. requires no special services except that he does require the use of a special seat belt to ensure that he remains in an upright seating position during the route should he fall asleep. No special training is required to release T.C. from this seat belt.

7. Grievant views T.C. as likeable and well behaved. T.C. poses no safety concern to himself or other students who are transported during the Vo-Tech route.

8. On November 6, 2008, Grievant filed a level one grievance with the West Virginia Public Employees Grievance Board and Respondent.

Discussion

Respondent asked that this grievance be dismissed as untimely filed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which

[1]Pursuant to the past practice of this Board, the student's initials will be used to protect his privacy.

is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). 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). If the respondent meets this burden, the grievant may then attempt to demonstrate that he 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).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

> Within fifteen days[2] 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, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*,

---

[2] Pursuant to WEST VIRGINIA CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

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). The event giving rise to the filing of this grievance was the August 28, 2008, letter which indicated that Respondent was assigning T.C. to Grievant's Vo-Tech route. Level Three, Respondent's Exhibit 1. Grievant did not initiate this grievance until November 6, 2008. This amounted to a disparity of forty-six days from the occurrence of the event upon which the grievance was based. The Respondent has met its burden of proving, by a preponderance of the evidence, that this grievance was untimely filed.[3]

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), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *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).

Grievant indicates that immediately after T.C. started riding his bus, he contacted his supervisor, Art Wilson, Transportation Director-Coordinator, and John Daniels, Director of Transportation, to question the circumstances of the situation. Grievant then attempted several times to contact Donna Simmons, Director of Special Education and Personnel,

---

[3]Even though Grievant asserts that T.C. was placed on his Vo-Tech bus route during the first week of October 2008, Grievant still failed to submit his grievance within the statutory time frame if one were to recognize that date as the triggering event.

without success, however, he did leave numerous messages for her about the situation and asked that she return his calls. Mrs. Simmons acknowledged that it was several weeks before she got in touch with Grievant regarding the issue.

The Grievance Board has long recognized that a grievant may be excused from untimely filing, if he delayed filing as a direct result of statements made by his employer. The West Virginia Supreme Court of Appeals, in *Naylor*, *supra*, defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only 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." In *Steele v. Wayne County Board of Education*, Docket No. 50-87-062-1 (September 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance."

The evidence presented by Grievant falls short of proving a “deliberate design” on the part of Respondent to cause him to delay filing his grievance. Grievant asserts that his grievance was filed in a timely manner after receiving a returned call from Mrs. Simmons. Grievant asserts that he did his part in following his chain of command; however, the neglect that Mrs. Simmons showed by not returning his phone call for several weeks is what slowed down the process of filing his grievance. The undersigned disagrees. While it is regrettable that Grievant did not receive a response from Ms. Simmons in a prompt

fashion, this cannot be viewed as a deliberate design to prevent Grievant from filing his grievance. In addition, there is no evidence that any official of Respondent ever made any type of representation to Grievant regarding his complaint. The delay in filing the grievance cannot be excused.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). 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).

2. Pursuant to the requirements of W. VA. CODE § 6C-2-4(a)(1), a grievance must be filed within fifteen days of the event upon which it is based.

3. Estoppel is available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should

unmistakably understood would cause the employee to delay filing his charge." *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Grievant's filing of the level one grievance was untimely. Grievant failed to provide a reasonable justification for his untimely filing of this grievance, which was more than fifteen days after the occurrence of the event upon which the grievance is based.

Accordingly, the Respondent's motion to dismiss is hereby **GRANTED**, and this grievance is **DISMISSED** from the docket of the Grievance Board.

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: August 4, 2009

Ronald L. Reece
Administrative Law Judge