THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BONITA K. REDD,

Grievant,

v. **DOCKET NO. 2012-0420-McDED**

McDOWELL COUNTY BOARD OF EDUCATION and
WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondents.

DECISION

On October 15, 2011, Bonita Redd ("Grievant"), a fourth grade teacher at Welch Elementary School in McDowell County, filed this grievance against the McDowell County Board of Education and the West Virginia Department of Education at Level One by mailing her grievance form dated October 14, 2011, and postmarked October 15, 2011, to the County Superintendent and the Grievance Board alleging the following complaint:

> The event causing this grievance to be filed was the selection of Leon Gravely as the Dean of Students at Mt. View. This position is the closest to a lateral position for Assistant Principal. Therefore, I should have been transferred into this position pursuant to transfer policy.
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> The WVDE and McDowell County Board of Education have violated state and federal statutes including, but not limited to, the following:
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> 1. 18A-4-7a
> 2. 18-2E-5
> 3. Title VII
> 4. Title IX
> 5. Policy 8-052
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> They have also practiced favoritism, discrimination, conspiracy, and sex discrimination, and violation of SIG grant.

As relief, Grievant seeks instatement to the position of Dean of Students or Assistant Principal at Mount View, "triple back pay," and "punitive damages[1] for violation of civil rights/public policy."

The grievance was denied following a level one hearing on October 31, 2011, and went forward through mediation at level two. Accordingly, a hearing was held at level three before the undersigned Administrative Law Judge on June 5, 2012, in Beckley, West Virginia. Grievant appeared *pro se* and Respondent, McDowell County Board of Education,[2] was represented by its attorney, Howard Seufer, with Bowles Rice McDavid Graff & Love LLP. At the close of the hearing, the parties agreed to submit findings of fact and conclusions of law. This matter became mature for decision on June 25, 2012, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.[3]

Synopsis

On January 7, 2011, McDowell County Schools Superintendent James Brown notified Grievant that she was being considered for transfer in accordance with W. Va. Code § 18A-2-7 indicating that he intended to eliminate all Assistant Principal positions, including the position she then held at Mount View High School. (Bd. Ex. 1 at Level I.)

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[1] The Grievance Board has no authority to award tort-like damages such as "triple" back pay or punitive damages. *See White v. Monongalia County Bd. of Educ*., Docket No. 2008-0586-CONS (Dec. 16, 2008); *Spangler v. Cabell County Bd. of Educ*., Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ*., Docket No. 98-20-325 (Dec. 30, 1998). Indeed, to award punitive damages would be contrary to law. *Spangler, supra*.

[2] The West Virginia Department of Education was not represented at the hearing, deferring to counsel representing the County Board.

[3] On July 5, 2012, the undersigned received Respondent McDowell County Board of Education's Motion to Strike the documents attached to Grievant's proposed findings. Grievant was provided an opportunity to respond to this motion. The documents in question were not considered in arriving at a decision on this grievance as the Board's procedures do not permit additional evidence to be submitted after the Level III hearing has closed. *See Hedinger v. Wyoming County Bd. of Educ*., Docket No. 2010-0589-WyoEd (Mar.

Superintendent Brown simultaneously notified Grievant, in accordance with W. Va. Code § 18A-2-2, that her employment contract as an Assistant Principal would be terminated at the end of the 2010-11 school year for the same reason. (Bd. Ex. 1 at Level I.) Following hearings on January 19, 2011, Benjamin Shew, acting as the designee of the State Superintendent, approved Grievant's transfer from her Assistant Principal's position, concluding that she was not entitled to "bump" a principal or central office staff member. (Bd. Ex. 2 at Level I.) Thereafter, on April 7, 2012, Grievant was notified by Barbara Miller, the Director of Personnel for the McDowell County Board of Education, that she was being transferred to the position of Classroom Teacher, MI/LD, at River View High School. (Bd. Ex 3 at Level I.) Grievant did not file a grievance challenging the termination of her contract as an Assistant Principal or her transfer to a teaching position at River View. Subsequently, Grievant applied for and received a position as a Fourth Grade Teacher at Welch Elementary, effective August 5, 2011. (Bd. Ex. 4 at Level I.)

On or around August 24, 2011, the Board posted an administrative job opening for Dean of Students at Mount View High School. (*See* Bd. Ex. 5 at Level I.) The posting was originally set to close on August 31, 2011, but the closing date was extended to September 2, 2011. Grievant submitted a timely application for the position but the Board selected another applicant, Leon Gravely, to fill the position.

The following Findings of Fact are made based upon the record developed through the level three hearing.

4, 2011).

Findings of Fact

1. During the 2010-2011 school year, Grievant was employed by the McDowell County Board of Education as an Assistant Principal at Mount View High School.

2. In January 2011, and at all times pertinent to this grievance, the West Virginia Board of Education, acting under the authority of W. Va. Code § 18-2E-5, exercised control over personnel actions through the State Superintendent of Schools.

3. By written notice dated January 7, 2011, the County Superintendent notified Grievant that he was recommending to the State Superintendent that her contract of employment as an Assistant Principal be terminated at the end of the 2010-2011 school year. The County Superintendent, in another written notice dated January 7, 2011, notified Grievant that he was recommending to the State Superintendent that her name be placed on the list of employees to be considered for transfer for the following 2011-2012 school term. The County Superintendent indicated that the school system was being restructured to eliminate all Assistant Principal positions. Grievant was advised by these notices of her right to request a hearing prior to any action by the State Superintendent on the County Superintendent's recommendations.

4. Grievant requested a hearing which was held by the State Superintendent's designee, Benjamin Shew, on January 20, 2011. At the hearing, Grievant contended that she should be allowed to bump a Principal or Central Office Administrator, pursuant to W. Va. Code § 18A-4-7a.

5. On January 28, 2011, Mr. Shew issued a written decision rejecting Grievant's objections to her transfer.

6. On April 7, 2011, the Personnel Director for McDowell County Schools, Barbara Miller, notified Grievant in writing that she was being transferred to a position of MI/LD classroom teacher at River View High School, effective August 17, 2011.

7. Prior to the beginning of the 2011-2012 school year, Grievant applied for and was selected to fill a vacant position for a fourth grade teaching position at Welch Elementary School.

8. On or about August 24, 2011, McDowell County Schools posted a notice of vacancy for the position of Dean of Students at Mount View High School. The closing date for applications was extended through September 2, 2011.

9. Grievant timely applied for the vacant Dean of Students position on or before September 2, 2011.

10. On September 12, 2011, Ms. Miller sent written notice to Grievant that she had not been selected for the Dean of Students position.

11. Grievant had more administrative seniority than the successful applicant, Leon Gravely.

12. Grievant's Level One grievance in this matter is dated October 14, 2011 and postmarked October 15, 2011.

13. This grievance was submitted more than fifteen days after Grievant was notified that her contract as an Assistant Principal would be terminated, more than fifteen days after Grievant was notified that she would be transferred to an MI/LD

classroom teaching position at River View High School, and more than fifteen days after she was notified that she had not been selected to fill the position of Dean of Students at Mount View High School.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "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 Resources*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent contends that Grievant failed to initiate her grievance within the statutory time limit set forth in W. Va. Code § 6C-2-4(a)(1):

> 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 . . . .

An assertion by an employer that a grievance was not timely filed is an affirmative defense, which the employer has the burden of proving by a preponderance of the evidence. *Carroll v. Mingo County Bd. of Educ*., Docket No. 98-29-396 (1999). Where an employer demonstrates that 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. *Rose v. Raleigh County Bd. of Educ*., Docket No. 2012-0188-RalED (Mar. 28, 2012). *See Duruttya v. Bd. of Educ*., 181 W. Va. 203, 382 S.E.2d 40 (1989). As required by W. Va. Code § 6C-2-3(c)(1), Respondent invoked this timeliness defense before level two in its post-hearing submission at level one and in its level one decision. *See Alexander v. Kanawha County Bd. of Educ*., Docket No. 01-20-377 (Sept. 12, 2001).

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *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). In this matter, Grievant was clearly notified that she was being transferred out of an Assistant Principal position to a classroom teaching position on April 7, 2011. As this grievance was not filed until October 15, 2011, Respondent has demonstrated that the portion of the grievance challenging the termination of Grievant's contract as an Assistant Principal and Grievant's transfer to a classroom teaching position was not timely initiated.

Nonetheless, the applicable statute of limitations allows the employee to demonstrate that she filed her grievance within fifteen days "of the date upon which the event became known to the employee." W. Va. Code § 6C-2-4(a)(1). *See Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990). Grievant stated

in her level one grievance that the "event causing this grievance to be filed was the selection of Leon Gravely as Dean of Students at Mt. View."

Grievant is contending that she should have been transferred into this Dean of Students position at Mount View High School. However, Grievant had been duly notified of the Superintendent's intention to terminate her contract as an Assistant Principal at Mount View and transfer her to another position on January 7, 2011. Thereafter, Grievant was afforded a hearing before Benjamin Shew, acting as the State Superintendent's designee. Mr. Shew subsequently denied Grievant's challenge to her proposed transfer in a written decision dated January 28, 2011. Moreover, on April 7, 2011, the Board's Director of Personnel, Barbara Miller, notified Grievant in writing that she would be transferred to a classroom teaching position at River View High School, effective August 17, 2011. Thus, Grievant was unequivocally notified of the decisions being challenged more than fifteen days before she filed her grievance. *See Rose, supra; Naylor, supra*.

In late August 2011, the County Board posted a vacancy for a Dean of Students at Mount View High School. The closing date for applications was September 2, 2011, extended from the original closing date of August 31, 2011. Grievant made a timely application for the position. Grievant is essentially alleging that she thereby discovered that the reasons given for her transfer were not genuine, and she should have been transferred into this Dean of Students position, if she should have been transferred at all.

The date when Grievant became aware of additional facts or an "event" which could support a grievance challenging elimination of her Assistant Principal position and her subsequent transfer to a teaching position, was September 2, 2011, when the posting for the Dean of Students position at Mount View High School closed. Obviously, Grievant was aware of the posting by that date because she made a timely application for the position before the closing date for the posting, September 2, 2011. However, this grievance was not filed within fifteen days following this discovery. It was filed on October 15, 2011, after she had been considered for the Dean of Students position and not selected.

There is no authority allowing a grievant to "bootstrap" a challenge to an earlier personnel action that was not timely grieved by challenging a subsequent personnel decision and arguing that it somehow relates back to the earlier action. The primary focus of her grievance is the Respondent's decision to eliminate her position as an Assistant Principal and transfer her to another non-administrative position. Even if the Board's actions in eliminating Grievant's position as an Assistant Principal and transferring her to a non-administrative position were flawed in some or all of the ways which Grievant is alleging, the posting and filling of another administrative position several months later, a position which did not exist when Grievant's Assistant Principal contract was terminated, and she was placed on transfer status, does not involve the type of "event" which excuses Grievant's failure to timely file under the rationale established by the West Virginia Supreme Court of Appeals in *Duruttya* and *Spahr, supra*.

The grievance at issue also challenges the Board's failure to select her for the Dean of Students position at Mount View. Thus, the Respondent likewise bears the burden of establishing by a preponderance of the evidence that this personnel action was not grieved within the statutory time limits. *See Carroll, supra*. Respondent presented evidence that Barbara Miller sent Grievant a letter dated September 12, 2011, advising Grievant of her non-selection for the Dean of Students position. Ordinarily, a letter dated September 12 would have been mailed that same day, or the following day, at the latest. Grievant presented no evidence to indicate when she actually received the letter, but there was no contention that she did not receive the letter in the ordinary course of business. Accordingly, Respondent demonstrated by a preponderance of the evidence that Grievant did not file her grievance within fifteen days of being notified that she had not been selected to fill the Dean of Students position.

Grievant states that she filed her grievance within fifteen days after obtaining relevant information regarding the certification and seniority of the successful applicant. In Syllabus Point 1 of *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739(1980), the West Virginia Supreme Court of Appeals stated that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." However, this grievance board has held that the event giving rise to a grievance of this nature is the decision not to award her the Dean of Students position, not when she discovers that the selection process was flawed or that the successful applicant had inferior qualifications. *See Carroll, supra*.

Indeed, mere ignorance of the facts is insufficient to toll the required time period for filing a grievance. *See Bailey v. McDowell County Bd. of Educ*., Docket No. 07-33-399 (Nov. 24, 2008). Grievant has not demonstrated that she was unable to obtain information necessary to file her grievance, or that the Board or any of its agents misled her or delayed her from timely filing her grievance. Merely gathering evidence to support the merits of a grievance does not delay the running of the time limit to file.

Although Grievant's failure to timely challenge her non-selection as Dean of Students does not appear to meet the criteria established in *Spahr* and *Duruttya* for excusing a Grievant's failure to file within fifteen days of the "event," this decision will nonetheless address the merits of this portion of her grievance in order to make a complete record.

Grievant contends she should have been transferred into the Dean of Students vacancy at Mount View High School in September 2011 in compliance with W. Va. Code § 18A-4-7a as a result of her Assistant Principal position being eliminated during the previous school year. As previously discussed, this aspect of her grievance was untimely. Grievant also asserts that she should have been competitively selected in accordance with the criteria established in W. Va. Code § 18A-4-7a to fill the Dean of Students vacancy, given that McDowell County Schools were then in "Conditional" status and the State Department of Education no longer had authority to exercise its considerable discretion under W. Va. Code § 18-2E-5. Grievant further asserts that the selection of a male applicant over her violates Title IX. It is not clear how a statute which guarantees equal educational opportunities for students could be violated in a

personnel decision concerning the employment of a Dean of Students, at least where there is no evidence that there was any exclusion of qualified applicants solely on the basis of sex. *See Rogar v. Raleigh County Bd. of Educ*., Docket No. 97-41-295 (Apr. 14, 1998). Indeed, Grievant presented no credible evidence that her gender was a factor in the selection decision. Accordingly, the remainder of this discussion will address the merits of the second prong of Grievant's argument.

W. Va. Code § 18-2E-5(p), school system approval, provides, in pertinent part:

> The State Board annually shall review the information submitted for each school system from the system of education performance audits and issue one of the following approval levels to each county board: Full approval, temporary approval, conditional approval or nonapproval.
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> (C) Whenever nonapproval status is given to a school system, the state board shall declare a state of emergency in the school system and shall appoint a team of improvement consultants to make recommendations within sixty days of appointment for correcting the emergency. When the state board approves the recommendations, they shall be communicated to the county board. If progress in correcting the emergency, as determined by the state board, is not made within six months from the time the county board receives the recommendations, the state board shall intervene in the operation of the school system to cause improvements to be made that will provide assurances that a thorough and efficient system of schools will be provided. This intervention may include, but is not limited to, the following:
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> (i) Limiting the authority of the county superintendent and county board as to the expenditure of funds, the employment and dismissal of personnel, the establishment and operation of the school calendar, the establishment of instructional programs and rules and any other areas designated by the state board by rule, which may include delegating decision-making authority regarding these matters to the state superintendent;
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> (ii) Declaring that the office of the county superintendent is vacant;
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> (iii) Delegating to the state superintendent both the authority to conduct hearings on personnel matters and, subsequently, to

> render the resulting decisions and the authority to appoint a designee for the limited purpose of conducting hearings while reserving to the state superintendent the authority to render the resulting decisions;
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> * * *
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> (v) Taking any direct action necessary to correct the emergency including, but not limited to, the following:
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> (I) Delegating to the state superintendent the authority to replace administrators and principals in low performing schools and to transfer them into alternate professional positions within the county at his or her discretion; and
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> (II) Delegating to the state superintendent the authority to fill positions of administrators and principals with individuals determined by the state superintendent to be the most qualified for the positions. Any authority related to intervention in the operation of a county board granted under this paragraph is not subject to the provisions of article 4, chapter eighteen-a of this code;

This Grievance Board has previously determined that W. Va. Code § 18-2E-5(p) grants the power to fill the positions of administrators and principals in school systems under State intervention to the State Superintendent of Schools. *Nelson v. Lincoln County Bd. of Educ*., Docket No. 2009-0044-LinED (May 13, 2009); *Jarvis v. McDowell County Bd. of Educ*., Docket No. 07-33-408 (Dec. 19, 2008); *Henry v. McDowell County Bd. of Educ*., Docket No. 07-33-009 (Dec. 8, 2008). *See Hicks v. Mingo County Bd. of Educ*., Docket No. 07-29-054 (Apr. 23, 2008). While Grievant does not disagree that W. Va. Code § 18-2E-5 gives the State Board of Education authority to exercise broad discretion when the county schools are in a "nonapproval" status, she contends that because McDowell County Schools had improved to a lesser "conditional" status at the time of these actions, the State Board was no longer authorized to dispense with the

requirements of Chapter 18A, Article 4, of the Code governing the hiring, assignment and transfer of professional public school employees.

Respondent does not dispute the fact that McDowell County Schools had been elevated to “conditional” status but explained that the State Board of Education had not relinquished authority over personnel decisions as part of the gradual return of local control to the McDowell County Board of Education. Respondent also argues that § 18-2E-5(p) provides continuing authorization to the State Superintendent to make decisions without following these school personnel laws, so long as the county system remains in intervention status.

This Grievance Board has not previously addressed this particular nuance in regard to the meaning and application of W. Va. Code § 18-2E-5. Subsection (p), quoted above, is part of a lengthy and detailed statutory scheme for establishing and maintaining accountability in implementing meaningful educational standards. Even though the statute does not directly address this issue, when the entire statute is read as a whole, it appears the Legislature intended to grant extensive authority to the State Board of Education to intervene in the operation of a county board of education and to continue to exercise the authority provided, so long as intervention remains necessary, in the State Board’s reasoned judgment. More succinctly, although the statute does not appear to permit the State Board to intervene and make personnel decisions without regard to W. Va. Code § 18A-4-1, *et seq*., when a county board is only in “conditional” status without having reached “nonapproval” status, once the State Board of Education intervenes in a county school system that has been declared in “nonapproval” status,

the Board does not automatically lose this authority when the county school system's status is elevated to "conditional."

Even if elevating McDowell County Schools to "conditional" status did serve to rescind the State Board of Education's authority to exercise authority in personnel decisions under W. Va. Code § 18-2E-5(p) without regard to school personnel laws, Grievant nonetheless failed to establish that she should have prevailed under the hiring criteria in W. Va. Code § 18A-4-7a. When filling administrative positions, W. Va. Code section § 18A-4-7a requires the best or most qualified individual be selected. These qualifications are judged by the following factors, often referred to as "the first set of factors" in that statute:

> (1) Appropriate certification, licensure or both;
> (2) Amount of experience relevant to the position; or, in the case of a classroom teaching position, the amount of teaching experience in the subject area;
> (3) The amount of coursework, degree level or both in the relevant field and degree level generally;
> (4) Academic achievement;
> (5) Relevant specialized training;
> (6) Past performance evaluations conducted pursuant to section 12 article 2 of this chapter; and
> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel, so long as their decisions are in the best interest of the school, and are not arbitrary and capricious. *See Hyre v. Upshur County Bd. of Educ*., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl Pt. 2, *Dillon v. Bd. of Educ*., 177 W. Va. 145, 351 S.E.2d 58 (1986).

While each factor in W. Va. Code § 18A-4-7a must be considered, this provision permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. *Bailey v. McDowell County Bd. of Educ*., Docket No. 2008-0442-McDED (May 12, 2009); *Elkins v. Boone County Bd. of Educ*., Docket No. 95-03-415 (Dec. 28, 1995). Once a board reviews the criteria required by W. Va. Code § 18A-4-7a, it has "wide discretion in choosing administrators.…" *March v. Wyoming County Bd. of Educ*., Docket No. 94-55-022 (Sept. 1, 1994).

Thus, the standard of review for a county board of education's decision in filling an administrative position such as Dean of Students is whether it was arbitrary and capricious, or an abuse of discretion. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985). Grievant presented no evidence to compare the relative qualifications between herself and the successful applicant beyond stating that she had more administrative seniority than Mr. Gravely. However, relative seniority is only one of the factors that a school board needs to consider, and neither seniority nor any other factor is necessarily controlling because the selection of candidates for such positions is not simply a mechanical or mathematical process. *French v. Mercer County Bd. of Educ*., Docket No. 2009-0822-MerED (Dec. 8, 2009); *Hoffman v. Mingo County Bd. of Educ*.,

Docket No. 97-29-266 (June 15, 1998). Accordingly, Grievant has not established that she was the most qualified applicant, nor that there was a flaw in the selection process.

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 an employer has demonstrated that 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. *Rose v. Raleigh County Bd. of Educ*., Docket No. 2012-0188-RalED (Mar. 28, 2012). *See Lewis v. Kanawha County Bd. of Educ*., Docket No. 97-20-554 (May 27, 1998).

2. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Rose, supra*. *See Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

3. 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 . . . .

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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).

5. Under W. Va. Code § 6C-2-3(c)(1), "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." Respondent timely asserted this affirmative defense.

6. Respondent proved by a preponderance of the evidence that Grievant did not file her grievance concerning the termination of her contract as an Assistant Principal, her transfer to a classroom teaching position at River View High School, or her non-selection for the position of Dean of Students at Mount View High School within the time limits established by statute. Grievant did not demonstrate a proper basis to excuse her failure to file in a timely manner.

7. Under W. Va. Code § 18-2E-5(p), once the State Board of Education has exercised its "takeover" authority in a county school system that has been duly placed in "nonapproval" status, the Board does not lose its authority to make decisions regarding personnel without regard to W. Va. Code § 18A-4-1, *et seq*., simply because the school system's status is elevated to "conditional."

8. "County boards of education have substantial discretion in matters relating to the hiring of school personnel so long as their decisions are in the best interest of the

school and are not arbitrary and capricious." Syl. Pt. 3, *Dillon v. Bd. of Educ*., 177 W. Va. 145, 351 S.E.2d 58 (1986).

9. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. In making its selection, a board must give consideration to appropriate certification, experience relevant to the position, course work and/or degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the relative qualifications of the applicants may be fairly judged. W. Va. Code § 18A-4-7a.

10. While each factor in W. Va. Code § 18A-4-7a must be considered, this Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. *Bailey v. McDowell County Bd. of Educ*., Docket No. 2008-0442-McDED (May 12, 2009); *Elkins v. Boone County Bd. of Educ*., Docket No. 95-03-415 (Dec. 28, 1995); *Hughes v. Lincoln County Bd. of Educ*., Docket No. 94-22-009 (July 31, 1992).

11. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the position of Dean of Students at Mount View High School was arbitrary and capricious, or otherwise contrary to law.

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).

DATE: July 27, 2012

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LEWIS G. BREWER
Administrative Law Judge