THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CECIL WILLIAM MORRIS,
Grievant,

v. **DOCKET NO. 2013-0672-CONS**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This consolidated matter consists of seven separate grievances filed by Grievant, Cecil William Morris, against his employer, the Harrison County Board of Education: two on June 22, 2012, three on August 24, 2012, and two on October 5, 2012. The statements of grievance are multiple pages in length, and make a number of allegations, some of which related to Grievant's suspension which has been previously decided by the undersigned Administrative Law Judge and will not be revisited here (*Morris v. Harrison County Bd. of Educ.,* Docket No. 2012-1498-CONS (June 13, 2013)).[1] The issues raised by the grievances were condensed at a pre-hearing conference held on June 19, 2013, and the grievances were consolidated by Order dated July 18, 2013. The relief sought by Grievant, which consisted of multiple pages, was also condensed at the pre-hearing conference.

---

[1] The parties were advised prior to the hearing that the doctrine of *res judicata* precluded relitigation by the very same parties of the very same issues already decided, and that these issues would not be heard in the course of these grievances.

The first three grievances were dismissed at level one on June 26, 2012, as either untimely filed, or because the issues raised were related to Grievant's suspension, which was the subject of a separate grievance, without a level one conference being convened. The three grievances filed on August 24, 2012, were consolidated at level one and a conference was held at that level on September 10, 2012. A decision denying those grievances was issued on September 20, 2012, with one of the claims being dismissed as moot. The last two grievances were also dismissed at level one, on October 12, 2012, without a conference having been held, as untimely filed, and because certain issues were found to be non-grievable issues. Grievant appealed each of the grievances to level two, and a mediation session was held on January 31, 2013, on all but the last two grievances. When the last two grievances were appealed to level two, they arrived at the Grievance Board without an identifying Docket Number, and were mistakenly marked with the Docket Numbers assigned to two of the grievances filed in August 2012. This error was discovered during a pre-hearing conference, and it was agreed that these grievances would be processed at level three as part of the consolidated matter. Grievant appealed the first five grievances to level three, and a level three hearing was held before the undersigned Administrative Law Judge on all the grievances, on September 11, 2013, in the Grievance Board's Westover office. Grievant was represented by Sharon Brisbin, and Respondent was represented by Susan L. Deniker, Esquire, Steptoe & Johnson, PLLC. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on October 16, 2013.

During the level three hearing Grievant withdrew several of his remaining claims, namely, all issues related to Grievant's request for accommodation for his disability, all

issues related to the assignment of afternoon bus duty, and all issues related to the delivery of an evaluation by Principal Dora Stutler to Grievant. The issues remaining to be decided in this grievance are: whether Grievant should have been compensated either monetarily or by being allowed to leave work early, for working early morning bus duty; whether Grievant has a right to be returned to early morning bus duty; whether Grievant should have been compensated for assignment to a second lunch duty; and whether Grievant lost his planning period when he was assigned to work the second lunch duty and should have been compensated for that.

Synopsis

Grievant was asked several years ago to work outside in the mornings before school, basically as a crossing guard, and the Principal of the school at that time agreed to let Grievant leave work early if he did so, and Grievant agreed. This was not an extracurricular assignment that was posted and filled, nor was it a paid assignment. Grievant could have quit working this duty at any time, and was not entitled to be returned to this duty at any time. When a new Principal was assigned to Grievant's school, she eventually declined to allow Grievant to leave early. She also assigned him to work a second lunch duty without pay. Grievant did not work either the early morning bus duty or the second lunch duty after February 27, 2012, but failed to file a grievance until June 22, 2012. Grievant's stated excuse to this untimely filing was that he did not know how to file a grievance. Ignorance of the grievance procedure is not a valid excuse to untimely filing.

The following Findings of Fact are made based on the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Harrison County Board of Education ("HBOE") as a teacher since 1994. He teaches Physical Education and Health at Norwood Elementary School.

2. In 2004, Grievant was asked by the Principal at Norwood Elementary School, Mr. Guido, if he would work in the morning when the buses were arriving, assisting the safe passage of the students from the buses to the school. Principal Guido told Grievant that if he worked in the morning, he could leave school early at 2:30 p.m. The morning bus duty was from a little before 7:00 a.m. until around 8:00 a.m. This was never a posted assignment, Grievant was never told that he could be paid for this duty, and Grievant could have quit performing this duty at any time.

3. When Dora Stutler became Principal at Norwood Elementary School in the 2010-2011 school year, she did not ask Grievant to continue to work bus duty in the mornings, but he did so. She did tell Grievant that she could not pay him for this work. During her first year at Norwood Elementary School, Principal Stutler did not make changes to Grievant's schedule, but, Grievant voluntarily stayed after school many nights a week to tutor students who asked for his assistance. At some point Principal Stutler made clear to Grievant that he could not leave school early at 2:30 p.m. Grievant made Principal Stutler aware that he was not happy with this change, and she told him she would work on it. Because Grievant was working as a crossing guard in the mornings, he was taken out of the evening bus duty rotation worked by other teachers at the school.

4. Grievant has not worked early morning bus duty since February 27, 2012. Grievant first filed a grievance complaining that he was not allowed to leave school early, and was not compensated for morning bus duty, on June 22, 2012.

5. After February 27, 2012, a substitute teacher, Wesley Brown, was asked by Principal Stutler to work the early morning crossing guard duty because the parents had come to expect someone to assist the students in the morning and were complaining. Mr. Brown was not paid for this work, but he was allowed by Principal Stutler to leave early at 2:30 p.m., through the end of the school year. Principal Stutler allowed Mr. Brown to leave early because she did not believe she could ask a substitute teacher to work extra hours.

6. The morning crossing guard duty has never been posted and filled as an extracurricular assignment.

7. An assignment was posted for the second lunch duty at Norwood Elementary School for the 2011-2012 school year. This assignment was filled by Joshua Thornton, and he was paid for this assignment.

8. Mr. Thornton resigned from this assignment on January 12, 2012. Principal Dora Stutler told Grievant she needed him to work this assignment, as she had no one else available to do so. Grievant was already working the first lunch duty and being paid for this assignment, and he did not want to work the second lunch duty. Grievant nonetheless began working the second lunch duty on January 12, 2012, if not earlier, and was not paid for working this assignment. He did not work in this assignment after February 27, 2012.

9. Grievant filed a grievance challenging the assignment to the second lunch duty without pay on June 22, 2012, and again on August 24, 2012.

10. Respondent raised a timeliness defense at level one.

11. Grievant's excuse for not filing any of the grievances earlier was that he did not know how to file one.

Discussion

Respondent asked that Grievant's remaining claims be dismissed as untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> 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 employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

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).

The first issue is related to the morning crossing guard duty. Grievant did not perform this duty after February 27, 2012, but delayed filing the grievance until June 22, 2012. Grievant testified that he did not file a grievance earlier because he did not know how to file a grievance. "'[I]gnorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule.' *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *See also Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001)." *Pisino v. Div. of Corr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008).

Grievant also argued in his post-hearing written argument that the early morning bus duty was an extracurricular assignment, and that he should have been allowed to return to that assignment at the beginning of the 2012-2013 school year, and been allowed to leave at 2:30, as Mr. Brown was allowed to do. It appears that this grievance was timely filed. It is also clear, however, that the early morning bus duty was never considered to be an extracurricular assignment, and that it was not posted and filled as is required by statute.

W. VA. CODE § 18A-4-16 provides, in pertinent part, as follows:

> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

W. VA. CODE § 18A-4-8b requires that positions be posted and filled. The morning bus duty was never posted as an extracurricular assignment, nor was Grievant ever required to perform this duty. He was asked by Principal Guido many years ago if he would help out in the mornings in exchange for leaving early, and he agreed to do so. Grievant did not acquire any right to work morning bus duty, or any right to compensatory time off work. If he did not like Principal Stutler's terms, he could have simply quit performing this work at any time. Likewise, if he chose to continue to help out in the morning, nothing prevented him from doing so.

The remaining issues related to the second lunch duty and planning period were likewise not timely filed. While it seems unfair to have made Grievant perform the second lunch duty without additional pay when Mr. Thornton accepted the duty voluntarily and was paid for it, the undersigned cannot, by statute, address a grievance which was not timely filed. Grievant clearly knew before February 27, 2012, that he was not being paid for the lunch duty and believed he was being forced to give up his planning period to perform this duty, yet he did not file a grievance over this until June 22, 2012. Grievant's excuse that he did not file earlier because he did not know how to file a grievance, as noted above, is not a valid excuse to the untimely filing.

Grievant also stated that Principal Stutler told him she was working on resolving the problem by trying to find someone else to work this assignment, seemingly asserting that her representations caused him to delay filing the grievance. 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*., upon denial thereof." The Supreme Court of Appeals of West Virginia, in *Naylor*, *supra*, 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 Principal Stutler's representations to Grievant that she would try to resolve the situation amounted to a deliberate design by her, or that she would have unmistakably understood that this would cause Grievant to delay filing a grievance. Moreover, since Grievant did not work the second lunch after February 27, 2013, Principal Stutler was not trying to relieve Grievant of this duty after this time, and Grievant knew this. Even if this situation met the *Naylor* standard, this would not explain the four-month delay in filing.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. Grievances *must* by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). 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).

3. The grievances related to failure to allow Grievant compensatory time off work for coming in early to work as a crossing guard, and related to assignment to the second lunch duty without compensation, were not filed within the statutory time lines for filing a grievance.

4. Grievant failed to demonstrate an excuse for his failure to timely file his grievances.

5. Grievant has the burden of proving his 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).

6. Extracurricular assignments must be posted and filled. W. VA. CODE §§ 18A-4-16 and 18A-4-8b.

7. The early morning crossing guard duty performed by Grievant was never posted and filled as an extracurricular assignment, and Grievant acquired no right to be assigned to this duty or to compensatory time off work.

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 21, 2013