THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BONITA K. REDD,

Grievant,

v. **DOCKET NO. 2012-0419-McDED**

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

Respondents.

DECISION

Grievant, Bonita Redd, is employed by Respondent McDowell County Board of Education as a fourth grade teacher at Welch Elementary School. For certain purposes, the public schools of McDowell County are under the control of the West Virginia Department of Education. Thus, Respondent West Virginia Department of Education is an essential party to her grievance. Grievant initiated this grievance at Level I on October 15, 2011 when she mailed her completed grievance form to the Grievance Board. Grievant presented an extensive statement of grievance as follows:

> The event causing this grievance to be filed was the hiring of Kathryn Tabor as the Supervisor of Curriculum and Instruction at Mt. View. This is an Assistant Principal position, as the law only recognizes school administrators as Principals or Assistant Principals. Therefore, I should have been transferred into this position pursuant to the transfer policy. Additionally, I was demoted to a teaching position, which violated Policy 5300 and 5310.
>
> Even if the law had not been required to transfer me into another Assistant Principal position, I should have received a special education MI/LD position at Mt. View, since I am more senior than Theda Muth, pursuant to transfer policy. Furthermore, all Assistant Principals were not terminated and transferred. Since Flourisha McGuire and Inga Barker did not have the required three years of administrative experience, as

> required by the posting, they should have been on permit, and released and transferred. Additionally, there were not any Central Office Administrators released and transferred, as required by policy.
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> McDowell County Board of Education and the West Virginia Department 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. 18A-4-8f
> 4. 18-5-13a
> 5. 18A-2-2
> 6. 18A-2-7
> 7. Policy 8-052
> 8. Policy 5300
> 9. Policy 5310
> 10. Title VII
> 11. 18-9A-4
> 12. 18-9A-5a
>
> They have also practiced favoritism, discrimination, conspiracy, racial discrimination, and violation of SIG grant.

As relief, Grievant sought the position of Supervisor of Curriculum or Assistant Principal at Mount View, triple back pay, and punitive damages[1] for violation of civil rights/public policy.

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 was represented by Howard Seufer, Esquire. At the close of the hearing, the parties agreed to submit findings of fact and

[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*.

conclusions of law. This matter became mature for decision on June 18, 2012, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.[2]

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 due to his decision to eliminate all Assistant Principal Positions. (Bd. Ex. 1 at Level I.) 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. 2 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. 3 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 4 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. 5 at Level I.)

[2] 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. However, 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. 4, 2011).

During May through August of 2011, the Board posted notices of a vacancy for the position of Supervisor of Curriculum and Instruction at Mount View High School on four separate occasions. (*See* Bd. Ex. 6 at Level I.) Following the fourth posting, Kathryn Tabor was selected to fill the position in September 2011. Grievant never applied for this position under any of these postings. In her grievance, Grievant states that "the event causing this grievance to be filed was the hiring of Kathryn Tabor as the Supervisor of Curriculum and Instruction at Mt. View."

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

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, controlled all 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, including a Supervisor of Curriculum and Instruction, 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. McDowell County Schools posted notices of vacancy for the position of Supervisor of Curriculum and Instruction at Mount View High School on four separate occasions: May 18-25, 2011; June 27-July 6, 2011; July 12-18, 2011; and August 11-17, 2011.

9. Grievant did not submit an application in response to any of the postings described in Finding of Fact Number 8.

10. In September 2011, Kathryn Tabor was selected to fill the vacancy and continues to serve as Supervisor of Curriculum and Instruction at Mount View High School.

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

12. This grievance was submitted more than fifteen days after Grievant was notified that her contract as an Assistant Principal would be terminated and 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.

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).

Respondent has asserted 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 . . . .

Any assertion by an employer that a grievance was not timely filed is an affirmative defense, and the employer has the burden of proving such untimely filing by a preponderance of the evidence. *Carroll v. Mingo County Bd. of Educ*., Docket No. 98-29-396 (Feb. 3, 1999). Once the 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). As required by W. Va. Code § 6C-2-3(c)(1), Respondent asserted a timeliness defense before level two in its post-hearing submission at level one and in its level one decision.

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.

Grievant has also challenged certain actions of Respondent which took place following her transfer, including the filling of a position for a Supervisor of Curriculum and Instruction for Mount View High School at the beginning of the 2011-12 school

year. Although there is evidence of when this position was posted and filled, Respondent has not unequivocally established when Grievant learned of this personnel action, or would have inevitably become aware of such action. Therefore, Respondent has not established by a preponderance of the evidence that the portion of the grievance which alleges that this position was improperly created, structured, or filled was not filed within 15 days of the time when Grievant became aware of the facts and circumstances which she is challenging through this grievance. *See Hale v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996). *See generally, Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990).

One reason why there is no evidence to clearly establish when Grievant became aware of the status and qualifications of the person who filled this position is that she did not make application for this position during any of the four times it was posted. Based upon these circumstances, Respondent has also challenged Grievant's standing to grieve these matters. An employer who asserts that a grievant does not have standing to pursue her grievance has raised an affirmative defense and, accordingly, has the burden of establishing such defense by a preponderance of the evidence. *Barber v. Mercer County Bd. of Educ*., Docket No. 2008-0001-MerEd (Aug. 26, 2008); *Sanders v. Pocahontas County Bd. of Educ*., Docket No. 06-38-430 (May 10, 2007). *See Lewis v. Kanawha County Bd. of Educ*., Docket No. 97-20-554 (May 27, 1998). It is well established that a school employee does not have standing to challenge a personnel decision involving the propriety of a posting or the filling of a position where she did not apply for the position. *See Barber, supra; Sanders, supra*. Likewise, there

is no authority to "bootstrap" a challenge to an earlier personnel action that was not timely grieved by timely challenging a subsequent personnel decision and arguing that it somehow relates back to the earlier action. The entire focus of this grievance relates back to the Respondent's earlier decision to eliminate Grievant's position as an Assistant Principal and transfer her to a non-administrative classroom teaching position. Grievant had an opportunity to present evidence to explain how her grievance was timely but she provided no meaningful facts, only assertions and conjecture regarding Respondent's motives.

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 and her transfer to a classroom teaching position at River 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. Where a Grievant does not apply for a vacant position, she does not have a sufficient personal stake in the selection to have standing to file a grievance

contesting the selection or the propriety of the posting. *Young v. Marshall County Bd. of Educ*., Docket No. 2008-1770-MarED (Sept. 18, 2009); *Barber v. Mercer County Bd. of Educ*., Docket No. 2008-0001-MerEd (Aug. 26, 2008). *See Sanders v. Pocahontas County Bd. of Educ*., Docket No. 06-38-430 (May 10, 2007).

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 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: July 18, 2012

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LEWIS G. BREWER
Administrative Law Judge