LYNNA MIDDLETON,

Grievant,

v. DOCKET NO. 98-20-291

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Lynna Middleton filed this grievance against Respondent Kanawha County Board of Education on June 4, 1998, grieving Respondent's failure to select her for a half- day Cook position at Elk Elementary Center, during the summer of 1997, alleging she was more senior than the successful applicant. Grievant requested as relief backpay from the date the position was filled. (See footnote 1)

Respondent raised as an affirmative defense that the grievance was not timely filed, as Grievant was aware, at least by the end of April 1998, that Tina Hayes was placed in the position at issue; but Grievant did not request an informal conference or file agrievance within 15 days of the date the event became known to her, as required by W. Va. Code §§ 18-29-3(a) and 18-29-4(a).

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

Findings of Fact

1. Grievant has been employed as a Cook I for the Kanawha County Board of Education ("KBOE") at Pinch Elementary since October 1997. She was previously employed by KBOE as a substitute.

2. In 1997, KBOE posted a half-time Cook vacancy at Elk Elementary Center for the summer of 1997.

3. KBOE has no record of Grievant's application for the subject position.

4. Grievant was told by a secretary that the successful applicant was Brenda Botkin. Ms. Botkin

had more seniority than Grievant.

5. Grievant learned in April 1998 or earlier that Tina Hayes had worked in the Cook position at Elk Elementary Center during the summer of 1997. She assumed Ms. Hayes was substituting for Ms. Botkin, as she believed Ms. Hayes was a substitute Cook. She did not ask anyone why Ms. Hayes was working in the position.

6. Grievant was told sometime in April, 1998, by Karen Castle, an employee at Pinch Elementary who worked for KBOE during the summer of 1997, that Ms. Hayes had been selected for the position, but Grievant did not believe her. After several other people told Grievant the same thing, Grievant went to Elk Elementary Center on May 19, 1998, and asked one of the Cooks whether Ms. Hayes had been selected for the position. She also called Gary Hendricks, and asked him about this. She was told that Ms. Hayes hadbeen selected for a position at Capitol High School during the summer of 1997, but Ms. Hayes and Ms. Botkin had traded places for the summer, so that Ms. Hayes had worked in the Cook position at Elk Elementary Center during the summer of 1997.

7. Grievant submitted a request for an informal conference with her supervisor on May 26, 1998.

8. Grievant's supervisor responded on June 1, 1998, and Grievant filed this grievance on June 4, 1998.

9. Respondent asserted at the Level II hearing that this grievance was not timely filed.

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). If the respondent meets this burden, 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 29, 1997). W. Va. Code § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.

W. Va. Code § 18-29-4(a) requires that:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteendays 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 conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.
>
> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
>
> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

Only working days are counted in determining when the time period runs for filing a grievance. Holidays, weekends and other school closings are not counted. W. Va. Code § 18-29-2(b). No evidence was presented regarding any holidays or other school closings.

Respondent argued Grievant knew of the event in April 1998, at the latest, when she was informed by Ms. Castle that Ms. Hayes had been awarded the Elk Elementary Center position for the summer of 1997. Under Respondent's theory, Grievant had to submit her request for an informal conference by May 22, 1998, at the latest.

Grievant argued she did not know of the event until May 19, 1998, when she talked to the Cooks at Elk Elementary Center and with Mr. Hendricks, and they confirmed the "rumors" she had heard from Ms. Castle and others. She questioned whether she should be required to believe such rumors.

It was these "rumors," combined with Grievant's knowledge of other instances whenMs. Hayes was placed in positions which Grievant questioned, which caused Grievant to finally ask whether Ms. Hayes was substituting or had been awarded the subject position for the summer of 1997. It is clear

Grievant knew at least as early as April 1998, that Ms. Hayes had worked in the subject position during the summer of 1997, but made the assumption she had been substituting for Ms. Botkin, and made no effort to check the accuracy of her assumption. She was also told by others at that time that her assumption was in error. The event, Ms. Hayes working in the summer 1997 position at Elk Elementary Center, became known to Grievant as early as April 1998. Her grievance was not pursued in a timely fashion.

Even if this grievance were found to be timely filed, Grievant has not proven the elements of her grievance by a preponderance of the evidence. See Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). An employee cannot grieve her nonselection for a position unless she applies for the position. See Sickles v. Monongalia County Bd. of Educ., Docket No. 96-30-207 (Oct. 30, 1996); Mills v. Doddridge County Bd. of Educ., Docket No. 90-09-402 (Nov. 26, 1990); See also, Delaney v. Harrison County Bd. of Educ., Docket No. 89-17-352 (Sept. 25, 1989).

> [I]t is the responsibility of a job applicant "to ensure that his interest in a given position is clearly made known and his application therefore adequately completed."

Sickles, supra, citing Mills, supra. While Grievant stated she submitted a summer application for the subject position in response to seeing it posted on the "hot line," by placing the application form in a box at KBOE's Elizabeth Street office, KBOE had no record of her application, Grievant did not keep a copy of it, and she took no steps to ensure her application had been considered. 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. W. Va. Code § 18-29-4(a) requires that a grievant schedule a conference with her supervisor to discuss her grievance "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."

3. Grievant failed to schedule a conference or file her grievance within 15 days of the date she

learned Tina Hayes had worked in a position at Elk Elementary Center during the summer of 1997.

4. Grievant presented no excuse for her failure to timely file her grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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 thecivil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 24, 1998

Footnote: 1

Grievant's immediate supervisor responded on June 12, 1998, that she was without authority to resolve the grievance, but she was advised the grievance was not timely filed. Grievant appealed to Level II on June 23, 1998, and after a hearing was held on June 30, 1998, the grievance was denied at Level II on July 15, 1998. Level III was waived by Respondent, and Grievant appealed to Level IV on August 11, 1998. A Level IV hearing was held on September 15, 1998, with Grievant appearing pro se, and Respondent represented by Gregory W. Bailey, Esquire. This matter became mature for decision at the conclusion of the Level IV hearing.