KENNITH G. EVANS,

Grievant,

v. **Docket No. 97-26-400**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Kennith G. Evans (Grievant) filed this grievance pursuant to W. Va. Code §§ 18-29- 1, et seq., challenging the decision by Respondent Mason County Board of Education (MCBE) to eliminate the Director of Elementary Curriculum position he held, and transfer him to his current position as Principal of Leon Elementary School. The grievance was denied at Level I, proceeding to Level II where an evidentiary hearing was conducted on August 11, 1997. The grievance was denied at Level II in a decision issued by Superintendent Larry Parsons on August 18, 1997. Grievant appealed to Level III where MCBE elected to waive participation in the grievance as permitted by W. Va. Code § 18-29-4(c). Thereafter, Grievant appealed to Level IV on September 4, 1997. A Level IV evidentiary hearing was held in this Grievance Board's office in Charleston, West Virginia, on October 28, 1997. The parties were provided an opportunity to submit written post-hearing arguments, and this matter became mature for decision on December 9, 1997, upon receipt of MCBE's submission. Based upon the evidence and testimony presented at Level IV, as well as the transcript of testimony taken and documentary evidence admitted at Level II, the following Findings of Fact are made in this matter.

FINDINGS OF FACT

1. Grievant is currently employed by the Mason County Board of Education (MCBE) as Principal of Leon Elementary School, a professional administrative position.

2. MCBE previously employed Grievant as its Director of Elementary Curriculum, an administrative position in its central office.

3. Dr. Larry Parsons is employed by MCBE as Superintendent.

4. During the 1996-97 school year, MCBE began considering elimination of one or more central office administrator positions because the county then employed more administrators and professional personnel than authorized for salary reimburse ment under the state funding formula. See Adm Ex 5 at L II. Dr. Parsons and MCBE gave first consideration to eliminating central office administrators in meeting the state funding ratio in accordance with guidance in W. Va. Code § 18-9A-4.

5. Dr. Parsons recommended, and MCBE approved, eliminating the separate central office administrative positions of Director of Secondary Curriculum and Director of Elementary Curriculum, combining the duties of those positions into a new position, Director of Curriculum and Instruction K-12. Dr. Parsons had prior experience in another county working in a comparable position where similar duties relating to the K-12 curriculum were performed by a single individual.

6. MCBE also eliminated the position of Director of Vocational Education, creating a new position of Director of Vocational and Alternative Education. As of the beginning of the 1997-98 school year, the total number of Directors in MCBE's central office had been reduced by one position in comparison to the number employed during the 1996-97 school year.

7. Following elimination of Grievant's position, MCBE applied its lateral transfer policy in determining Grievant's right to transfer to another position in the Mason County Schools. Grievant had participated in drafting MCBE's lateral transfer policy to comply with W. Va. Code § 18A-4-7a.

8. MCBE's lateral transfer policy, adopted in March 1995, contains the following provisions pertinent to this grievance.

> Appropriate certification and/or licensure and seniority must be considered in the employment of all professional employees in cases of lateral transfers.
>
> The following defines lateral transfers as they relate to the reduction in force of professional personnel.
>
> DIRECTOR (If certified and meets job description):

Lateral to: Other Directors

Coordinator

Principal

Vice-Principal

Specialists

Classroom Teacher

Adm Ex 1 at L II.

9. Dr. Parsons interprets the foregoing language in MCBE's lateral transfer policy to require that a Director seeking a lateral transfer to another Director's position must hold the professional certification required by the position description for the position, as well as possess the other minimum qualifications, such as education, training and experience, contained in the position description. Grievant interprets the same language to permit him to "bump" a less senior Director, unless the position contains a certification requirement which Grievant does not meet.

10. The position description for MCBE's Director of Finance/Administration contains the following minimum qualifications:

Possess a degree in Business (accounting, finance) or a minimum of a Master's Degree in education with administrative experience.

Demonstrate ability to work with all sectors of the public and educational community.

Demonstrate the ability to manage the school system finances and human resources.

Possess or secure School Business Official Authorization as per State Board Policy 5202.

Experience with WVEIS FMS and EMS Systems.

Adm Ex 4 at L II.

11. The Director of Finance/Administration position description does not include any specific certification requirement. See Adm Ex 4 at L II. For this reason, Dr. Parsons did not consider this position to be a position to which Grievant could "bump" on the basis of seniority.

12. Grievant has more seniority than the employee who currently holds the position of Director of Finance/Administration.

13. Grievant had no prior meaningful experience with the computerized financial management systems described as the "WVEIS FMS and EMS Systems." 14. The newly created position of Director of Curriculum and Instruction K-12 was posted for the 1997-98 school year. Grievant applied for this position and was not selected. Grievant did not grieve his nonselection for this position.

15. Following a hearing before MCBE regarding the proposed elimination of his position as Director of Elementary Curriculum, Grievant received notice by certified mail on April 5, 1997, that MCBE had approved elimination of his position, and he would be placed on transfer and subsequent assignment. See R Exs B, C, D & E at L IV.

16. MCBE formally approved elimination of the position of Director of Elementary Curriculum in a meeting held on May 13, 1997. See R Ex F at L IV.

17. Grievant initiated this grievance on May 22, 1997, by requesting, in writing, a conference with his immediate supervisor, MCBE Assistant Superintendent George Miller. See Adm Ex 7 at L II.

18. Grievant subsequently met with Mr. Miller to discuss the grievance on May 27, 1997. Mr. Miller advised Grievant that the informal conference was unable to resolve the matter in a letter dated May 28, 1997. Mr. Miller personally delivered this written response to Grievant on May 28, 1997.

19. Grievant's completed grievance form formally submitting his grievance to Level I of the grievance procedure, dated June 16, 1997, was received in Mr. Miller's office on June 18, 1997.

20. More than 10 days, excluding Saturdays, Sundays, and holidays, elapsed between the date Grievant received a written response to his informal grievance and the date Grievant formally initiated his grievance at Level I of the education employee grievance procedure.

21. As an experienced school administrator, Grievant was reasonably familiar with the grievance procedure for education employees, having previously received training on the process.

DISCUSSION

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

element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

MCBE contends that this grievance was not initiated within the time limits set forth in W. Va. Code § 18-29-4(a):

> (1) 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 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 his 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 said 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.
>
> (4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

In accordance with W. Va. Code § 18-29-3(a), Respondent properly asserted before and during the Level II hearing that this grievance was not advanced to the formal step at Level I in a timely manner. HT at 13, 93; Level I response, June 19, 1997. See Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997). See also Payne v. Mason County Bd. of Educ., Docket No.

96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996). A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Mr. Miller's testimony regarding the dates on which events germane to resolution of this issue transpired was consistent and unequivocal. He specifically recalled delivering his written response to Grievant on the day following their informal conference. Grievant, although he believed he did not receive the response until sometime the following week, had no specific recollection of the date on which the response was received. Thus, although generally credible, Grievant's testimony was not so clear and unequivocal as to refute Mr. Miller's specific recollection of the date.

Grievant did not contradict Mr. Miller's testimony that the form elevating this grievance to the formal step at Level I was not received until June 18, 1997. Mr. Miller noted that the form was stamped "received" on that date, and initialled by his Secretary, in accordance with standard procedures employed in his office. Accordingly, a preponderance of the credible evidence of record established that Grievant's time limit to elevate his grievance to the formal stage at Level I began to run on May 28, 1997, and the grievance was not elevated until June 18, 1997.

W. Va. Code § 18-29-4(a) requires Grievant to file his written formal grievance within ten days of receiving his supervisor's response from the informal conference. W. Va. Code § 18-29-2(b) defines "days" to mean days of the employee's employment term, exclusive of Saturday, Sundays, official holidays or school closings in accordance with W. Va. Code § 18A-5-2. May 29, 1997, a Thursday, was the first work day following Grievant's receipt of his supervisor's response. (See footnote 1) May 31, 1997, a Saturday, and June 1, 1997, a Sunday, must be excluded. Likewise, June 7 and 8, 1997, a Saturday and Sunday respectively, are excluded. Thus, in order to comply with the ten-day time limit, Grievant should have filed his formal grievance at Level I no later than June 11, 1997. Because this grievance was not formally elevated to Level I within the time frame required by statute, this grievance was not timely submitted for consideration under the grievance procedure for education

employees. See Harmon v. Jackson County Bd. of Educ., Docket No. 95-18-001 (Mar. 18, 1996), rev'd, Cir. Ct. of Kanawha County, No. 96- AA-55 (June 16, 1997).

Even assuming Grievant substantially complied with the time limits in the grievance procedure for education employees in pursuing this grievance, the contentions Grievant makes in regard to elimination of his position and subsequent transfer are without merit. "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. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

The Director of Finance/Administration position which Grievant contends he should have received through lateral transfer when the administrative position he held was eliminated does not include any particular certification requirement as part of its minimum qualifications. See Adm Ex 4 at L II. The Supreme Court of Appeals of West Virginia has previously determined that administrative positions which do not require specific certification or licensure are not available for "bumping" when the position of a more senior central office administrator is eliminated. Bd. of Educ. v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990). See Lambert v. Pocahontas County Bd. of Educ., Docket No. 89-38-342 (Sept. 28, 1990). Although this conclusion was reached under W. Va. Code § 18A-4-8b (1988), the predecessor to W. Va. Code § 18A-4-7a (1990) applicable here, the language regarding certification and licensure in relation to rights of employees encountering a reduction in force situation is essentially the same. Further, the plain language of MCBE's lateral transfer policy does not indicate any intent to provide additional protection to MCBE's employees beyond that afforded by statute, as interpreted in Bowers, notwithstanding Grievant's claim that he drafted the policy for that intent.

Further, even if Grievant's reading of MCBE's lateral transfer policy is correct insofar as certification requirements are concerned, MCBE established that Grievant did not meet the minimum requirements for Director of Finance/Administration because he was not familiar with the budget and finance portions of the computer program employed by MCBE in that office. Grievant argued that he could learn whatever was necessary through on-the-job training, despite the fact that he had not previously used a computer in his work. However, considering the school board's financial difficulties which precipitated elimination of Grievant's position as Director of Elementary Curriculum, assigning

him to perform the duties of Director of Finance/Administration in such a "sink or swim" fashion would appear foolhardy, at best. Therefore, MCBE did not abuse its discretion when it failed to "bump" a less senior administrator and transfer Grievant to the Director of Finance/Administration position in its central office. See Bowers, supra; Dillon, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. A timeliness defense is an affirmative defense, which must be established by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. MCBE established by a preponderance of the evidence that the instant grievance was not submitted to Level I within ten days following Grievant's receipt of his immediate supervisor's response to Grievant's informal grievance as required by W. Va. Code § 18-29-4(a). See Harmon v. Jackson County Bd. of Educ., Docket No. 95-18-001 (Mar. 18, 1996), rev'd, Cir. Ct. of Kanawha County, No. 96-AA-55 (June 16, 1997).

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 23, 1998

Footnote: 1In accordance with W. Va. Code § 2-2-3, the day Grievant receives the response is excluded from the time period in which he is required to act.