THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FRED SEELEY,
Grievant,

v. **Docket No. 2008-1718-UpsED**

UPSHUR COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Fred Seeley, Grievant, is employed by the Upshur County Board of Education, Respondent, as a bus operator. He filed this grievance at level one on June 3, 2008. His Statement of Grievance reads as follows:

> Grievant Fred Seeley claims that the evaluation completed on him by Upshur County School's Director of Transportation stands in violation of West Virginia State Board of Education Policy 5310 and West Virginia Code 18A-2-12a in that data collection was not conducted in an open and honest manner. Additionally, Grievant claims a violation of West Virginia State Board of Education Policy 5902, "Employee Code of Conduct". Grievant claims the actions on part of the Director of Transportation are a form of reprisal against Grievant for filing a grievance in the fall of 2007. Grievant also claims a violation of WV Code 18A-4-8b, Seniority Rights for School Service Personnel, in that the Director of Transportation has, on occasion, removed him from the Extra-Duty Rotation cycle.
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> Grievant requests removal of the evaluation conducted by the Director of Transportation dated April 1, 2008. Additionally, Grievant requests that, with the removal of the evaluation, the Improvement Plan he is now on by [sic] eliminated and all references to this plan be removed from all work place files, including his personnel file. Grievant also requests that he be placed back into the rotation for extra-duty bus trips. Additionally, Grievant requests that the administration by [sic] directed to follow the mediated agreement from his earlier grievance.

The level one hearing was conducted on July 15, 2008 and a decision denying the grievance was issued on September 2, 2008. Grievant appealed to level two on September 4, 2008. The mediation session was conducted on April 20, 2009. Thereafter,

Grievant appealed to level three on April 30, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on July 27, 2009, at the Grievance Board's Westover office. Grievant appeared in person and was represented by Cassandra Bradshaw, Organizational Development Specialist, West Virginia Education Association. Respondent appeared by its Superintendent of Schools, Scott Lampinen, and was represented by its counsel, Rebecca Tinder, Bowles Rice McDavid Graff & Love. The matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on September 1, 2009.

Synopsis

On April 22, 2008 Grievant received an unsatisfactory evaluation from Upshur County Schools' Director of Transportation. On May 9, 2008 a letter was sent to the Director's attention from Grievant's Representative requesting information pertaining to the evaluation. There was no agreement to extend the time line for filing this grievance to a date after Grievant received a response to this request for information. This grievance was not filed by Grievant until June 3, 2008. This grievance is untimely. In any event, Grievant failed to meet his burden of proof that the evaluation was flawed, inaccurate or otherwise violated any statute, rule, regulation or policy or that it was arbitrary, capricious or an abuse of discretion. In addition, no reprisal has been demonstrated and Grievant failed to offer any instances of lost opportunities for extra-duty assignments. Accordingly, this grievance is dismissed.

The following Findings of Fact are based upon the record developed at levels one and three of this grievance:

Findings of Fact

1. Grievant is a bus operator for Respondent and has been employed in that position since the fall of 1996.

2. Respondent allows for employees who chaperone trips using the services of bus operators to report their observations of the bus operator to the Transportation Director on evaluation forms following each curricular and extracurricular bus trip. If problems are reported on the evaluation forms, the Transportation Director investigates the allegations.

3. A report filed by the cross-country track coach on September 12, 2007, was provided to Grievant following an extracurricular bus run. The report noted that Grievant "somewhat" handled the bus in a safe manner; "somewhat" cooperated with the chaperon; "yelled at kids more than was needed" and requested that "he not drive anymore trips for us." Level one, Grievant's Ex. 6.

4. The cross-country track coach, Jim Johnson, described one experience which included a trip to Webster County during which Grievant was driving too fast for the road conditions and "on the way back, he slammed on the brakes and threw us up against the seat and some of the kids hit the floor." Level three testimony. (Mr. Johnson retired from his teaching position after teaching drivers' education for twenty-nine years.)

5. Coach Johnson also reported a trip to Doddridge County with middle and high school students. Grievant again made Coach Johnson nervous as a result of his driving. Grievant also yelled at a student to close the back door of the bus, causing the student to cry because she did not know how to latch the back door of the bus. This incident was reported to the Transportation Director.

6. After being questioned about this incident report by Transportation Director Sherry Dean, Grievant approached Coach Johnson in a confrontational manner in front of students demanding to talk about the report. Coach Johnson declined to discuss the report with Grievant in that setting, but was willing to do so in the Transportation Director's office at a later time if needed.

7. A report filed by two basketball coaches on December 18, 2007, was provided to Grievant following an extracurricular bus run to Morgantown, Monongalia County, with the freshman basketball team. The report noted that Grievant "somewhat" handled the bus in a safe manner; "somewhat" cooperated with the chaperon; and "the enforcement was in a very rude manner." In addition, "every time player would even shuffle in seat slammed on brakes - even when arriving back at school - players getting bags from top slammed on brakes. When someone would stand - he would hit the break [sic] even while driving."

8. Transportation Director Dean reviewed the video tape of the December incident and observed Grievant hitting the brakes abruptly causing students to fall to their seat; leaving his assigned bus unattended with the keys in the ignition and the bus idling for one hour; selectively enforcing the no eating rule on the bus; and not cleaning the bus, but charging the Respondent for that time.

9. Following a discussion with Grievant over these incidents with Ms. Dean, Grievant was issued a letter of reprimand on January 2, 2008, in which the Transportation Director outlined various violations of the West Virginia Board of Education transportation regulations.

10. On January 11, 2008 a citizen filed a written complaint alleging that Grievant pulled his bus out in front of her car, which almost resulted in a collision. Transportation Director Dean attempted to discuss the incident with Grievant; however, he refused to talk to her and was rude in his refusal. The video viewed as part of the investigation revealed that such a near miss had occurred as reported.

11. Grievant received an unsatisfactory evaluation on April 22, 2008, in the following areas:

a. Adheres to the West Virginia School Transportation Regulations.

b. Demonstrates and adheres to all safe driving procedures.

c. Willingly work with and accepts suggestions for improvement from the Director of Transportation.

d. Complies with policies and safety procedures; observance of good safety practices.

e. Works with other employees of the transportation system and all other school employees in a cooperative, congenial manner.

f. Strives to improve his/her knowledge and skills as a school bus operator.

12. This yearly evaluation was reviewed by the Transportation Director with Grievant on April 22, 2008. After this conference, another meeting was scheduled to develop an improvement plan with Grievant to be held on May 21, 2008.

13. By letter dated May 9, 2008, Grievant's representative requested additional documentation and information relative to the five areas where Grievant was rated unsatisfactory.

14. By letter dated May 19, 2008, Grievant was provided with a response to his request. The conference to develop an improvement plan with Grievant was held on May

21, 2008. Grievant's representative provided suggestions which were incorporated into the improvement plan. Grievant agreed to the terms of the improvement period; however, he asserts the evaluation was not conducted in an open and honest fashion.

15. By way of background, and relating to Grievant's reprisal claim, Grievant was given a written reprimand on September 5, 2007, when he allowed an 8-year-old student on the bus to walk a 4-year-old preschool student across a highway and through a parking lot to a day care center without proper adult supervision on or about August 28, 2007.

16. Grievant filed a grievance contesting the reprimand and an agreement was reached on February 29, 2008, to remove the letter of reprimand from all files on or before the last day of the 2007-2008 school year so long as there are no further infractions. Nothing in the agreement prohibited the Respondent from evaluating Grievant regarding his performance for the entire 2007-2008 school year.

Discussion

Respondent raised the defense at level one and renewed its request that this grievance be dismissed as untimely filed at level three. 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). 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[1] 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.*, 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

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[1] 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."

the April 22, 2008 unsatisfactory evaluation of Grievant. Level one, Grievant's Exhibit 1. Grievant did not initiate this grievance until June 3, 2008. This amounted to a disparity of some thirty working 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.

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).

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. In fact, Grievant did not offer any excuse for failing to file within the fifteen-day time period. The undersigned could take administrative notice that Grievant’s representative’s request for additional documentation and information relating to the areas in which Grievant was rated unsatisfactory somehow tolled the time limits; however, there was no agreement to extend the time line for filing this grievance until after Grievant received a response to his request. Grievant’s representative participated in this set of events that encompassed the reprimand, the letter requesting additional information, and formulating an improvement period. Grievant and his representative were certainly aware of a time line cutoff on filing a grievance and did not seek an extension of those deadlines. This is demonstrated by a correspondence from Grievant’s representative previously agreeing to waive time lines for holding the level one hearing. Accordingly, the delay in filing the grievance cannot be excused.

Although the grievance was not timely filed, some discussion of the merits may assist Grievant in understanding his concerns over the evaluation, his claim of reprisal, and his claim that Respondent has violated his seniority rights as it relates to extra-duty assignments. They will be briefly discussed in the order that Grievant presented them in his Statement of Grievance.

"Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students. Thus, Grievant has the burden of proving [his] case by a preponderance of the evidence. *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10-427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

An evaluation is properly conducted if it is performed in an "open and honest" manner, and is fair, and professional. W. Va. Code § 18A-2-12.[2] *See Brown*, *supra*; *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a Grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30,

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[2]W. VA. CODE § 18A-2-12(3) states that the purpose of an evaluation is to "serve as a basis for the improvement of the performance of the personnel in their assigned duties."

1988). The immediate supervisor is responsible for the employee's evaluation, and he or she must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. *Jones v. Braxton County Bd. of Educ.*, Docket No. 97-04-311 (Apr. 28, 1998).

In the instant case, Grievant did not challenge the means by which information was gathered; which included reports from individuals in and out of the school, video tapes, and statements of others as well as Grievant. Grievant was provided an opportunity to respond to all the charges against him in meetings with the Transportation Director. Grievant's evaluation was performed in a fair, open and honest manner. In addition, the undersigned cannot find any violation in the settlement agreement reached in February 2008 because the incidents leading to the second reprimand occurred before the end of the school year.

Grievant alleges that this reprimand was done as an act of reprisal for filing a grievance in the fall of 2007. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he was subsequently treated in an adverse manner by the Respondent or an agent;

(3) that the Respondent or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Once a *prima facie* case of reprisal or retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller*, *supra*. *See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26- 56 (Sept. 29, 1989).

During the 2007-2008 school year, Grievant did file a grievance and was subsequently evaluated as unsatisfactory seven months later by the Transportation Director who had participated in the previous grievance. That is where the necessary elements of reprisal stop. There was no causal connection between Grievant filing the previous grievance and his unsatisfactory evaluation that is the subject of this grievance. In any event, even if a retaliatory motive could be inferred from the record, Respondent offered a legitimate non-retaliatory reason for the contents of the evaluation.

Grievant asserts that Respondent violated his seniority rights by removing him from the rotation list for extra-duty assignments.[3] The record does reveal that the Transportation Director indicated that when a coach or chaperone requests a bus operator not drive their team or group, the driver is not taken out of rotation, because they are given the next available trip. Level one transcript, pg. 43. That scenario demonstrates that a bus driver would be taken out of rotation on a seniority basis. Grievant offers the apt example where Driver A is next in line and the team does not want Driver A, the trip is given to Driver B, effectively taking Driver A out of the rotation based on seniority. However, Grievant only offers the example and did not present any instances where this actually occurred to him. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons, supra*; *See Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

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,

[3]W. VA. CODE § 18A-4-8b(f)(2)(A) provides that "[a] service person with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other employees on a rotating basis according to the length of service until all such employees have had an opportunity to perform similar assignments."

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). 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. 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 have 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: September 30, 2009

Ronald L. Reece
Administrative Law Judge