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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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**HOWARD B. TYREE**

**v.**

**DOCKET NO. 10-86-252-4**

**FAYETTE COUNTY BOARD OF EDUCATION**

**DECISION**

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a determination by the Fayette County Board of Education that affirmed the response of the level two grievance evaluator denying the grievant a hearing because the grievance was untimely.

Pursuant to notice duly given, this matter came on initially for hearing on October 17, 1986, at 10:00 a.m., before John M. Richardson, Hearing Examiner at the offices of the West Virginia Education Employees Grievance Board, 101 Harper Park Drive, Suite D, Beckley, West Virginia. The employer appeared by Wayne Wriston, Director of Services, and Erwin L. Conrad, its attorney. The grievant, by his attorney, John E. Roush, requested that the matter be continued to a later date. There being no objection by the respondent, the motion of the grievant was granted and the matter was rescheduled for hearing on November 14, 1986. On November 14, 1986, the matter came on again for hearing before

John M. Richardson, Hearing Examiner. The grievant appeared in person and by counsel, John E. Roush. The employer appeared by Wayne Wriston, Director of Services, and Erwin L. Conrad, its attorney.

In this grievance the grievant complained that he applied for one of five positions classified as painter/general maintenance and was not selected. The grievant contends that he was qualified and more senior than four of the five individuals selected to fill the positions, and therefore, the respondent violated WV Code §18A-4-8b.

Respondent, the Fayette County Board of Education, contends that it did not violate WV Code §18A-4-8b and further states that grievant did not file his grievance within fifteen days as provided in WV Code §18-29-4(a)(1).

The evidence reveals that this grievance arises out of the same facts as those contained in the grievance of Holstine, et al., v. Fayette County Board of Education, Docket No. 10-86-263-4. The transcript of that grievance was admitted into evidence in this grievance as Joint Exhibit #1.

The resolution of the Holstine grievance, supra, except for the procedural issues herein, renders the merit of this grievance moot.

In this grievance, the procedural issues revolve around the timeliness of filing of the grievance and the denial of a hearing at level two.

With regard to the procedural matters, it appears that the respondent posted a notice of five vacancies in the classification of painter/general maintenance. This posting occurred on January 14,

1986; however, the positions were not filled until May 16, 1986.<sup>1</sup> ON June 10, 1986, the grievant obtained a "consent" form executed by Michael G. Holstine, Vincent R. Yarber and Michael Brubaker agreeing to allow the grievant to participate in their grievance, which was currently pending at level two.

Thereafter, and on June 18, 1986, a level two hearing was convened in the matter of Holstine, supra. At that time, the respondent, via its attorney, Erwin Conrad, resisted the request of grievant Howard Tyree to join in the grievance, which caused the level two evaluator to deny grievant Tyree the status of being a party in that grievance.

Grievant Tyree proceeded to file his own grievance on July 2, 1986. Mr. Wriston, the level one grievance evaluator, denied the grievance because it was untimely. This grievance was appealed to level two where the Superintendent of Schools, Howard P. Hurt, without convening a hearing, declared the grievance null and void.<sup>2</sup> That decision was affirmed at level three and appealed to level four.

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<sup>1</sup>WV Code §18A-4-8b(b) provides that after the five day minimum posting period, the vacancy shall be filled within twenty days of the posting date notice. However, Mr. Wriston's explanation for not timely filling the positions was that a skills test was still to be administered. Considering that the positions were not filled for over eighty days, the explanation given by Mr. Wriston was not reasonable.

<sup>2</sup>The level two response by Superintendent Hurt was admitted into evidence by respondent as Respondents' Exhibit #5. The response thereon stated: A review of your request for a grievance at Level II has been made. As Mr. Wayne Wriston indicated to you on July 9, 1986, your grievance is out of the time limit, and is hereby declared null and void.

One of the problems found herein is that the level two grievance evaluator failed to convene a level two hearing as required by WV Code §18-29-4(b) or render a decision which complied with WV Code §18-29-6.

WV Code §18-29-4(b), in pertinent part, provides:

(b) Level two.  
Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator and such administrator or his or her designee shall conduct a hearing in accordance with section six [§18-29-6] of this article within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from.

Additionally, WV Code §18-29-6, in pertinent part, provides:

Every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law.

Another problem based upon the evidence adduced at the level four hearing, is that the grievant failed to timely file his grievance in accordance with WV Code §18-29-4(a)(1). It was determined in the Holstine grievance, supra, that the grievable event occurred when the positions were filled on May 16, 1986. Here however, the grievant failed to file his grievants until July 3, 1986, which was more than fifteen days after May 16, 1986.

Grievant's reliance on the "consent" of his fellow employees to permit him to become a party to their grievance was without the consent or knowledge of the respondent. In as much as WV Code §18-29-1, et seq., does not provide for a procedure whereby a party may join in a grievance after it is filed, any reliance on the consent

of one party without the consent or acquiescence of the respondent would not be appropriate or binding.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

#### FINDINGS OF FACT

1. The grievant, Howard B. Tyree, is an itinerant bus operator regularly employed by the Fayette County Board of Education.
2. The respondent posted a notice for the filling of five painter/maintenance positions on January 14, 1986 and did not fill these positions until May 16, 1986.
3. The grievant herein attempted to join in the grievance of other employees at level two by obtaining only the consent of the grieving employees but not the consent or approval of the respondent.
4. The respondent refused to consent to the joinder of the grievant herein to the grievance of other employees at the level two hearing of that grievance.
5. The grievant did not file his grievance until July 3, 1986, which was more than fifteen days after the filling of the contested positions which occurred on May 16, 1986.
6. Respondent, the Fayette County Board of Education, did not hold a hearing on this grievance at level two or level three.
7. The statement rendered by the County Superintendent of Schools purporting to be his "decision" at level two, did not contain the required findings of fact or conclusions of law.

CONCLUSIONS OF LAW

1. Pursuant to WV Code §18-29-4(a)(1), a grievant must file the grievance within fifteen days following the occurrence of the event upon which the grievance is based.

2. Every decision rendered following a hearing must contain findings of fact and conclusions of law in order to comply with WV Code §18-29-6.

For all of the foregoing reasons, the grievance is denied.

Either party may appeal this decision to the Circuit Court of Fayette County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (WV Code §18-29-7) Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
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JOHN M. RICHARDSON  
Hearing Examiner

DATED: Feb. 11, 1987