

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MELISSA WILFONG,
Grievant,**

v.

Docket No. 2018-0177-RanED

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

DECISION

Grievant, Melissa Wilfong, filed this action against the Randolph County Board of Education directly to Level Three, over Respondent's objection, challenging her transfer for the 2017-2018 school year. A Level Three evidentiary hearing was conducted before the undersigned on November 13, 2017, at the Randolph County Development Authority, Elkins, West Virginia. Grievant appeared in person and by her representative, Thomas Bane, West Virginia Education Association. Respondent appeared by Superintendent Gabriel Devono and its counsel, Denise M. Spatafore, Dinsmore & Shohl LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on December 18, 2017.

Synopsis

Grievant has been a professional employee for Respondent since 2009. Grievant served as a half-time principal and half-time teacher at Valley Head School for approximately six years. Valley Head was designated for closure at the conclusion of the 2016-2017 school year. Because of the closure of her school, by letter dated March 17, 2017, Grievant was notified that she would be recommended for transfer for the upcoming

2017-2018 school year. She was advised of her right to request a hearing before the Board of Education. Grievant is alleging improprieties regarding her transfer. There being no positions which were lateral to Grievant's position as a half principal/half teacher, she was not entitled to direct placement into any other position in the county.

Respondent asserts that the filing of this grievance was clearly untimely. This grievance was filed far beyond the 15-day time requirement of the grievance statute, and no explanation or excuse for the untimely filing has been offered. Grievant did not file a grievance until August 1, 2017, based upon a transfer that was approved on April 18, 2017, so this grievance is untimely.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant has been a professional employee for Respondent since 2009.
2. Grievant served as a half-time principal and half-time teacher at Valley Head School for approximately six years. Valley Head was designated for closure at the conclusion of the 2016-2017 school year.
3. Grievant has seven years of seniority as an administrator in Randolph County, and is more senior than a number of other school administrators.
4. As of the 2016-2017 school year, only one other administrator in the county was a half principal/half teacher. That individual was employed at Pickens School. The teaching half of that position teaches math classes for which math certification is required, and the individual holding that job has a math certificate.
5. Grievant is certified as Multi-Subject (K-8), Reading Specialist, Superintendent/Supervisor/Principal.

6. Because of the closure of her school, by letter dated March 17, 2017, Grievant was notified that she would be recommended for transfer for the upcoming 2017-2018 school year. She was advised of her right to request a hearing before the Board of Education.

7. At a meeting held on April 18, 2017, Grievant was approved for transfer for the upcoming school year, with her specific assignment to be determined at a later date. Grievant was advised of Respondent's action by letter dated April 20, 2017.

8. Although Grievant was only a half-time principal, the least senior assistant principal in the county was recommended to be transferred in order for Grievant to be placed in that position, which would have been a promotion for Grievant to full-time principal. At the meeting on April 18, 2017, Respondent voted against transferring the least senior assistant principal.

9. Shortly after she was placed on transfer, Grievant was advised by Denise Fletcher, Director of Personnel, that she would be considered an automatic applicant for all positions posted for which she was qualified. Throughout the spring and summer of 2017, numerous positions were posted for which Grievant was qualified and which would have constituted a salary increase from her prior position of half principal/half teacher. Grievant declined to be considered for most of these positions and would not participate in interviews when asked to do so.

10. Gabriel Devono was selected to be the new superintendent for Respondent, to begin his duties as of July 1, 2017. He was first informed of Grievant's situation in June of 2017, prior to officially assuming his position as superintendent.

11. Mr. Devono met with Grievant in June of 2017 to discuss her job situation. Mr. Devono advised her to apply for every position for which she was qualified in order to secure her exact employment position for the 2017-2018 school year.

12. Superintendent Devono indicated at Level Three that, if Grievant had not submitted any applications by the time the new school year was to commence, he would have simply placed her in a position without her application or input.

13. By email dated June 14, 2017, Grievant advised Ms. Fletcher that she would only apply for the George Ward principal position if it were posted, and that she would not be interested in or apply for any other positions.

14. The George Ward principal position was posted, applications taken, and interviews conducted. Grievant applied, but she was not the successful applicant for the position.

15. On July 26, 2017, Grievant applied for the position of Remedial Specialist at Tygarts Valley Middle/High School. On August 1, 2017, she was approved by Respondent to be placed in this position for the 2017-2018 school year. This grievance was filed on August 1, 2017, alleging improprieties regarding her transfer.

Discussion

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is

evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Because the Valley Head school was to be closed at the conclusion of the 2016-2017 school year, Grievant's position as half principal/half teacher would no longer exist in the upcoming school years. Grievant was recommended to be transferred to a different position for 2017-2018, of which she received proper notice. Because of her seniority in the county, Grievant was not recommended for reduction in force. The record was lacking of any evidence to support Grievant's contention that a new position should have been created for her, nor is there any legal precedent or requirement for such action.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

Whenever there is a reduction in the number of professional positions in the county, WEST VIRGINIA CODE § 18A-4-7a(k)(3) provides:

Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority

shall be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter . . .

An employee subject to release shall be employed in any other professional position where the employee is certified and was previously employed or to any lateral area for which the employee is certified, licensed or both, if the employee's seniority is greater than the seniority of any other employee in that area of certification, licensure or both.

WEST VIRGINIA CODE § 18A-2-2 requires that an employee's continuing contract can be terminated only after written notice and the opportunity for a hearing before the board of education, prior to May 1. However, the Grievance Board has held that this provision does not apply to the lateral transfer of administrators who retain employment after the elimination of their positions. *Roncella v. McDowell County Bd. of Educ.*, Docket No. 01-33-395 (Dec. 27, 2001). Grievant has contended that she was entitled to notice of contract termination under this provision, which is not applicable in this instance. The facts of this case establish that Grievant was placed on transfer for subsequent assignment to a different position. Grievant did receive notice and the opportunity for a hearing regarding her transfer well before any May deadline.

Is it undisputed in this case that there was only one position in the county which was similar, or even potentially considered lateral, to Grievant's. The record established that only the administrative position at Pickens was half principal/half teach, and Grievant is not certified for the teaching portion of that position in Math. Grievant did not have the requisite legal qualifications to be placed in this position by Respondent. Due to the unusual situation of Grievant holding a position that was half administrative and half teaching, there were no lateral positions into which she could have been placed. With no such positions being available, Grievant was not entitled to a direct transfer into any other

position in the county. *Birmingham v. James Rumsey Technical Institute*, Docket No. 02-MCVTC-134 (Nov. 25, 2002).

There being no available positions which were lateral to Grievant's, Respondent placed Grievant on transfer for subsequent assignment, with the directive to apply for all available positions for which she was qualified. The record established that the personnel director placed Grievant in the applicant pool for such positions; however, when the time came to conduct interviews to narrow down applicants, Grievant refused.

The record does not support a finding that Grievant was entitled to any additional notice or action beyond what was provided to her during the April 2017 transfer process. It is unfortunate that Grievant allowed many employment opportunities for better positions and a promotion to pass by, but she did ultimately secure a teaching position for the 2017-2018 school year. The record does not support a finding that Respondent had any further obligation than the transfer notice and hearing.

Finally, Respondent asserts that the filing of this grievance was clearly untimely. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. See *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See also *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v.*

Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

WEST VIRGINIA 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-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

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

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). 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).

Grievant is alleging improprieties regarding her transfer, which was approved by Respondent on April 18, 2017, but she did not file this grievance until August 1, 2017. The record demonstrated by a preponderance of the evidence that Grievant knew at the time of this transfer approval and within the weeks following that she had not been directly placed into any particular position and would be required to bid upon available positions. Grievant offered no explanation or excuse for waiting until over three months after approval

of her transfer to file a grievance. Grievant had been repeatedly advised by the personnel office to apply for posted positions, as reflected in email discussions dating back to May of 2017. This grievance was filed far beyond the 15-day time requirement of the grievance statute, and no explanation or excuse for the untimely filing has been offered.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. Pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. An administrative transfer is within the discretionary authority of the superintendent, subject to the approval of the Board, in compliance with the notice and hearing requirements. That power must be exercised in a reasonable manner and in the best interests of the school, rather than arbitrarily and capriciously. *Roncella v. McDowell County Bd. of Educ.*, Docket No. 01-33-395 (Dec. 27, 2001).

4. When an employee is reduced in force, he or she is entitled to placement “in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified” if the employee has more seniority than the person holding the position. W. VA. CODE § 18A-4-7a.

5. There being no positions which were lateral to Grievant’s position as a half principal/half teacher, she was not entitled to direct placement into any other position in the county.

6. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See Higginbotham v. W. Va. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep’t*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff’d*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See also Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

7. A grievance must be filed by the employee within fifteen days of the event upon which it is based. W. VA. CODE § 6C-2-4(a)(1).

8. Grievant did not file a grievance until August 1, 2017, based upon a transfer that was approved on April 18, 2017, so this grievance is untimely.

Accordingly, the 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 *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: January 25, 2018

Ronald L. Reece
Administrative Law Judge