MICHAEL E. WHALEN,

Grievant,

v. **Docket No. 97-26-234**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This is a grievance by Michael E. Whalen (Grievant) submitted pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Mason County Board of Education (MCBE) violated its policy established by past practice when it refused to pay him for vacation time accrued during his tenure as MCBE's Superintendent. This grievance was initiated at Level I on February 19, 1997. Grievant's immediate supervisor was unable to grant the relief requested, and the matter was elevated to Level II where a hearing was conducted on March 13, 1997. Thereafter, MCBE Superintendent Larry Parsons denied the grievance on April 4, 1997. Grievant appealed to Level III, and MCBE waived acting on the grievance in accordance with W. Va. Code § 18-29-4(c). Grievant then appealed to Level IV on May 7, 1997. A Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on August 1, 1997. As agreed at the conclusion of that hearing, this matter became mature for decision on September 16, 1997, upon receipt of MCBE's proposed findings of fact and conclusions of law. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Levels II and IV.

FINDINGS OF FACT

1. Grievant was employed by Respondent Mason County Board of Education (MCBE) as its Superintendent.

2. On January 25, 1993, Grievant entered into a written contract of employment as MCBE's Superintendent, for a four-year term ending on June 30, 1997. R Ex 3 at L IV.

3. Grievant's employment contract included a provision which states: "The Superintendent shall receive annually 15 vacation days exclusive of legal holidays, and shall be entitled to 1.5 days per month personal leave for illness and other causes as provided by state law and Board policy." R Ex 3 at L IV.

4. On approximately three to four occasions prior to June 11, 1996, Grievant discussed with the board members, in executive session during board meetings, and by telephone or in person with board member Mary Beth Carlisle on several other occasions, the possibility of MCBE "buying out" the final year of his contract as Superintendent. With the approval of the board's president, Harry Siders, Ms. Carlisle assumed the role of negotiating the terms of the buyout with Grievant.

5. At some point prior to June 11, 1996, Grievant asked Ms. Carlisle if he could be paid for unused vacation days, should he resign as Superintendent. Ms. Carlisle responded that the board would consult with counsel, and Grievant would receive whatever he was legally entitled to receive under the terms of his contract as Superintendent. Thereafter, Ms. Carlisle consulted with the board's counsel. Based on advice obtained from the board's counsel, Ms. Carlisle called Grievant shortly after June 11, 1996, and told Grievant that they could not pay for his unused vacation days, but that Grievant could take his vacation days before July 1, 1996.

6. On June 11, 1996, at a regular meeting, MCBE adopted the following motion:

> [I]f the superintendent will tonight announce his resignation effective June 30, 1996, that this board will accept it; the superintendent be paid on June 30,1996 for the fourth year of his contract at the salary he otherwise would have received for that year and that we will employ Mr. Whalen, for the 1996- 97 school year only, at the Alternative School with full teacher pay and benefits; and that the entire transaction be conditioned on the superintendent signing tonight an appropriate instrument releasing the board from any and all liability to Mr. Whalen under his contract and regarding this motion.

G Ex C at L IV.

7. Following adoption of the motion described in Finding of Fact Number 6, Grievant tendered his resignation and executed a release which contained the following provisions:

> **RELEASE** executed on June 11, 1996, by **MICHAEL E. WHALEN** of Point Pleasant, Mason County, West Virginia, here referred to as Whalen, to **THE BOARD OF EDUCATION OF THE COUNTY OF MASON**, a statutory corporation having its

OFFICES at Point Pleasant, Mason County, West Virginia, here referred to as the Board.

Recitals

A. A certain contract of employment was entered into between Whalen and the Board on January 25, 1993. The contract employed Whalen as the Board's Superintendent for a term of four years commencing on the first day of July, 1993, and ending on June 30, 1997.

B. At its meeting on June 11, 1996, the Board decided to adopt a motion which, among other things, invited Whalen's resignation as the Board's Superintendent, effective June 30, 1996. That decision is a matter of minute record. It conditioned Whalen's receipt of certain benefits upon hissigning an appropriate instrument releasing the Board from any and all liability to Whalen under the contract of employment referred to above, and all liability to Whalen for the Board's action upon the June 11, 1996 motion.

C. Whalen is willing to release the Board from all past and present claims based on the contract and on the Board's action on the June 11, 1996 motion.

Release of all Claims

In consideration of the terms set forth in the Board's June 11, 1996 decision adopting the motion regarding Whalen's contract of employment as Superintendent, Whalen and his heirs, legal representatives, and assigns release and forever discharge the Board, its successors, and assigns of and from all claims, demands, action, and causes of action of any kind or nature, at law or in equity, based on the above-mentioned contract and upon the Board's consideration and adoption of the above-mentioned motion on June 11, 1996. This release applies to all past and existing claims, including, without limitation, the rights of Whalen under said contract.

Adm Ex 5 at L II (emphasis in original).

8. As a result of the motion adopted on June 11, 1996, and the Release executed by Grievant on June 12, 1996, as described in Findings of Fact Numbered 6 and 7, respectively, MCBE effectively "bought out" the final year of Grievant's contract.

9. After July 1, 1996, Grievant's payroll record maintained by MCBE continued to show a "carryover" of 31.5 days of "vacation" which Grievant earned while serving as Superintendent of Schools. See G Ex D at L IV. However, as a classroom teacher, Grievant was only authorized to take

sick leave and personal days, not vacation days which are available only to employees with 261-day contracts.

10. On December 5, 1996, Grievant wrote to George Miller, MCBE's Assistant Superintendent, requesting pay for the vacation days he had accrued. See Adm Ex 1 at L II. 11. On December 19, 1996, Assistant Superintendent Miller wrote back to Grievant advising as follows:

> Your letter of December 5, 1996, requesting payment for unused vacation days is denied.
>
> A legal review has been conducted. Granting your request would not only be violating the Superintendent's contract held by you, but would be violating the release signed by you upon leaving the position.
>
> If there should be any further questions concerning this matter, please contact my office.

Adm Ex 2 at L II.

12. This grievance was initiated at Level I on February 19, 1997, more than 15 working days after Grievant received Assistant Superintendent Miller's correspondence denying payment for unused vacation days. See R Ex 4 at L IV.

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 argued several defenses to this grievance, foremost of which involves the contention that Grievant was not authorized to use the grievance procedure in W. Va. Code §§ 18-29-1, et seq., to contest the compensation or benefits he should have received for serving as MCBE's Superintendent of Schools. W. Va. Code § 18-29-2(a) defines a "grievance" as "any claim by one or more affected employees of the . . . county boards ofeducation . . . ." Further, W. Va. Code § 18-29-2(c) defines "employee" as "any person hired as a temporary, probationary or permanent employee by an

institution either full or part time."

This Grievance Board has previously recognized that "[a] county superintendent of schools elected and appointed by the board of education pursuant to W. Va. Code § 18-4- 1, (See footnote 1) is an officer, not an employee, of the school board." Church v. McDowell County Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987). See Lookabill v. Wyoming County Bd. of Educ., 172 W. Va. 225, 304 S.E.2d 678 (1983); Hall v. Pizzino, 164 W. Va. 331, 263 S.E.2d 886 (1980); Jackson v. Bd. of Educ., 128 W. Va. 154, 35 S.E.2d 852 (1945). Although Grievant was employed by MCBE as a classroom teacher at the time he initiated this grievance, the essence of this grievance involves the terms of his employment as Superintendent. Therefore, Grievant is not a proper party to bring a grievance involving this particular matter pursuant to W. Va. Code §§ 18-29-1, et seq., and the undersigned administrative law judge has no authority to rule upon the merits of this grievance. See Church, supra; Trahern v. Bd. of Trustees, Docket No. 94-BOT-026 (June 22, 1994); Mahon v. Bd. of Directors, Docket No. 91-BOD-394 (Oct. 2, 1991). See also Mills v. W. Va. State Soil Conservation Agency, Docket No. 96-AGR-153 (July 30, 1996); Jawa v. McDowell County Bd. of Educ., Docket No. 33-86-192-4 (July 24, 1986).

Nonetheless, MCBE's timeliness defense will also be addressed briefly. MCBE contends that this grievance was not initiated within the time limits specified 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.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. 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). As required by W. Va. Code § 18-29-3(a), Respondent asserted at the Level II hearing that this grievance was untimely. L II HT at 6, 22. See generally 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).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566

(1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). In the instant matter, Grievant was given unequivocal written notice by MCBE Assistant Superintendent George Miller on December 19, 1996, that he would not be paid for unused vacation days accrued while he was serving as MCBE's Superintendent. Nonetheless, Grievant waited well over the fifteen working days allowed by statute (See footnote 2) before he filed this grievance with his immediate supervisor. Thus, this grievance was not initiated in a timely manner. See Rose, supra. Even if this grievance involved a matter that properly falls under the limited jurisdiction of this Grievance Board, and such matter had been timely pursued, the release which Grievant executed on June 11, 1996, incorporating the motion approved by MCBE at its meeting on June 11, 1996, extinguished any claim which Grievant might have had regarding his vacation pay. See, e.g., Billiter v. Melton Truck Lines, 187 W. Va. 526, 420 S.E.2d 286 (1992). Given the language of the release, "[t]his release applies to all past and existing claims, including, without limitation, the rights of Whalen under said contract," the subject of this grievance, compensation for unused vacation days accrued under Grievant's contract of employment as Superintendent, is fully encompassed by the terms of the release. In view of this determination, and the previous conclusions that this matter is outside this Grievance Board's jurisdiction and was not timely filed, Respondent's additional defenses on the merits of Grievant's claim need not be addressed in this decision.

In addition to 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 county Superintendent of Schools, elected and appointed by the board of education pursuant to W. Va. Code § 18-4-1, is an officer of the school board, and not anemployee within the meaning of W. Va. Code §§ 18-29-1, et seq. Church v. McDowell County Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987). See Lookabill v. Wyoming County Bd. of Educ., 172 W. Va. 225, 304

S.E.2d 678 (1983); Hall v. Pizzino, 164 W. Va. 331, 263 S.E.2d 886 (1980); Jackson v. Bd. of Educ., 128 W. Va. 154, 35 S.E.2d 852 (1945).

3. This grievance, which involves the question of entitlement to payment for unused vacation days which Grievant accrued while serving as a county Superintendent of Schools, directly relates to Grievant's status as an officer of the board, and is therefore outside the jurisdiction of this Grievance Board to adjudicate disputes between county boards and their employees. See Church, supra. See also Lookabill, supra; Hall, supra; Jackson, supra.

4. 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).

5. A grievance must be filed within the fifteen day time limit specified in W. Va. Code § 18-29-4(a). W. Va. Code § 18-29-3(a). W. Va. Code § 18-29-4(a) 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.

6. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va.Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

7. MCBE established by a preponderance of the evidence that Grievant did not initiate this grievance within fifteen days of the event which gave rise to this grievance, Assistant Superintendent Miller's unequivocal notice that Grievant would not be compensated for unused vacation days accrued while serving as the county board's Superintendent. See Rose, supra; Naylor, supra; Kessler, supra.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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: February 27, 1998

Footnote: 1

W. Va. Code § 18-4-1 provides that a Superintendent "shall be elected by the board" and that the Superintendent "shall take office" on a certain date following his election.

Footnote: 2

W. Va. Code § 18-29-2(b) defines "days" as days of the employee's employment term, excluding Saturdays, Sundays, official holidays and school closings.