DEBRA BUCKLEY,

Grievant,

v. Docket No. 98-DOE-174

WEST VIRGINIA SCHOOLS FOR THE DEAF AND BLIND,

Respondent.

D E C I S I O N

Grievant, Debra Buckley, employed by the West Virginia Schools for the Deaf and Blind (Respondent), filed three level one grievances on April 10, 1998, in which she alleged that she had lost an employment opportunity when she was not called to substitute for a position in 1988, that her misclassification while a long-term substitute had impaired her ability to secure a permanent assignment in the secretary classification, and that she was entitled to “regular” employee status based upon her full-time employment. The grievances were denied at levels one and two, and Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). The matters were consolidated at level four, and a hearing held on July 21, 1998. (See footnote 1) The matter became mature for decision with the submission of proposed findings of fact and conclusions of law, with a response by Grievant, on September 8, 1998.

The following findings of fact have been derived from the record, including the leveltwo transcript, and level four proceedings.

Findings of Fact

1. In 1988, Instructional Resource Center (IRC) clerical aide Mary Jo Rinker was awarded Workers' Compensation benefits and granted a leave of absence. A substitute, Brenda Fields, was hired to fill Ms. Rinker's position.

2. In 1990, Ms. Fields transferred to another position, leaving the substitute clerical position vacant. Grievant was given the assignment, and has held the position continuously since that time.

3. In March 1995, Grievant passed the Accountant test for school service personnel. At the same time, and again in March 1998, Grievant failed to pass the typing and transcription portions of the Secretarial test for school service personnel.

4. Grievant applied for, but did not receive, four or five positions over the years, including a

secretarial assignment in 1995.

5. Grievant is presently classified as an IRC Clerical Aide IV. Her duties generally require her to prepare large print and braille materials and books to send to counties for use by visually impaired students. She receives the materials upon return, and insures they are repaired, maintained, and catalogued, to be sent out to the school systems the following year. She also types letters, answers the telephone, receives visitors, makes files, conducts inventories, uses the copy machine, calculator, computer, and thermal form machine. Grievant does not work under the supervision of a teacher, and has no direct contact with students.

6. Although Grievant was not given an annual contract of employment, she remains classified as a substitute employee, and Ms. Rinker remains on medical leave ofabsence.

7. Beginning in or about 1995, Grievant made inquiries as to the status of her employment; however, the matter was never resolved, and she filed this grievance on April 10, 1998.

Discussion

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

The three issues will be addressed separately.

I. Whether Grievant was entitled to the substitute position in 1988.

Grievant asserts that she had accumulated the greatest amount of substitute seniority, and was entitled to the position, when Ms. Rinker began her leave of absence in 1988. Respondent offered a letter from then-Director of the IRC, Leslie Durst, in which Ms. Durst stated that she called the substitutes in order, and that Grievant rejected the assignment because she was reluctant to leave her current full-time employment for a position of uncertain duration. Grievant denies that she was ever contacted or offered the position at that time.

Initially, Respondent contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code §18-29-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, theemployer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't. of

Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). 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. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See 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).

W. Va. Code §18-29-4(a)(1) provides:

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.

Respondent has proven that Grievant delayed approximately ten years before shefiled a grievance complaining that she was entitled to the IRC Clerk position in 1988. Grievant claims that she was not even aware that the job was available in 1988 because it was not advertised. It appears that she may not have been aware until she was hired in 1990 that Ms. Rinker had been on a leave of absence for two years. However, Grievant does not indicate that she took any action at the time she was hired to assert her rights regarding employment the previous two years, and she has not provided a proper basis to excuse her failure to file this complaint in a timely manner.

II. Whether Grievant is misclassified as an aide.

Grievant claims that the duties and responsibilities of her position are those of a Secretary I rather than an aide, and that the long-term misclassification has impeded her from transferring into regular

secretarial positions, particularly since it has been required that service employees pass a competency test. Respondent asserts that the position Grievant has held is properly classified as an aide.

W. Va. Code §18A-4-8 defines "Aide IV" as:

personnel referred to in the 'Aide I' classification who hold a high school diploma or general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education, or who have completed fifteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in-service training program determined by the state board to be the equivalent of three hours of college credit.

"Aide I" is defined as "personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aide."

"Secretary I" is defined as "personnel employed to transcribe from notes ormechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines."

Unlike the previous issue, misclassification is considered to be a continuing violation which may be grieved at any time. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). To prevail on a claim of misclassification, an employee must establish, by a preponderance of the evidence, that her duties more closely match those of another classification. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994); Pope v. Mingo County Bd. of Educ., Docket No. 91-28-068 (July 31, 1992). Further, the Grievance Board has previously recognized that because two or more job definitions may encompass the same duties, proof that an employee performs such crossover duties does not necessarily mandate that her position be reclassified. Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1996).

Many of the duties which Grievant performs clearly overlap the Secretarial and Clerical Aide positions. Grievant did not provide a percentage of time which she spends performing secretarial duties; however, it appears that it may be minimal because she does not dispute the recitation of her duties provided by retired business manager John Childs. As stated by Mr. Childs and the IRC Clerical Aide job description, Grievant is primarily responsible for procuring, processing, reproducing, and producing large-print and braille textbooks, workbooks, and other educational materials, as well as maintaining necessary records. While she may type letters or perform what is generally perceived

as secretarial duties occasionally, Grievant has failed to prove that she was misclassified.

III. Whether Grievant is entitled to regular employee status.

Grievant asserts that she has worked full-time since 1990, without a contract of anykind for most, if not all of that time. She testified that she made a number of attempts to resolve this matter informally with Mr. Childs, and his successor Kris Willard. These individuals confirmed that they had both spoken with Grievant regarding her employment status, a number of times in the case of Mr. Childs. Grievant stated that during this period of time she “felt she was in the grievance procedure” and was acting with the understanding that she needed an answer before she could proceed. She requests that she be granted regular employee status, effective twenty days from the commencement of the vacancy, a continuing service personnel contract, and all benefits to which she would have been entitled as a regular, full-time employee.

Respondent argues that it was unable to grant Grievant regular employee status because Ms. Rinker continued to hold the position while she was on Workers' Compensation. Even if there had been an open position, Respondent notes that it would have been required to advertise the position, interview the applicants, and assess their seniority, prior to selection. Finally, Respondent asserts that Grievant's status as a substitute would not adversely affect her pursuit of regular employment. Superintendent Jane McBride testified that during this period of time, approximately seventy full-time jobs became available for which Grievant could have applied, yet she sought only four.

W. Va. Code §18A-4-15 requires the position of a service personnel employee on leave of absence beyond thirty days to be filled pursuant to the requirements of W. Va. Code §18A-4-8b. Once a position is filled in compliance with these requirements, the substitute holding the position “shall be accorded all rights, privileges and benefits pertaining to such a position.” Code §18A-4-8g provides that a substitute school service employee shall acquire regular employment status and seniority if said employee receivesa position pursuant to Section fifteen, subsections (2) and (5).

Consistent with these provisions, Respondent should have posted the Clerical Aide position thirty days after Ms. Rinker went on Workers' Compensation leave, and filled the position according to statute. Based upon erroneous advice, Respondent did not comply with the statute. Notwithstanding this error, because Grievant's substitute position was not posted and filled pursuant to statute, she could not earn regular employee status. W. Va. Code §18A-4-8g, Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994).

After she became an employee, Grievant could have promptly grieved the failure of Respondent to post the position, but she did not. Grievant knew from the time she was hired that she was in a substitute position. She also knew she had not received the job through a posting and selection process as required by statute. The failure to post is a single act that may have caused the Grievant continuing damage. See Spahr v. Preston Bd. of Educ., 182 W. Va. 729, 339 S.Ed.2d 723 (1990). Continuing damage does not ordinarily convert a single act into a continuing practice for the purpose of the grievance statute. Id. Spahr states that once a grievant has knowledge of the act she has an obligation to act. Grievant has known since her hiring that she was in essence “a long term substitute”; she cannot now complain because she did not receive regular seniority in this position, and the grievance is not timely filed. Lambert, supra.

In addition to the foregoing discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has theburden of proving each element of her 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. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE- 130 (Dec. 26, 1996); Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. Respondent established by a preponderance of the evidence that Grievant was aware of all the facts relating to her employment in 1990, and the employment of the previous substitute in 1988, more than fifteen days before the instant grievance was filed. Accordingly, this portion of the grievance is time-barred by the provisions of W. Va. Code §18-29-4(a)(1). See Byrd, supra; Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE- 507 (Apr. 26, 1996).

4. In order to prevail in a misclassification grievance, an employee must establish, by a preponderance of the evidence, that her duties more closely match those of another W. Va. Code §18A-4-8 classification than that under which her position was previously classified. Farley v. Logan

County Bd. of Educ., Docket No. 96-23-159 (Sept. 26, 1996); Pierantozzi v. Brooke County Bd. of Educ., Docket No. 96-05-061 (May 31, 1996).

5. "Because of similarities in the nature of certain jobs listed in W. Va. Code §18A-4-8, two or more job definitions may encompass the same duties. Proof that anemployee performs such 'crossover' duties does not necessarily mandate that [her] position be reclassified." Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

6. W. Va. Code §18A-4-8 defines "Aide IV" as

personnel referred to in the 'Aide I' classification who hold a high school diploma or general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education, or who have completed fifteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in-service training program determined by the state board to be the equivalent of three hours of college credit.

7. W. Va. Code §18A-4-8 defines "Aide I" as "personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aide."

8. W. Va. Code §18A-4-8 defines "Secretary I" as "personnel employed to transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines."

9. Grievant failed to prove by a preponderance of the evidence that her duties, beginning in 1990, more closely match the Secretary I classification than the Aide IV classification under which she is employed.

10. Because Grievant's substitute position was not posted and filled pursuant to statute, she could not earn regular employment seniority. W. Va. Code §18A-4-8g. Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994).

Accordingly, the grievance is **DENIED.**

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

Date: September 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by WVEA Consultant Harvey Bane, and Respondent was represented by Katherine L. Dooley, Esq.