THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

STEPHANIE BROWN,
Grievant,

v. **DOCKET NO. 2011-0894-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on December 13, 2010, by Grievant, Stephanie Brown, against her employer, the Hancock County Board of Education. The statement of grievance reads:

> I, Stephanie Brown, Principal and Professional Staff, have been during [sic] a service personnel's job for two and [a] half years. The job being a 3 ½ hour cook.

The relief sought by Grievant is "[c]ompensation for the job and a 3 ½ hour cook."[1]

A hearing was held at level one on January 31, 2011. At the conclusion of the level one hearing, Grievant waived the right to receive a decision, and appealed to level two on February 15, 2011. A mediation session was held at level two on May 25, 2011. Grievant appealed to level three on June 1, 2011, and a level three hearing was held before the

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[1] In response to information that the number of lunches served at Liberty Elementary School had increased, in December 2010, Hancock County Superintendent Suzan Smith asked the Board of Education to approve the addition of a part-time Cook position for the school. Respondent approved the addition of a 3 ½ hour Cook position for Liberty Elementary School in December 2010, and a part-time Cook was hired effective January 5, 2011. That part of the requested relief that seeks a 3 ½ hour Cook has already been granted.

undersigned Administrative Law Judge, in the Grievance Board's Westover office on September 20, 2011. Grievant appeared *pro se*, and Respondent was represented by William T. Fahey, Esquire, Hancock County Assistant Prosecuting Attorney. This matter became mature for decision on October 20, 2011, the deadline for submission of Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a principal, perceived that she needed to assist in serving lunches at her school after Respondent eliminated a part-time Cook position at the school. She offered her assistance voluntarily, without any expectation of additional compensation, for about two years before she filed a grievance seeking additional compensation. Respondent argued the grievance was not timely filed. This scenario falls within the continuing practice exception, making the grievance timely filed, but any relief would be limited to 15 days preceding the filing of the grievance. Grievant offered no legal theory under which she would be entitled to additional compensation for voluntarily assisting in serving lunch.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Hancock County Board of Education ("HBOE"), as the Principal at Liberty Elementary School ("Liberty").

2. Earlean Jones is employed as a full-time Cook at Liberty. Prior to sometime in 2008, Ms. Jones was assisted by a 3 ½ hour Cook who was employed part-time at Liberty.

3. HBOE was facing a budget deficit, and enlisted the help of the State Department of Education to find ways to balance the budget. The State Department of Education found that HBOE had more service personnel positions than they should have, and recommended, among other things, that some Cook positions be eliminated. In 2008, HBOE eliminated the half-time Cook position at Liberty.

4. Without the assistance of a half-time Cook, Ms. Jones was unable to complete her paperwork during her normal work hours and filed a grievance regarding this situation in September 2008. At level one of the grievance procedure, Ms. Jones received overtime pay. She did not pursue the grievance.

5. Grievant observed that Ms. Jones needed assistance serving the students lunch. Grievant began helping Ms. Jones serve lunch in 2008. The record does not reflect how much time Grievant spent assisting Ms. Jones.

6. In response to information that the number of lunches served at Liberty had increased, in December 2010, HBOE Superintendent Suzan Smith asked the Board of Education to approve the addition of a part-time Cook position for Liberty. HBOE approved the addition of a 3 ½ hour Cook position for Liberty in December 2010, and a part-time Cook was hired effective January 5, 2011.

7. Respondent asserted a timeliness defense at level one.

8. Grievant waited two years to file this grievance, because she believed it was the job of the Director of Nutrition Services to make sure Liberty was properly staffed.

Discussion

Respondent asserts that the grievance was not filed within the time period allowed

by W. VA. CODE § 6C-2-4, and therefore it must be dismissed. When an 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. *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). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

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

> 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 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 waited more than two years to file a grievance. Her stated excuse was that she expected the administrators responsible for staffing to provide proper staffing for her school. This expectation does not excuse Grievant's late filing. In *Steele v. Wayne County Board of Education*, Docket No. 50-87-062-1 (September 29, 1987), it was held that, "[a]n 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 pursuant to W. VA. CODE §18-29-1, *et seq*.,[2] upon denial thereof." The Supreme Court of Appeals of West Virginia, in *Naylor v. West Virginia Human Rights Commission,* 180 W. Va. 634, 378 S.E.2d 843 (1989), 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." There is no evidence that any HBOE official ever made any type of representation to Grievant which would have caused Grievant to delay filing her grievance.

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[2] These CODE SECTIONS set forth the grievance procedure for education employees prior to July 1, 2007.

However, the continuing practice exception allows a grievance to be filed with each new occurrence of the event which has triggered the grievance. Misclassification, for example, is a continuing practice, however, it is well-settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*, Docket No. 98-HHR-344 (June 24, 1999). In addition, the "'Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996).' *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999)." *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

The undersigned concludes that each time Grievant assisted Ms. Jones in serving lunch, this constituted a new event for purposes of the grievance procedure, and allowed Grievant to file a timely grievance under the continuing practice exception. However, any backpay would be limited to 15 days preceding the filing of the grievance.[3]

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[3] Grievant asserted in her written argument that the Department of Labor has a two-year statute of limitations. Whether that is an accurate statement of the law or not, it has no bearing on the rules applicable to the filing of grievances. If Grievant believes the labor laws have been violated, her remedy would be to go to the Department of Labor. However, it appears that Grievant is exempt from overtime requirements as a professional, salaried employee.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

Grievant cited no statute, regulation, rule, or policy in support of her claim that she was entitled to additional compensation for choosing to assist Ms. Jones with serving lunch, except that she stated in her written argument, filed after the close of evidence, that Hancock County compensates teachers for “extra duties” at the rate of $10 per half-hour. The undersigned cannot consider this information, as it was not testified to by any witness at either hearing, nor admitted as an exhibit, and is therefore not part of the record. Respondent argued that professional and service personnel positions are separate and distinct, and that as a principal, Grievant could not also be classified as a Cook and compensated as such.

While not addressed by either party, it should be pointed out that the State Board of Education Policy related to the child nutrition program states that:

> School employees who supervise during the lunch or breakfast periods, sell tickets or perform other duties directly related to the food program should do so on a contract basis as described in W.Va. Code §§18A-4-14 and 16.

126 C.S.R. 85 § 83.2. This provision, however, when read in context, does not provide a mechanism for additional compensation under a contract; rather it allows a school the discretion to "provide employees with free meals as compensation for performing duties related to the child nutrition program. However, the school is not required to do so. If the school chooses to provide free meals to these employees it should reflect that they are actually performing duties related to the lunch program by providing contracts for these duties pursuant to W. VA. CODE § 18A-4-14 or § 18A-4-16." *Redd. v. McDowell County Bd. of Educ.*, Docket No. 2009-1477-McDED (May 26, 2011). Grievant did not execute any contract in exchange for free meals, nor were free meals approved by anyone for her.

One mechanism under which Grievant possibly could have received compensation is W. VA. CODE § 18A-4-14, which requires that all school personnel receive a duty-free lunch period of at least thirty continuous minutes. This statute allows an employee to waive her duty-free lunch in exchange for compensation. There was no evidence, however, that Grievant did not receive a duty-free thirty-minute lunch each day.

While Grievant felt she needed to assist Ms. Jones, no one told her to do so. She alone made the decision to help Ms. Jones, with no expectation of additional compensation. There was no part-time Cook position for Grievant to fill, and Grievant had no authority to create and fill such a position for additional compensation. Further, the record does not reflect how much time Grievant spent each day assisting with serving lunch. Moreover, as a professional employee, Grievant was not entitled to overtime (*Hussell, et al. v. Mason County Bd. of Educ.*, Docket No. 96-26-073 (July 24, 1996)), and took it upon herself to assist with lunch, with no expectation of additional compensation.

"She cannot now claim entitlement to compensation. *Reed v. Kanawha County Bd. of Educ.,* Docket No. 99-20-111 (May 27, 1999); *Toney v. Lincoln County Bd. of Educ.,* Docket No. 98-22-424 (Feb. 8, 1999); *Anderson v. Gilmer County Bd. of Educ.,* Docket No. 95-11-197 (Aug. 1, 1995); *Catron v. Mingo County Bd. of Educ.,* Docket No. 95-29-060 (July 11, 1995)." *Sitler v. Boone County Bd. of Educ.*, Docket No. 00-03-353 (Apr. 17, 2001).

Finally, Grievant pointed to the staffing guidelines found in W. VA. CODE § 18A-2-13, arguing Liberty was entitled to a 3 ½ hour Cook for the previous two years. As is clear from the plain language of that statute, "[t]he kitchen staffing guidelines meal-to-cook ratios and meal values specified in W. VA. CODE § 18A-2-13 are *optional*, and county Boards of Education are not obligated to use those figures. *Miller v. Lincoln County Brd. of Educ.*, Docket No. 97-22-083 (Jul[y] 23, [1]997)." *Martin, et al., v. Raleigh County Bd. of Educ.*, Docket No. 02-41-212 (Sept. 13, 2002). (Emphasis added.)

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. When an 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. *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). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

2. A grievance must be filed within 15 days "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." W. VA. CODE §§ 6C-2-3(a)(1) and 6C-2-4(a)(1).

3. The grievance was filed within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance.

4. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

5. Grievant did not demonstrate that she was entitled to additional compensation for voluntarily assisting the Cook at her school in serving lunch to students.

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: November 23, 2011