THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBRA L. LAWTON,
Grievant,

v. **DOCKET NO. 2011-1081-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent, and,

TEENA SMITHBAUER,
Intervenor.

DISMISSAL ORDER

Grievant, Debra L. Lawton, filed a grievance against her employer, the Hancock County Board of Education, on or about February 3, 2011. The statement of grievance reads:

> Grievants [sic] contends that a less senior aide was permitted to perform an assignment/duty that resulted in additional compensation rather than Grievant. Grievant alleges a violation of West Virginia Code 18A-4-8b and 6C-2-2 (favoritism/discrimination).[1]

Grievant attached a one page explanation of her complaint to her level one filing. As relief Grievant sought, "reassignment to the duties/assignment at issue and compensation for lost wages with interest to maximum extent permitted by law."

A hearing was held at level one on March 3, 2011, and a level one decision denying the grievance was issued on April 19, 2011. Grievant appealed to level two on May 4,

---

[1] No evidence of discrimination or favoritism was presented, nor was this argument pursued in Grievant's post-hearing submission. Any claims of discrimination or favoritism are deemed abandoned.

2011, and a mediation session was held on September 20, 2011. Grievant appealed to level three on September 28, 2011. A level three hearing was held before the undersigned Administrative Law Judge on February 15, 2012, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, Respondent was represented by William T. Fahey, Esquire, Assistant Prosecuting Attorney for Hancock County, and Intervenor was represented by Owens Brown, West Virginia Education Association. This matter became mature for decision on March 16, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was assigned to a mid-day bus run at the beginning of the school year. In November 2010, this run was re-assigned to a less senior Aide at Grievant's request, resulting in Grievant working fewer than seven hours, while being paid under a seven hour contract, and the less senior Aide often working more than seven hours, and earning additional pay when she did so. When Grievant became aware that the less senior Aide was earning additional pay, she then asked to be returned to the mid-day run and to be paid for more than seven hours. The only reason Grievant seeks to be returned to the mid-day run which she had voluntarily left, is because she wants to be paid for more than seven hours a day. However, due to her regular morning and afternoon assignments being shorter than those of the Aide working the mid-day run, Grievant would not be working more than seven hours a day were she to be returned to the mid-day assignment, and would not be entitled to additional pay. The relief requested by Grievant is not available. A timeliness defense was also raised, but was not proven.

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

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education ("HBOE") as an Aide for 20 years, and is currently working in the Transportation Department under a seven hour contract.

2. At the beginning of the 2010-2011 school year, Grievant was assigned to assist special needs students riding Bus 72. She boarded the bus at 6:30 a.m. at the Transportation Department at Weirton, and remained on the bus until the last student departed the bus at 9:00 a.m., at the Transportation Department in Weirton. Four days a week, Monday through Thursday, Grievant was assigned to meet a different bus, Bus 35, at Weir Middle School at 11:10 a.m., and ride the bus with the students, returning to Weir Middle School at 12:30 p.m. Grievant ended the day by meeting Bus 72 at the Transportation Department at 2:15 p.m., and accompanying special needs students on the bus ride home, returning to the Transportation Department at 4:50 p.m. Between the bus runs, Grievant has free time to do as she chooses. Grievant was paid for this work under a seven hour contract.

3. Intervenor Teena Smithbauer is employed by HBOE as an Aide in the Transportation Department under a seven hour contract. At the beginning of the 2010-2011 school year, Ms. Smithbauer was not assigned to work a mid-day bus run, but was being paid for working seven hours even though she was not working seven hours a day. Grievant was working more hours than Ms. Smithbauer, and complained to her supervisor about this, asserting that she should be the one who did not work the mid-day run since

she was the more senior Aide, or that she and Ms. Smithbauer should take turns working the mid-day run.

4. In response to Grievant's complaint, on November 1, 2010, Ms. Smithbauer was assigned to work the mid-day run which Grievant had been working. Grievant was not assigned any additional duties, and did not work seven hours a day. Nonetheless, she continued to be paid for seven hours of work per day.

5. Prior to the 2010-2011 school year, both Grievant and Ms. Smithbauer had worked mid-day runs. During the 2010-2011 school year, only one mid-day run was needed for transporting the students.

6. When all the students are present, Ms. Smithbauer's morning assignment takes approximately two and a half hours, and her afternoon assignment takes approximately three hours and fifteen minutes, for a total of five hours and 45 minutes. The mid-day run takes about 1 hour and ten to fifteen minutes, plus the time it takes her to travel from her assigned home base to meet the bus. She is also paid for a lunch break. After being assigned to work the Bus 35 mid-day run, Ms. Smithbauer's work hours frequently exceeded seven hours a day. When Ms. Smithbauer's work hours exceed seven hours she receives additional pay for the time exceeding seven hours.

7. If Grievant worked the mid-day run, her work hours would not under normal circumstances ever exceed seven hours, and she would not be entitled to receive any pay beyond her normal pay for a seven hour contract.

8. The record does not reflect the date on which Grievant became aware that Ms. Smithbauer was working more than seven hours a day on occasion, and earning additional pay when she exceeded seven hours.

Discussion

Respondent and Intervenor argued 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 her 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).

In order to prove this grievance was not timely filed, Respondent or Intervenor would need to produce evidence of the date on which Grievant became aware that Ms. Smithbauer was working more than seven hours a day and being paid for the extra time. No such evidence was placed into the record. The grievance was timely filed.

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 argued she should be assigned the mid-day run because she is the more senior Aide. This is exactly the reasoning she used when she asked her employer to assign the run to Ms. Smithbauer. Respondent did as Grievant requested, and when

Grievant got what she wanted, she filed a grievance; proving that, no good deed goes unpunished.

It is crystal clear that Grievant voluntarily gave up her assigned mid-day run because she felt it was unfair for the more senior Aide to work longer hours than the less senior Aide. Grievant changed her mind when the change in assignment resulted in the less senior Aide exceeding her seven hour contract and receiving additional pay. Grievant was at that time working significantly less than seven hours while being paid for seven hours of work. It is likewise crystal clear that even were Grievant to be returned to the mid-day assignment from which she asked to be removed, she would not be entitled to additional compensation, as her work day would not exceed seven hours. Grievant only wants to be returned to the assignment so that she can be paid for more than seven hours a day. This relief is not available.

The Procedural Rules of the W. Va. Public Employees Grievance Board provide that, "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 156-1-6 6.11(2007). In instances where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002). This grievance must be dismissed.

The following Conclusions of Law support the Dismissal of this grievance.

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).

2. The grievance was timely filed.

3. 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).

4. In instances where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

5. Grievant has requested relief which is not available. When it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion.

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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 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: April 18, 2012