KAREN HECKLER,

Grievant,

v.

RANDOLPH COUNTY BOARD OF EDUCATION,

DOCKET NO. 97-42-140

Respondent,

AND

RODNEY J. LAMBERT, JUDY CHEWNING, AND ELIZABETH S. PRITT,

Intervenors.

DECISION

On March 13, 1997, Intervenor Rodney J. Lambert appealed a Level II decision, which granted Grievant Karen Heckler's grievance, directly to Level IV, pursuant to W. Va. Code §18-29- 4(c). Intervenor Lambert was allowed to amend his appeal. In his original appeal Intervenor Lambert had listed himself as “Grievant” instead of “Intervenor.” This amendment allowed Ms. Heckler to retain the title of “Grievant” throughout all levels of the grievance process, and did not alter the merits of the grievance. He alleges that:

> Intervenor [Lambert] was awarded a teacher's aide position at Elkins Middle School and began working in this position on January 2, 1997. Intervenor [Lambert]
>
> was removed from this position effective March 10, 1997
>
> pursuant to a Level II [decision] in a grievance filed by Karen Heckler [Grievant]. Intervenor [Lambert] had intervened in this grievance by letters dated February 14, and February 20, 1997. Intervenor [Lambert] alleges that the Respondent and its [Superintendent violated [his] due process rights in this matter by its failure to advise [him] of the filing of the grievance by Ms. Heckler [Grievant], its failure to permit [him] or his counsel to review, to respond, and to allege any affirmative defenses in the grievance filed by Ms.Heckler [Grievant,] and by it[s] failure to provide copies of relevant documents to [him] or to his counsel. Intervenor additionally alleges [a] violation of West Virginia Code §18A-4-15.

As relief, “Intervenor [Lambert] requests reinstatement into the position at Elkins Middle School (EMS), and wages, benefits, and regular employment seniority retroactive to March 10, 1997.” Intervenor Lambert's Grievance Statement.

Intervenors Judy Chewning and Elizabeth S. Pritt requested to intervene in this grievance by letters dated April 11, 1997. Their request was granted by an Order dated May 30, 1997. They disagree with the Superintendent's decision, as Grievance Evaluator at Level II, that Grievant should be placed above them on the school service personnel seniority list. The Respondent in this case is the Randolph County Board of Education.

At Level IV, this grievance was scheduled for hearing on July 1, 1997, but was continued for good cause shown by Respondent. This grievance was rescheduled, and a Level IV evidentiary hearing was held on July 17, 1997, at the Grievance Board's office in Elkins, West Virginia.

The case became mature on September 2, 1997, with receipt of Intervenors' post-hearing submission. Grievant, pro se, did not file proposed findings of fact and conclusions of law.

In a case where an Intervenor appeals a lower level decision to Level IV, the burden is on the Intervenor to prove his case by a preponderance of the evidence. Holmes v. Berkeley County Bd. of Educ., Docket No. 96-02-070 (Jan. 13, 1998). Compare Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997). The following findings of fact were derived from the record, and were proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant was employed as a substitute aide, and Intervenors were employed as regular aides by Respondent when this grievance arose.

2. For an applicant to become a substitute aide with Respondent, an applicant must pass the state competency test for the aide classification and receive a favorable evaluation from the interview team. Applicants who pass the competency test are not guaranteed employment.

3. On or about December 5, 1995, fourteen applicants, including Grievant and Intervenors Chewning and Pritt, took the competency test to be eligible to become school aides. These tests were graded by Dr. Shannon Bennett, Respondent's Personnel Director.

4. Later in December, 1995, Grievant was advised by Dr. Bennett that she had failed the aide competency test.

5. Although Grievant believed she had passed the test, she did not file a grievance, or take any

action to contest the grading of her test.

6. As a consequence of Grievant's failure to pass the competency test she did not go through the second stage of the application process (interview), and was not hired by Respondent as a substitute aide. Intervenors Chewning and Pritt were hired as substitute aides along with eight other applicants. These ten newsubstitute aides participated in a random selection to determine which of them would be entitled to the first opportunity to work as a substitute and establish his or her seniority date as a substitute aide. Intervenor Chewning received first priority, and later established her seniority date as a substitute by accepting an assignment prior to any of the other nine employees hired at the same time.

7. In the summer of 1996, Grievant again took the aide competency test, and passed the test. Again, Dr. Bennett administered the competency tests.

8. Grievant was hired on August 26, 1996, as a substitute aide. Based upon her successful completion of the test in 1996, she became concerned that her test may have been inappropriately scored in 1995. Grievant requested that an investigation be performed by Superintendent Larry Pritchard regarding her 1995 aide competency test score.

9. Intervenor Lambert was hired as a regular aide at EMS on January 2, 1997.

10. Unknown to Intervenors, Grievant filed a grievance prior to February 11, 1997, seeking instatement into the regular aide position at EMS.

11. On February 11, 1997, the Level II evidentiary hearing was held. At this time the representative for Respondent (Dr. Bennett) raised the defense of timeliness.

12. On or about February 14, 1997, Intervenor Lambert wasadvised of Grievant's grievance, and filed a written request to intervene in the grievance. Counsel for Intervenor Lambert also filed a motion to intervene on February 20, 1997. Despite these requests to intervene, Intervenor Lambert was not made a party at Level II.

13. By decision dated February 24, 1997, Superintendent Prichard, acting pursuant to W. Va. Code §18-29-4 as the Grievance Evaluator, determined that a mistake had been made in grading Grievant's December 5, 1995, aide competency test, and that she had passed the test. Contrary to Dr. Bennett's statements to Grievant, she had passed the aide competency test in December of 1995. Dr. Bennett had scored Grievant's test, and had given her a total of 125, when her actual score should have been reported as 144.

14. Superintendent Pritchard granted Grievant's grievance at Level II, and ordered that a random drawing occur to determine her
seniority priority in relation to the ten applicants hired in late 1995, and the regular job to which she would have been entitled as the result of that drawing. The ten aides were not advised of the procedure, nor present at the drawing.

15. Superintendent Prichard, as Grievance Evaluator at Level II, determined that the numbers one to eleven would be put in a container, that Grievant would draw a number, and that would be her seniority ranking. The numbers one through eleven were used because ten persons had originally been hired in late 1995.

16. Superintendent Prichard, as Grievance Evaluator, placed Grievant above of all the individuals hired in December 1995,including Intervenors Chewning and Pritt, because Grievant drew the number one for the purposes of substitute seniority, and because she testified at Level II that she would have taken the first available regular employment position offered to her to begin her regular employment seniority.

17. Superintendent Prichard, as Grievance Evaluator, also determined that Grievant should be placed in the position of the individual first awarded a permanent position of employment who was below her on the substitute aide seniority list. Pursuant to that decision, Grievant was placed in the aide position held by Intervenor Lambert at EMS.

18. Intervenor Lambert lost no wages or seniority in that he was transferred to another position with the Randolph County School system.

DISCUSSION

Although this case contains many issues, it is only necessary for the undersigned to address whether Grievant timely filed her grievance at Level I. Timeliness is an affirmative defense. The burden of proving the affirmative defense by a preponderance of the evidence, is upon the party asserting the grievance was not timely filed. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). W. Va. Code §18-29-4(a)(1), in pertinent part, provides:

> Before a grievance is filed (See footnote 1) 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.

First, one must determine what is "the event," and second, when did it occur. In this case, the event is Respondent's communication to Grievant that she failed the aide competency test. Grievant learned that she failed the test in December, 1995. Therefore, Grievant failed to timely file her grievance because it was not filed until February 5, 1997.

Because "the event" above occurred, and ended in December, 1995, "the event" does not constitute a "continuing practice". See Hazelwood v. Mercer County Bd. of Educ., Docket No. 94-27-258 (Apr. 27, 1995) (a miscalculation of seniority is not a continuing event that may be grieved at any time). Similarly, there is no exception to the fifteen day filing deadline in W. Va. Code §18-29-4(a)(1)for a school board employee's discovery that a certain event may have been a grievable event. See Kish v. Mercer County Bd. of Educ., Docket No. 94-27-080 (Apr. 27, 1995). Moreover,

> "[A]s a general rule, ignorance of the law... will not suffice to keep a claim alive." Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). "[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether [her] grievance is timely filed. Instead, if [she] knows of the event or practice, [she] must file within fifteen days of the event of occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989)(emphasis in original).

Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

In addition to the foregoing formal findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. and State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). See W. Va. Code §18-29-6.

2. The burden of proof is upon the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95- 54-041 (May 18, 1995). 3. W. Va. Code §18-29-4(a)(1), in pertinent part,

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.

4. There is no exception to the fifteen day filing deadline in W. Va. Code §18-29-4(a)(1) for a school board employee's discovery that a certain event may have been a grievable event. See Kish v. Mercer County Bd. of Educ., Docket No. 94-27-080 (Apr. 27, 1995).

5.

> "[A]s a general rule, ignorance of the law... will not suffice to keep a claim alive." Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). "[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether [her] grievance is timely filed. Instead, if [she] knows of the event or practice, [she] must file within fifteen days of the event of occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989)(emphasis in original).

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1997).

6. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

7. Respondent proved by a preponderance of the evidence that Grievant failed to timely file her grievance.

Accordingly, the appeal of Intervenors is **GRANTED**, and the Level II decision is **REVERSED**. Respondent is **ORDERED** to place Intervenor Lambert in his former aide position at Elkins Middle School, and to place Grievant on the aide seniority rooster with the same seniority date she held prior to her filing this grievance at Level I.

Any party may appeal this **DECISION** to the Circuit of Kanawha County or to the Circuit Court of Randolph 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.

DATED: February 26, 1998. _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Procedural Rules of the West Virginia Education and State Employees Grievance Board 156 C.S.R. 1 §2.1.1 (1996), provides:

> *"File or "filing means to place an appropriate grievance form or letter evidencing an intent to appeal a lower level grievance decision in an official depository of the United States Postal Service, postage prepaid, and addressed to the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, or by facsimile transmission to the Board's offices. A hard copy of any grievance filed by facsimile must be received by the Board office within a reasonable time following the facsimile transmission.*