MELISSA STRATTON,

Grievant,

v. DOCKET NO. 97-29-387

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and,

BARBARA HENRY and DEBBIE MOORE,

Intervenors.

DECISION

This grievance was filed by Grievant Melissa Stratton on April 21, 1997, (See footnote 1) against Respondent Mingo County Board of Education ("MBOE"), alleging violations of W. Va. Code §§ 18A-4-7a and 18A-4-8. Grievant argued MBOE acted illegally when it posted two positions in January 1996 as something other than secretary positions, when the two employees holding those positions retired. These positions had previously been classified as secretary positions. She argued that if these positions had been posted as secretary positions, there would be two additional secretary positions in the county and she would not have been reduced in force ("RIF'd") at the end of the 1996-97 school year. She did not otherwise contest her RIF. Respondent asserted at Level II and at Level IV that the grievance was not timely filed. (See footnote 2) Grievant argued this grievance should be considered timely filed because in January 1996 she did not realize MBOE's action had the potential to affect her at a later date. Grievant did not apply for either of the posted positions, but may have applied had they been posted as secretary positions. Although Grievant makes a good argument, the undersigned ruled from the bench that this grievance was not timely filed, and affirms that ruling here. (See footnote 3)

Discussion

The burden of proof is on the party 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). A grievance which is not timely filed will be dismissed or denied. W. Va. Code § 18-29-4 provides, in pertinent part:

> 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 within fifteen 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.

The two positions which Grievant believes should have been posted as secretary positions, were posted in January 1996. Grievant knew in November or December 1995 that the twoemployees who occupied these positions in the MBOE Central Office were retiring, and she knew these were secretary positions. Grievant knew in January 1996 that the positions were posted as something other than secretary positions. (See footnote 4) She did not grieve the posting at that time. Grievant received notice that MBOE had approved her RIF in early April 1997, and filed this grievance. Grievant argues the event which gave rise to her grievance was the discovery when she was RIF'd, that the January 1996 postings affected her by eliminating two secretary positions. She argued she was not harmed at the time the positions were posted, but was harmed by the postings when she was RIF'd.

Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." In this case, Grievant knew all the facts she needed to know about the postings in January 1996. Specifically, she knew there would be two less secretarial positions, and that she was a secretary near the bottom of the seniority list. Grievant did not discover anything in 1997 except a legal theory to attempt to tie her RIF to the postings. "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dept. of Transp./Division of Highways, Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993).

After being advised the grievance was not timely as it related to the 1996 postings, Grievant advanced for the first time the argument that the reason for her RIF no longer existed as of June 30,1997, and her RIF should have been rescinded. MBOE objected, arguing it was not on notice and

was not prepared to address this issue, and that it had not had the opportunity to address this issue at the lower levels of the grievance procedure. MBOE also objected to Grievant being allowed to file a new grievance to assert this theory.

W. Va. Code § 18-29-3(j) provides that if the grievance evaluator determines that the evidence presented renders the grievance a different grievance, she may rule "that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling." The undersigned ruled at the hearing that Grievant's new theory constituted a new grievance, and that she would be allowed fifteen working days from the date of the hearing to file this new grievance.

The following Findings of Fact are made based upon the evidence presented at the Level II and Level IV hearings.

Findings of Fact

1. Grievant has been employed as a secretary by MBOE eight or nine years.

2. Grievant became aware in November or December 1995 that two secretaries employed by MBOE were retiring.

3. The two positions formerly held by the retired secretaries were posted as something other than secretary positions. Grievant was aware of this in January 1996, did not apply for either of these two positions, and did not grieve the posting at that time. Nothing prevented Grievant from filing a grievance in January 1996 to contest the postings. 4. After giving Grievant notice that MBOE would consider a recommendation that she be reduced in force, and a hearing on the recommendation, MBOE approved the recommendation March 31, 1997.

5. This grievance was filed on April 21, 1997.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the party 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).

2. A grievant must file her grievance within fifteen working days of the date of the event, the discovery of the event, or the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4.

3. The discovery of a legal theory is not the discovery of the event for purposes of determining whether a grievance is timely filed. Lynch v. W. Va. Dept. of Transp./Division of Highways, Docket No. 97-DOH-060 (July 16, 1997).

4. This grievance was not timely filed, as Grievant knew of the events giving rise to the grievance in January 1996, but did not file her grievance until April 1997.

Accordingly, this grievance is **DISMISSED** and stricken from the docket of the Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: October 21, 1997

Footnote: 1

This grievance was filed at Level IV by mail, and was post-marked April 21, 1997. It was remanded to Level I by Order entered May 19, 1997, Docket No. 97-29-196.

Footnote: 2

Respondent also argued Grievant had no standing to challenge the postings as she did not apply for either of the two positions. This argument need not be addressed as the grievance was not timely filed.

Footnote: 3

The grievance was denied at Level I on June 13, 1997. A Level II hearing was held on August 14, 1997, and the grievance was denied at Level II on August 20, 1997. Grievant waived Level III, appealing to Level IV on August 25, 1997. A Level IV hearing was held before the undersigned Administrative Law Judge on October 8, 1997.

Footnote: 4

Grievant believed the positions were posted as Clerk and Accountant/Office Manager positions.