THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN K. BARKER,
Grievant,

v. **Docket No. 2011-1262-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Brian K. Barker, filed a grievance on February 24, 2011, against his employer, Respondent. The statement of grievance reads:

> Grievant contends that the Respondent violated W.Va. Code 18A-4-8b & 18A-4-15 by its failure to post the position of an employee who had been absent since August 2008. It is not clear whether the employee was suspended without pay, was on a leave of absence, or had abandoned her job. However, in each case, posting with a grant of benefits to the successful applicant was required.

As relief, Grievant seeks "compensation for lost wages retroactive to June 1, 2010 with interest and all benefits, pecuniary and nonpecuniary, including but not limited to seniority, personal leave and insurance retroactive to June 1, 2010."[1]

A level one hearing was held on March 29, 2011.[2] The grievance was denied at that

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[1]At the level one hearing, Grievant clarified that the relief he was seeking was to be granted regular bus operator's seniority and back benefits starting from June 10, 2010. *See* Level one hearing decision.

[2]At the level three hearing, both parties agreed to proceed without a level one hearing transcript due to recording difficulties.

level.[3] A level two mediation was conducted on August 12, 2011. A level three hearing was held before the undersigned on December 19, 2011, at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by John Everett Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by counsel, David Lycan, Esq. This matter became mature for decision on February 16, 2012, upon final receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts that Respondent should have posted bus run No. 9927 at the end of the regular bus operator's medical leave of absence. He asserts that if the position would have been posted at some point before June of 2010, then he would have been awarded the position and received a regular bus operator position under the retirement and benefit system in effect at that time. Grievant asserts that Respondent violated WEST VIRGINIA CODE §§18A-4-15 and 18A-4-8b by not posting and filling the position for regular bus run No. 9927 after the regular bus operator's absence from work extended beyond thirty working days.

Respondent asserts that Grievant failed to prove he would have been "next in line" in bus operator seniority for bus run No. 9927 if it had in fact been posted before June of 2010. Also, Respondent argues that the grievance is untimely as it was not filed until February 24, 2011.

Grievant failed to timely file his grievance within 15 days of learning that the bus operator performing bus run No. 9927 was absent from her position for longer than thirty

[3]Respondent first asserted the issue of this grievance being filed untimely at the level one hearing.

working days. In addition, Grievant failed to demonstrate that he would have been "next in line" for the position.

Accordingly, this grievance is DENIED.

Findings of Fact

1. At the time of filing this grievance, Brian Barker, Grievant, was employed by Respondent as a substitute bus operator. Grievant was later awarded a regular bus operator position on June 21, 2011, which went into effect on August 23, 2011.

2. Bus operator, Armilda Michels, performed regular bus run No. 9927. Ms. Michels was on a leave of absence granted by Respondent for the period of time from October 21, 2008 to October 21, 2009.

3. Respondent filled Ms. Michels' regular bus run No. 9927 with substitute bus operators until she returned from her leave of absence.

4. Grievant began performing Ms. Michel's bus run No. 9927, as a substitute, on February 4, 2010. He continued making the run, except when he was occasionally "bumped" by regular bus operators, until the conclusion of the 2010-2011 school year. When Grievant was bumped by regular bus operators to perform the bus run No. 9927, he would then perform the "bumping" bus operator's run.

5. At the time Grievant performed the substitute position for bus run No. 9927, he was seventh on the substitute bus operator's seniority list.

6. Some retirement and insurance benefits changed for regular bus operators at the end of the 2009-2010 school year.

7. Grievant filed this grievance on February 24, 2011.

8. Grievant bid upon every posted regular bus operator position from October

2009 through June 21, 2011.

9. Grievant was not awarded any of the postings he bid upon until he was awarded the regular bus run No. 2831 on June 21, 2011. He was not awarded the other postings because he was either outbid by regular employees or more senior substitute bus operators.

10. Ms. Michels was terminated on May 3, 2011.[4] Respondent waited until after Ms. Michel's appeal period had expired before posting bus run No. 9927. The position was posted[5] during the time period of May 20, 2011 to May 26, 2011.

11. Grievant bid upon the posting for bus run No. 9927, however it was awarded to Elyssa Carico, a more senior applicant and regular employee, on June 9, 2011.[6]

12. Grievant was awarded the regular bus run No. 2831 on June 21, 2011.

13. Grievant's regular bus run No. 2831 was effective August 8, 2011, the first day of the 2011-2012 school year.

14. Ms. Carico transferred from bus No. 9927 to bus No. 2605, effective June 23, 2011.[7]

15. As a result of Ms. Carico's transfer, the position for bus No. 9927 was re-posted.

16. Grievant placed a bid on the posting of bus No. 9927, however he did not list

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[4]Grievant's Exhibit No. 2, Recommended Personnel Matters dated May 3, 2011.

[5]Grievant's Exhibit No. 3, Vacancy posting.

[6]Grievant's Exhibit No. 4, Recommended Personnel Matters dated June 7, 2011.

[7]Respondent's Exhibit No. 1, Recommended Personnel Matters dated June 21, 2011.

that bus No. as his first choice. Grievant was awarded his first choice of posted positions, bus No. 2831.

17. The position for bus No. 9927 was filled by David Thompson on or about July 19, 2011.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant asserts that Respondent should have posted bus run No. 9927 at the end of Ms. Michels' leave of absence. He asserts that if the position would have been posted at some point before June of 2010, then he would have been awarded the position and received a regular bus operator position under the retirement and benefit system in effect at that time. Some retirement benefits changed at the conclusion of the 2009-2010 school year. Grievant asserts that Respondent violated WEST VIRGINIA CODE §§18A-4-15 and 18A-4-8b by not posting and filling the position for regular bus run No. 9927 after Ms. Michels' absence from work extended beyond thirty working days.

Respondent asserts that it did not post Ms. Michels' position immediately following her approved leave of absence out of concern under the American with Disabilities Act and

because it wanted to give her ample time to recover. Superintendent Gary Adkins, for Respondent, was in the process of placing Ms. Michels' termination on the list of recommended actions to be voted upon at the next regular agenda meeting for Respondent when he fell and injured himself. Superintendent Adkins' injury rendered him unable to work for a period of time. During that time, the recommendation to terminate Ms. Michels was not placed on a regular meeting agenda. Respondent asserts that Grievant failed to prove he would have been "next in line" in bus operator seniority for the bus run No. 9927 position if it had in fact been posted before June of 2010. Also, Respondent argues that the grievance is untimely as it was not filed until February 24, 2011.

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. . . .

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). 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). Should the employer demonstrate a grievance has not been timely filed, the

employee may demonstrate 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). *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).

Respondent argues that Grievant knew in October of 2009 that Ms. Michels' year of leave of absence had expired. Respondent asserts that Grievant was aware of Ms. Michels' absence at the time he started performing the bus run on February 4, 2010 as a substitute. Respondent asserts Grievant possessed knowledge of Ms. Michels' continued absence because Grievant performed the bus run as a substitute on a regular basis from February 4, 2010 until the conclusion of the 2010-2011 school year. Grievant filed this grievance after performing the bus run for a year.

In response to Respondent's assertion of untimeliness, Grievant argues that he did not know the exact details of Ms. Michels' absence. Grievant claims that he did not know if Ms. Michels had abandoned her position, was still on a leave of absence, or had been suspended. Grievant argues the failure to post the position was a continuing practice.

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's core argument for this grievance is that a vacant position should be

posted after a regular employee's absence extends beyond thirty working days. Grievant relies upon W.VA. CODE §18A-4-15, which states in part:

> (a) The county board shall employ and....shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (1) To fill the temporary absence of another service employee;
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> (2) To fill the position of a regular service person as follows:
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> (A) If the regular service person requests a leave of absence from the county board in writing and is granted the leave in writing....; or
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> ...
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> (C) If an absence pursuant to paragraph (A)... of this subdivision is to extend beyond thirty working days, the county board shall post the position of the absent employee under the procedures set forth in section eight-b [18A-4-8b] of this article. If a substitute service person is employed to fill the position of the absent employee and is employed in the position for twenty or more working days, the substitute service person:
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> (i) Acquires regular employment status with the exception of regular employee job bidding rights;
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> (ii) Does not accrue regular seniority; and
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> (iii) Is accorded all other rights, privileges and benefits pertaining to the position until the regular employee returns to the position or ceases to be employed by the county board;
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> ...
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> (5) To fill the vacancy created by a regular employee's suspension.
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> (A) If the suspension is for more than thirty working days, the county board shall post the position of the suspended employee under the procedures set forth in section eight-b [18A-4-8b] of this article.

Grievant asserts that Respondent should have posted the position after Ms. Michels was absent for longer than thirty working days. Because Grievant asserts the position should have been posted and the selected candidate should have acquired regular status and retirement benefits before June 2010, a specific point in time that was over 7 months prior to the filing of this grievance, the undesigned does not find the grievable event to be continuous. Grievant performed the run as a substitute due to Ms. Michels' absence for

over a year before filing this grievance. Grievant did not file his grievance within 15 days of unequivocally learning that Ms. Michels was absent from her position for longer than thirty working days.[8]

Even were this grievance timely filed, Grievant has not demonstrated he would have been awarded Ms. Michels' bus run No. 9927. "Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE § 18A-4-8b." *Leishman v. Monongalia County Bd. of Educ.,* Docket No. 04-30-127 (Aug. 31, 2004). County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

With regards to seniority rights for school service personnel, W.VA. CODE § 18A-4-8b states in part:

> Qualified applicants shall be considered in the following order:
> (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
> (2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;
> (3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;
> (4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;
> (5) Substitute service personnel who hold a classification title within the classification category of the vacancy;
> (6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and
> (7) New service personnel.

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[8]The undersigned does note that Respondent failed to follow the statutory requirements for posting a position as required by W.VA. CODE §18A-4-15. However, the present grievance was filed untimely.

"In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.'" *See White et al. v. Monongalia County Bd. of Educ.,* Docket No. 2008-0586-CONS (Dec. 16, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonEd (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.,* Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1997).

Grievant failed to prove that he would have been "next in line" for the position assigned to Ms. Michels had the position been posted before June 2010, as he claims it should have been. In June of 2010, Grievant was a substitute bus operator. At the time, he was seventh in seniority on the substitute bus operator's list. Although Grievant claimed that the substitute bus operators ahead of him in seniority were not actively accepting substitute assignments at the time and were not bidding upon regular posted positions, he failed to provide any evidence of such claim. Grievant bid upon every posted regular bus operator's position from October 2009 through June 21, 2011, but was not awarded any of the posted positions because he was not the most senior applicant for any of the positions.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the

evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). 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).

3. Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate 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). *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).

4. 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).

5. Grievant did not timely file his grievance within 15 days of learning that Ms. Michels was absent from her position for longer than thirty working days.

6. Grievant failed to demonstrate a proper basis to excuse his failure to file this grievance in a timely manner.

7. "Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE § 18A-4-8b." *Leishman v. Monongalia County Bd. of Educ.,* Docket No. 04-30-127 (Aug. 31, 2004).

8. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

9. "In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.'" *See White et al. v. Monongalia County Bd. of Educ.,* Docket No. 2008-0586-CONS (Dec. 16, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonEd (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.,* Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1997).

10. Grievant did not demonstrate he would have been awarded Ms. Michels' bus run No. 9927. Grievant failed to prove that he would have been "next in line" for the position.

For the foregoing reasons, this grievance is hereby 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 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 (2008).

DATE: March 29, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge