

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DEBORAH K. MCKINNEY,
Grievant,**

v.

DOCKET NO. 2016-1583-TayED

**TAYLOR COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Deborah K. McKinney, filed a grievance against her employer, the Taylor County Board of Education, on April 22, 2016, asking to proceed directly to level three. Respondent agreed to waive levels one and two of the grievance procedure. The statement of grievance is quite lengthy, but generally alleges that she should have been selected as the Girls' Track Coach at Taylor County Middle School in April 2015. Grievant asserted she was not selected because her school bus run prevented her from being at practice by 3:30 p.m., but she learned in April 2016, that the practice was being held at 5:00 p.m. As relief Grievant sought, "monetary compensation for position in which I was denied wrongfully.

A level three hearing was held before the undersigned Administrative Law Judge on August 8, 2016, at the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Denise M. Spatafore, Dinsmore & Shohl, LLP. This matter became mature for decision on September 15, 2016, on receipt of Respondent's

proposed findings of fact and conclusions of law. Grievant declined to submit written proposals.

Synopsis

Grievant alleged that the basis given by Respondent for not awarding her an extracurricular assignment was false, based on a statement made to her by a student. The reason given was that Grievant did not finish her bus run in time to perform the extracurricular assignment. The information provided by the student was not entirely accurate, and Grievant did not demonstrate that the basis for not awarding her the assignment was false, or that she could have performed the assignment. Respondent raised a timeliness defense, but this filing falls within the discovery rule exception.

The record developed at level three consists of the testimony of Grievant and Superintendent Kathy Green. The following Findings of Fact are properly made based on the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Taylor County Board of Education ("TBOE") as a bus operator for 13 years.
2. Sometime in the spring of 2015, an extracurricular assignment was posted for the Girls' Track Coach at Taylor County Middle School ("TCMS"). Grievant applied for the assignment.
3. Practice for the TCMS girls' track team was to begin at 3:20 p.m. Grievant's bus run did not end until 4:05 p.m. Grievant was not placed in the TCMS Girls' Track

Coach assignment because she could not be at practice at 3:20 p.m. The assignment was not filled in the spring of 2015.

4. Respondent posted the TCMS Girls' Track Coach assignment again sometime after the spring of 2015 when Grievant had applied and not been selected. A newly hired teacher, Justin Polley, applied for the assignment and was placed in the assignment.

5. Grievant did not grieve the selection of Mr. Polley, the reposting of the assignment, or her non-selection.

6. Sometime in March 2016, a female TCMS student riding Grievant's bus told Grievant that she had track practice that evening at Taylor County High School at 5:00 p.m.

7. The TCMS girls' track team practices in the spring of 2016 began at 3:20 p.m. at TCMS, except on 5 to 10 occasions when the team was allowed to practice at Taylor County High School on the rubberized track, after high school practices, at 5:00 p.m.

Discussion

Respondent asserted this grievance should 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. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*,

Docket No. 96-DOH-445 (July 28, 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).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA 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. . . .

“Days’ means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. 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). However, under the “discovery rule exception” to the statutory time lines, as addressed by the Supreme Court of Appeals of West Virginia in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), 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. In this case,

Grievant learned in March 2016, almost a year after she had not been placed in the assignment at issue, that the reason she had been given for not being placed in the assignment appeared to be false, and that she could have completed her bus run and made it to practice by 5:00 p.m. With regard to this issue, the grievance was timely filed.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

This grievance was filed after Grievant heard that TCMS practices were being held at 5:00 p.m., not 3:20 p.m. Grievant does not dispute that Respondent was not required to place her in the assignment if she could not perform the assignment at 3:20 p.m., and Respondent does not dispute that Grievant would have been entitled to the assignment had her schedule allowed her to be at practice at the designated time. Indeed, the Grievance Board has previously found that "it is not an abuse of discretion for a board of education to refuse to award an assignment to a driver when 'legitimate questions existed as to Grievant's logistical ability to perform the run[.]'" *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*,

Docket No. 02-50-041 (March 25, 2002); See *Smith v. Putnam County Bd. of Educ.*, Docket No. 99-40-058 (Apr. 2, 1999).

What Grievant is arguing is that Respondent's rationale for not awarding her the assignment was without basis. Grievant believes that she was entitled to be placed in the assignment because it began at 5:00 p.m., and she could perform the assignment at that time. The evidence presented, however, makes clear that Grievant is mistaken in her assertions. Girls' track practice began at 3:20 p.m. at TCMS, except for 5 to 10 times when the girls' track team was allowed to practice at the high school. Grievant did not prove her allegations.

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. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 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).

2. WEST VIRGINIA 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. . . .

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. 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). However, under the “discovery rule exception” to the statutory time lines, as addressed by the Supreme Court of Appeals of West Virginia in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), 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.

4. Grievant timely filed her grievance after learning of the facts giving rise to the grievance.

5. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Grievant was incorrect regarding the facts, and did not demonstrate that track practice was being held at a time when she was available to perform the assignment, or that the reason she was given for her non-selection was otherwise without basis.

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: October 20, 2016

BRENDA L. GOULD
Deputy Chief Administrative Law Judge