THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JAMES DODGINS,
Grievant,

v. **DOCKET NO. 2009-0407-DOE**

DEPARTMENT OF EDUCATION/
SCHOOLS FOR THE DEAF AND THE BLIND,
Respondent.

DECISION

Grievant, James Dodgins, filed this grievance against his employer, the Department of Education/Schools for the Deaf and the Blind, on August 18, 2008. The statement of grievance reads: "WVSD&B misrepresented information in job postings and withheld information during job interview (violation § 18A-4-8[b](g)(2)); Favoritism – gave unfair advantage to one applicant (violation § 6C-2-2(iii))." As relief Grievant seeks: "Repost all three general maintenance/security vacancies to encourage all qualified applicants to apply, and offer work schedules for all three positions. During interviews, do not withhold any information pertinent to the job that, if withheld, would favor one candidate over the others."[1]

A conference was held at level one on August 28, 2008, and a decision denying the grievance was issued on September 17, 2008. The level one decision also states that the

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[1] Grievant argued in his post-hearing written argument that Respondent was required to take some action to accommodate his "disability." This was not part of the grievance and will not be addressed. The undersigned would note that it does not appear from the record developed in this proceeding that Grievant made clear to Respondent that he was requesting accommodation for his medical condition.

grievance was not timely filed. Grievant appealed to level two on September 26, 2008, and a mediation session was held on December 19, 2008. The parties were unable to resolve this matter, and Grievant appealed to level three on January 5, 2009. On March 5, 2009, Respondent filed a Motion to Dismiss this grievance as untimely filed, which Motion was Denied pending a hearing to take evidence on the Motion, and on the merits of the grievance. A level three hearing was held before the undersigned Administrative Law Judge on March 16, 2009, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Heather L. Deskins, Respondent's General Counsel. This matter became mature for decision upon receipt of the last of the parties' written arguments, on April 27, 2009.

Synopsis

Respondent posted three General Maintenance/Security Guard positions. The job description stated with regard to work hours, "rotating shifts" and "as scheduled by supervisor." Grievant applied for one of the positions, and was offered one of the positions. Grievant did not accept the position because he did not want to work rotating shifts. This grievance was not filed until several weeks later when Grievant saw the schedule for these positions, which showed that only one of the employees was rotating among the shifts. Grievant claimed that he had been misled. Respondent argued this grievance should be dismissed as untimely filed. Grievant did not timely complain about the posting itself or the job requirements in the posting or job description. As to Grievant's complaint that he was misled, Respondent did nothing improper by posting the position to allow the option of scheduling the employees for rotating shifts, and then not scheduling all employees to rotate among the shifts. Although the initial schedule does not reflect that

two of the three successful applicants are scheduled to rotate among the shifts, Respondent retains the option to adjust these employees' schedules, as needed, to rotate them among shifts. Grievant also claimed favoritism, but produced no evidence to support this claim.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Department of Education/Schools for the Deaf and the Blind ("DOE"), since 1989, and is currently a Janitor.

2. On July 1, 2008, DOE posted three full-time positions for "General Maintenance/Security Guard." The posting noted that a job description was available. The job description lists the work hours as "Forty hours per week (rotating shifts) including weekends, as scheduled by department supervisor." Grievant applied for one of these positions, and was interviewed by Steve Triplett, Director of Operations, and Sondra McKenery, Director of Personnel. Grievant was aware when he applied that the job description included the notation "rotating shifts."

3. During the interview, and sometime shortly after the interview, Grievant asked for the work schedule. Mr. Triplett told Grievant the schedule was not finished, and that he could not provide it to him yet.

4. Grievant was the most senior applicant. By letter dated July 14, 2008, Grievant was offered one of the General Maintenance/Security Guard positions by DOE. The letter requested that Grievant indicate his intent to accept this position by completing

the form at the bottom of the letter, and returning it to Ms. McKenery by July 23, 2008, at 4:00 p.m.

5. The other two positions were offered to Gerald D. "Tubby" Corbin and Jack Norris. Both Mr. Corbin and Mr. Norris returned their letters indicating they accepted these positions, by July 23, 2008.

6. Grievant did not return the letter accepting the position by July 23, 2008, and he did not accept the position.

7. When Grievant did not return the letter accepting the position, this position was offered to Ralph Lewis, and he accepted the position on July 24, 2008.

8. Grievant did not accept this position because the job description indicated that he would be subject to working rotating shifts. Grievant was concerned that it would be difficult for him to rotate among work shifts due to a medical condition.[2]

9. Mr. Triplett worked on the schedule for two weeks in an attempt to develop a rotating shift schedule that would work. He was unable to develop a schedule that he was satisfied with. He told Kristen Williard, Director of Finance and Data, that he was unable to develop a new rotating shift schedule. Ms. Williard worked on the schedule also. The final schedule for the General Maintenance/Security Guard positions was not completed until July 28, 2008.

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[2] It is unclear whether Grievant can work rotating shifts, due to his medical condition. At one point Grievant stated he could not work rotating shifts, while at another point he stated he was reluctant to work rotating shifts. Grievant did not present any documentation from a physician which indicated any such limitation.

10. All those interviewed for these positions were asked the same basic questions. None of those interviewed was provided with any information regarding the work schedule prior to July 28, 2008.

11. The work schedules for the General Maintenance/Security Guard positions for the period beginning August 4, 2008, and ending October 5, 2008, were posted in an office. Mr. Corbin was scheduled to work the 7-3 shift Monday, Tuesday, Friday, Saturday and Sunday, Mr. Norris was scheduled to work the 11-7 shift Tuesday, Wednesday, Thursday, Friday, and Saturday, and Mr. Lewis was scheduled to work the 11-7 shift on Sunday and Monday, the 7-3 shift on Wednesday and Thursday, and the 3-11 shift on Friday. Grievant saw the schedule on August 13, 2008.

12. This grievance was filed on August 18, 2008.

Discussion

Respondent asked that this grievance be dismissed as untimely filed. 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 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).

W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> 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, 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 employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

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).

Grievant attempted first to challenge certain provisions of the posting. Insofar as Grievant challenges the posting, this grievance is untimely filed.[3] Grievant knew what the job posting required at the time of the posting, on July 1, 2008. Rather than contest the posting within 15 days, Grievant chose to apply for one of the positions, as it was posted, and, in fact, was offered one of the positions. This grievance was not filed until August 18, 2008, more than a month after Grievant was offered one of the positions.

The remainder of Grievant's complaint is that he was misled by the job description, and declined the job when it was offered to him because he thought he would have to work rotating shifts. The first component to this argument is that Grievant asked for the work schedule during the interview, and then again a few days later. Grievant's argument that

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[3] This includes Grievant's arguments about whether it was proper to include a requirement of experience in law enforcement or a related field, and whether the successful applicants possessed this experience. Further, Grievant is without standing to challenge whether any of the successful applicants possessed such experience, as this does not affect Grievant in any way. Grievant was offered the job, and chose not to accept it. Therefore, the qualifications of the other applicants are irrelevant.

he should have been provided a work schedule at the time of the interview was not timely filed. However, were this argument to be considered, Grievant did not demonstrate that Respondent was required to produce a work schedule for Grievant's perusal either at the interview, or at any time prior to the date he was required to decide whether to accept the job. The work schedule was not completed until July 28, and could not have been provided to him before then. No one had the work schedule before July 28.[4]

The second component of this argument is that Grievant did not accept the job because he thought he would be required to work rotating shifts, and as soon as he saw the work schedule and realized that two of the three new employees were working the same hours five days a week, he filed this grievance. This part of the grievance was timely filed.

Grievant has the burden of proving his grievance by a preponderance of the evidence. *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). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

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[4] The undersigned believes it is important to clarify one point. Grievant argued that he was "denied" one of these positions because Ms. Williard's friend wanted it. This argument is not logical. First, obviously, Grievant was not denied one of the positions. He was offered one of the positions, and made a choice not to accept it. Moreover, both Grievant and Ms. Williard's friend, Mr. Corbin, were offered one of these positions at approximately the same time. Whether Grievant accepted the offer or not had no bearing on Mr. Corbin being offered one of these positions, and Mr. Corbin did not know whether Grievant had accepted one of the positions when he returned his letter accepting the offer.

Grievant did not demonstrate that Respondent acted improperly by including language in the job description which advised the applicants that they would be subject to working rotating shifts, but not scheduling all the employees to work rotating shifts. This language in the job description provides Respondent with the *option* of adjusting the schedules of the employees in these positions, as needed. Otherwise, in order to affect a significant change in the work schedule, the employees might have to be placed on transfer in order to comply with statutory requirements applicable to service personnel. Both Ms. McKenery and Ms. Williard testified that "rotating shifts" meant not only that the employees could be required to rotate among the eight hour day shift, evening shift and night shift, but also that their schedules could be changed so that they were not always working the same days, they would be subject to working weekends, and the work hours could be changed from eight hour shifts to ten or twelve hour shifts, for example. Ms. Williard testified that they wanted to look at different schedules to determine the best way to utilize the staff. In the end, the schedule for the first two months required only Mr. Lewis to work differing hours, but all of the employees were scheduled to work weekends. This does not mean that Respondent cannot adjust the work schedules for these employees in the future, as needed.

Essentially, Grievant believes this was all a ruse to keep him from taking this job. It was clear from the testimony that Ms. Williard does not favor Grievant, and the feeling is mutual. There was also some testimony that the rotating shifts language was included in the job description to discourage some applicants, possibly including Grievant. However, it is also clear that Mr. Triplett did, in fact, work for two weeks trying to develop a schedule where all the new employees in these positions would rotate among the shifts,

but he could not come up with something that worked. He did not know at the time of the interviews that he would end up with a schedule that differed very little from the previous schedule used for these positions.

Finally, Grievant claimed favoritism, asserting that Mr. Corbin knew what the schedule would be before he accepted the position. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). No evidence was presented which supported Grievant's assertions of favoritism. The schedule had not even been finalized at the time Mr. Corbin accepted the position.

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 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).

2. Grievances *must* by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). 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).

3. To the extent that this grievance attempts to challenge the posting and whether Grievant should have been provided with the work schedule during the interview or shortly thereafter, this grievance was not filed within the statutory time lines for filing a grievance.

4. Grievant offered no excuse for his failure to timely file his grievance.

5. Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

6. Grievant did not demonstrate that Respondent acted improperly by including in the job description language which advised that the employee would be subject to working rotating shifts, and then not scheduling all of the employees to work rotating shifts.

This language gives Respondent the option of making adjustments to the employees' work schedules, as needed.

7. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

8. No evidence was presented which supported Grievant's assertions of favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: June 15, 2009