**JEFFREY L. CLENDENEN, .**

**Grievant, .**

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**.**

**V. . DOCKET NUMBER: 95-26-356**

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**MASON COUNTY BOARD OF EDUCATION, .**

**Employer. .**

## DECISION

___Grievant, Jeffrey Clendenen, a former employee of the Mason County Board of Education (hereinafter Mason), filed this grievance pursuant to West Virginia Code §§18-29-1, et seq., on July 5, 1995, claiming as follows:

> On June 14, 1995, at 3:45 p.m., I received a letter from Mr. Michael Whalen, Superintendent of Mason County Schools, stating that on July 1, 1995, My employment would be discontinued and my contract terminated. This letter was not sent in accordance with School Laws of West Virginia - 18A-2-8a. The letter states that this was done because of a level IV decision by Lewis G. Brewer, Administrative Law Judge, West Virginia Education and State Employees Grievance Board. This stems back to a letter I received on December 14, 1994, from Mr. Whalen stating that the job I was holding would be reposted because it was erroneously posted in August 1993. I reapplied for the job on December 22, 1994, I was told bythe Maintenance Director, Mr. Gary Mitchell, that the seniority I had accrued from August 31, 1993 to the present could not be counted to bid on this job, according to Libby Mattox, Personnel Director, because I have been hired illegally. Since none of this seniority counted, this takes me back to June 30, 1989 when I was placed on the reduction in force list from the maintenance department, and became eligible for the preferred recall list (18A-4-8b). I was employed as a substitute for the maintenance department for the school years 1989/1990, 1990/1991, 1991/1992 and 1992/1993. Through all these years, I was never recalled for employment or notified of any position openings although an employee was hired for the maintenance department on August 7, 1991, ahead of me for a job I was qualified for.

> To resolve this grievance, I am asking: 1) to be reinstated to employment with the Mason County Board of Education with a continuing contract; 2) All back pay including overtime pay due me from 8/7/91 to 8/31/93 and from 7/1/95 to the time of my reinstatement to employment; 3) All benefits due me from 8/7/91 to 8/31/93 and from 7/1/95 to the time of my reinstatement to employment, including sick days, vacation days, or optical expenses that I may incur while not employed by the Mason County Board of Education; 4) That my seniority date be changed to 8/7/91; 5) And in the event this grievance is not resolved at the level IV hearing, all court costs and reasonable attorney fees be paid by the board as stated in School Laws of West Virginia 18A-4-8b.

This grievance was denied at levels one and two of the grievance procedure, and level three was bypassed pursuant to W. Va. Code §18-29-4. Mason contended at level two that the grievance was untimely filed. Appeal to level four was made on August 11, 1995, and after numerous continuances granted for good cause shown, an evidentiary hearing was held at the Grievance Board's office in Charleston, West Virginia on February 8, 1996. The case became mature for decision on April 15, 1995, upon receipt of the final post-hearing brief. At level four, Mason again contended that the grievance was untimely filed. The facts of the case are largely undisputed and shall be set forth below as appropriately deduced findings of fact. Further, the parties entered into three stipulations of fact at the level four hearing which will follow such findings:

## Findings of Fact

1. Grievant was hired by Mason as a temporary maintenance employee for the period of May 8, 1989 through June 30, 1989.

2. Grievant signed a probationary contract of employment covering this specific length of employment.

3. On May 4, 1989, Mason's then-Director of Facilities, William Barker, Jr., presented Grievant with a letter titled Mutual Agreement, stating as follows:

> The signatures on this letter indicate that all parties understand and agree that the period of employment, for the listed employees, commence on May 8, 1989, and terminate on June 30, 1989. The listed employees hereby waive a hearing before the Mason County Board of Education and are hereby notified of their assignment to the reduction in force list as of June 30, 1989, and that all rights and privileges afforded under the reduction in force provisions of West Virginia Code shall be accorded.

Mr. Barker and Grievant signed this document.

4. At the end of the temporary assignment, Mason did not act to lay off Grievant or place him on a preferred recall list because it believed that his employment had simply ended pursuant to the terms of the probationary contract that had been executed.

5. After June 30, 1989, Grievant did not receive any notice from Mason, indicating what his employment status was at that time. He believed that he had been placed upon a preferred recall list. 6. Grievant was hired as a substitute maintenance employee effective September 5, 1989. He executed with Mason a Substitute Service Personnel Probationary Contract of Employment, and continued in this position throughout the 1990-1991 school year.

7. During this time period, Grievant was not sent notices of job vacancies by Mason. On April 8, 1991, one service personnel position became vacant and was posted as a multiclassified position made up of the following titles: General Maintenance/Truck Driver/Carpenter I/Plumber I/Electrician I/Sanitation Plant Operator.

8. Grievant did not apply for this position and the Board filled it with another employee. Grievant later learned in 1993 that this position had been posted and filled.

9. Grievant continued to be employed as a substitute throughout the 1991-1992 and 1992-1993 school years.

10. On August 16, 1993, Mason posted for bid two temporary vacancies for maintenance employees. Grievant applied for and received one of these positions.

11. Grievant was granted regular employee status by Mason, while serving in this position, on December 21, 1993.

12. This Grievance Board issued a decision in the matter of Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994), wherein it was held that Mason had improperly posted the two maintenance positions referred to above in finding of fact number 10. The Board was ordered to vacate, repost and fill these two positions and it did. 13. Grievant applied for one of these two positions but was not a successful applicant because he was not given seniority credit for the time he had served in the position prior to its being vacated.

14. The two employees who were selected for the positions, effective January 26, 1995, did not hold the class title at the time of the posting; however, they were both regularly employed service employees.

15. By letter dated February 24, 1995, Grievant was informed by Superintendent Whalen that it had been recommended to Mason that his probationary contract be terminated because of the Weaver decision. He was told that he would be placed upon the preferred recall list if the recommendation was approved.

16. Grievant was granted a hearing before Mason concerning his continued employment. Thereafter, on March 28, 1995, Mason voted "to delete Jeffrey Clendenen, Maintenance, from the RIF list and not renew his contract."

17. By letter of June 13, 1995, Grievant was notified that his contract had been terminated and his employment discontinued, effective July 1, 1995.

## Stipulations of Fact

1. Grievant was not notified, via certified letter, of the April 8, 1991 posting of the maintenance position.

2. Neither Gary Jones nor Franklin Jones had experience as maintenance employees at the time of their hiring on January 25, 1995. 3. On or about June 14, 1995, Grievant was notified by Mason that it had decided at a meeting on March 28, 1995, to terminate his contract of employment.

## Positions of the Parties

Grievant contends that he relied to his detriment upon the agreement he signed with Mr. Barker on or about May 4, 1989, in that he believed he was placed upon the preferred recall list after his temporary employment. He testified that he did not apply for any positions for which he would have been qualified because he was not given notice of any openings by Mason, even though he believed he would receive such notice because he was on the preferred recall list. In particular, he contends that he was denied the opportunity to bid upon the April 8, 1991 posting. He also contends that he was wrongfully denied one of the positions reposted on December 14, 1994, and that he should have been awarded one of these positions because of the seniority he had earned while in the job prior to the Weaver decision. Finally, he avers that Mason did not given him timely notice of the termination of his employment, pursuant to W. Va. Code §§18A-2-6 or 18A-2-8a, by notifying him of said action on June 14, 1995. (See footnote 1)

Mason contends that the grievance was untimely filed because it was not filed within fifteen days

of the occurrence of the events relied upon to support Grievant's claims. On the merits, itcontends that Grievant was not entitled to be given any rights or protection afforded by Code §18A-4-8b to employees who are laid off from their jobs because he was not laid off; instead, his employment ceased pursuant to contract. It avers that Grievant could not acquire any preferred recall rights pursuant to the ultra vires promise of Mr. Barker. It maintains that Grievant was not entitled to the position posted in April, 1991, because he had not been laid off. Further, it asserts that he was not entitled to one of the positions that were reposted for bid pursuant to the Weaver decision because he had never gained regular employment seniority throughout the tenure of his employment. In response to Grievant's last argument, Mason contends that he was given a meaningful hearing before the Board, that he had notice it had been recommended to Mason that his contract be terminated, and that any technical violation of Code §18A-2-6 was harmless.

Grievant responds to Mason's affirmative defense, that the grievance was untimely filed, by contending that he only learned of the facts giving rise to the grievance in June 1995, after he was informed his employment had been terminated. He asserts that prior to that date, he was regularly employed by the Board. Finally, he contends that he did not have knowledge of the 1991 posting in issue.

## Discussion

W. Va. Code §18-29-4(a)(1) states:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or withinfifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

A timeliness defense is an affirmative defense that the employer must establish by a preponderance of the evidence. Grievant relies upon the holdings in Spahr v. Preston County Board of Education, 391 S.E.2d 739 (W. Va. 1990), wherein the Supreme Court interpreted the above cited language to contain a “discovery” provision or “discovery rule”. A grievant may timely file a grievance within fifteen days of discovering the facts supporting the claim. However, one's discovery of the legal theory supporting a claim is not sufficient to support the application of such a rule under the language “within fifteen days of the date on which the **event** became known to the grievant.” Emphasis added.

Here, Grievant contends that various events transpired giving rise to the grievance, but that he was not aware of those events until June 1995. As indicated, Grievant believed that he was placed upon a preferred recall list in 1989, and that Mason violated Code §18A-4-8b by not notifying him of job openings. He contends, at the latest, if he had been made aware of the posting of the position in 1991, that he would have been awarded that job based upon his seniority. With the legal issue of whether Grievant was eligible for or should have been given preferred recall status aside, the evidence indicates that Grievant was aware in 1993, at the latest, that this position was posted and filled by another employee. Pursuant to an application of the discovery rule,Grievant should have filed a grievance contesting the Board's failure to notify him of this opening, and consequently not placing him in the position, at that time. Further, given that Grievant believed he was on the preferred recall list, this issue would have been addressed at that time. Therefore, Grievant's claim in this regard is untimely.

Grievant argues that he should have been awarded one of the positions reposted due to the Weaver decision. He was obviously aware on December 12, 1994, that he was to be removed from the position he held so it could be reposted pursuant to this Board's Order. He then learned in February 1995 that he was not hired for one of these positions but he did not file the grievance until July. Grievant had knowledge of the events leading to the grievable event, that the positions had been reposted and that he was not selected. Therefore, he had fifteen days from the date he learned he was not selected to have filed a claim. He did not do so; therefore, the grievance is untimely in this regard.

Finally, the grievance was filed, as grievant contends, within fifteen days of learning that he was not given timely notice of the termination of his continued employment pursuant to W. Va. Code §18A-2-6, or in the alternative, the nonrenewal of his probationary contract under Code §18A-2-8a. In any event, the action giving rise to the claim was Mason's late notice to him. Pursuant to stipulation by the parties, Grievant was notified on June 14, 1995, that his employment was to be discontinued effective July 1, 1995. The grievance was filed on July 5, 1995, fifteen working days fromthe date he was given notice by Mr. Whalen. (See footnote 2) Therefore, the grievance concerning Mason's action in this regard was timely filed.

Regardless of the arguments presented by Grievant to support the conclusion that he should have been in other positions at the time of his termination from employment in June 1995, his challenge to

Mason's action in this regard is that the written notice he received was not given to him in a timely fashion, either under Code §18A-2-6 if he is to be considered a regular employee, or under Code §18A-2-8b if he is to be considered a probationary employee because he neither achieved regular employment status nor was placed on the preferred recall list. Under Code §18A-2-6, each service employee who has provided three years of acceptable performance shall be granted a continuing contract of employment, this contract shall remain in full force and effect unless the board terminates it, with written notice to the employee, before the first day of April. Under Code §18A-2-8a, a probationary employee must receive written notice of the board's intent not to rehire him within ten days of the board hearing which must be held on or before the first Monday in May.

It is obvious that the notice given Grievant was not timely under either of these Code provisions. However, the real issue here is whether Grievant was required to receive notice under either of the provisions, and if so, which one. At the timeGrievant was notified in 1995 that his employment was to be terminated, his status was that of a substitute employee. He had never received a regular position except for the one which he was later required to vacate pursuant to the Weaver decision. Therefore, his status was that of a substitute, stemming back to the last substitute contract he signed in August 1991 for the 1991- 1992 school year. W. Va. Code §18A-4-15, states, in pertinent part,

> Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel in sections six, seven, eight and eights-a [§§ 18A-2-6, 18A-2-7, 18A-2-8 18A-2-8a], article two of this chapter.

Unfortunately for Grievant, the record cannot support a finding that he worked thirty days or more in any of the three school years while he was a substitute. Therefore, he has not met his burden of proving that he was entitled to notice of nonretention pursuant to Code §18A-2-6. Therefore, the Board's notice in June 1995, was for all practical purposes, sufficient notice. Accordingly, this grievance is denied.

The foregoing discussion of the case is hereby supplemented by appropriately made conclusions of law:

## Conclusions of Law

1. Grievant bears the burden of proving his claims by a preponderance of the evidence. See, W.

Va. Code §18-29-6.

2. Grievant's claims concerning whether he was or was not properly placed upon a preferred recall list after his temporary employment in 1989 are untimely. 3. Grievant's claims alleging a violation of W. Va. Code §18A-4-8b are untimely.

4. Grievant's claims concerning his nonselection for positions posted for bid both in 1991 and 1995 are untimely.

5. Grievant's claim concerning a violation of W. Va. Code §18A-2-6 is timely.

6. Grievant's status at the time of his termination from employment was that of a substitute employee, in part, as he was illegally hired for a position in 1993. See generally, Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). Mason's action of granting Grievant regular employee status while holding a position illegally filled was invalidated by the decision in Weaver.

7. Grievant failed to prove by a preponderance of the evidence that he worked thirty days or more during one or more of the school years 1990-1991, 1991-1992, 1992-1993.

8. Grievant was not entitled to written notice of the nonrenewal of his substitute contract pursuant to W. Va. Code §18A- 2-6.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**ALBERT C. DUNN, JR.**

**Administrative Law Judge**

**May 31, 1996**

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*Footnote: 1*

*It is recognized that Grievant's statement of grievance refers to an alleged violation of W. Va. Code §18A-2-8a. Also,*

*his post-hearing brief alleges a violation of both Code §§18A-2-8a and 18A-2-6.*

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*Footnote: 2*

*"Days" is defined as working days under W. Va. Code §18-29- 2(b).*