KATHY E. BOSTIC and

MARTHA A. GREEN,

Grievants,

v.

DOCKET NO. 98-20-182

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent,

and

FRED BUCKLEY,

Intervenor.

D E C I S I O N

Grievants, Kathy E. Bostic and Martha A. Green, filed this grievance against their employer, the Kanawha County Board of Education ("Board") on February 17, 1998:

> Grievants, regularly employed school bus operators, allege that the Respondent has failed to post, on a temporary basis, a bus operator's position held by Kenneth Butler, another regularly employed school bus operator. Mr. Butler suffered an injury or illness in the fall of 1996 and has not returned to employment with the Respondent. Grievants allege a violation of West Virginia Code § 18A-4-15(2) and requests (sic) posting of this position.

The grievance was denied at level one by Grievant's immediate supervisor, Karen Williams, and advanced to level two, where a hearing was held on May 14, 1998. The grievance was denied by Charlene Byrd, the level two grievance evaluator, and was bypassed at level three in accordance with W. Va. Code § 18-29-4(c). The grievance wasappealed at level four on June 3, 1998, and a hearing was held on August 10, 1998. The matter became mature for decision on August 31, 1998, the

deadline for the parties' proposed findings of fact and conclusions of law. Grievants were represented by John E. Roush, Esq., West Virginia School Service Personnel Association, the Board was represented by Gregory W. Bailey, Esq., and the Intervenor was represented by Perry Bryant, West Virginia Education Association.

SUMMARY OF EVIDENCE

Evaluator's Exhibits

Ex. 1 -

Grievance Forms.

Intervenor's Exhibits

Ex. 1 -

November 27, 1996, memorandum from George W. Beckett to Team, Principals, and Supervisors

Testimony

Grievants testified in their own behalf and presented the testimony of Larry Cobbs. Intervenor testified in his own behalf and presented the testimony of Richard Stonestreet. The Board presented the testimony of George Beckett and Larry Cobbs.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievants are employed by the Board as regularly employed school bus operators.

2. Intervenor is employed by the Board as a substitute bus operator.

3. In the fall of 1996, Kenneth Butler, a regular bus operator, was injured and has been off work ever since. 4. Intervenor, who was the most senior substitute bus operator on the rotation list at the East Bank Bus Terminal, was assigned to fill Mr. Butler's position on or about November 7, 1996.

5. At the time, it was the accepted practice for filling vacancies for service personnel who were off due to injury or illness for more than twenty days to take the substitute on top of the rotation list and place them in the position until the regular employee returned to work.

6. This practice also allowed for regular employees to request the opportunity to substitute for the absent employee. The substitute employee would then be placed in that regular employee's position.

7. In the Fall of 1996, the Board decided to change its practice regarding posting of positions in which the regular employee is absent for more than thirty days, to comply with the law set forth by statute and this Grievance Board. Before instituting the change, the Mr. George Beckett, Administrative Assistant for the Board, and Mr. Bill Courtney, Director of the Department of Personnel, conferred with Mr. Richard Stonestreet, WVEA UniServ Consultant, and Mr. Wesley Wills, President of the Kanawha County Education Service Personnel Association. Based upon these consultations, it was agreed that the change in practice would not be applied retroactively to affect any employee already holding a long term substitute assignment under the old rotation method.

8. On November 27, 1996, the Board issued a memorandum changing its practice regarding posting of positions in which the regular employee is absent for more than thirty days, to comply with the law set forth by statute and this Grievance Board. It elected to post all such absences occurring after that date, but to leave all substitutesalready in long term assignments in the positions. In other words, the Board elected to apply the new policy prospectively only, beginning on December 1, 1996. I. Ex. 1.

9. The November 27, 1996, memorandum instructed all recipients to post the memorandum for all employees to see. Mr. Larry Cobb, Supervisor of the East Bank Bus Terminal, posted the memorandum at the East Bank Terminal.

10. Information regarding the changed procedure for filling long term absences was also disseminated through in service training at the bus terminals.

11. Grievant Green was aware on December 1, 1996, that Intervenor remained in the long-term assignment created by Mr. Butler's absence. No one, including her, asked for Mr. Butler's position to be posted at that time. LII p. 17.

12. Grievant Bostic began working in the East Bank Terminal in the Spring of 1997. She was aware at that time that Intervenor remained in the long-term assignment created by Mr. Butler's

absence. LII, p. 27.

13. Grievants filed this grievance on February 17, 1998, challenging Intervenor's assignment to fill the long term absence of Mr. Butler.

DISCUSSION

Grievants allege the Board violated the provisions of W. Va. Code § 18A-4-15(2) regarding the posting and filling of vacancies created by the long-term absence of a regular employee. The Board asserts this grievance was untimely filed.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. 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). 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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).

A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the action being challenged. Kessler, supra. 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 case, there is no dispute that Grievants were aware that Intervenor was assigned, in the Fall of 1996, to fill in for Mr. Butler as the most senior substitute on the rotation list, but without the benefit of posting in accordance with the applicable provisions of W. Va. Code §§ 18A-4-8b and

18A-4-15(2). Grievants claim that Intervenor's continuing presence in that assignment constitutes a continuing practice, and thus, theirgrievance is not untimely, according to W. Va. Code § 18-29-4(1), which provides that a grievance may be filed within fifteen days of the most recent occurrence of an incident giving rise to a continuing practice. Grievants rely on this Board's decision in Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-272 (Aug. 25, 1997), to support their contention that the Board violated W. Va. Code § 18A-4-15(2), and that their grievance is timely filed.

Adkins upheld this Board's established precedent, that W. Va. Code §§ 18A-4-8b and 18A-4-15(2) require that county boards of education post all vacancies which occur as a result of an employee being on a leave of absence for more than 30 days. It is not necessary for the employee to formally request a leave of absence for these statutory provisions to be triggered, and an employee off on Workers' Compensation is on leave of absence. Id.; Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996); Eagle v. Marion County Bd. of Educ., Docket NO. 94-24-226 (Nov. 23, 1994); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Hensley v. Mingo County Bd. of Educ., Docket No. 93-29-037 (July 6, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987).

In Adkins, the grievant had held a long-term assignment as a substitute since February 1994. In October 1996, the Board decided to post that long-term substitute assignment in accordance with the above statutory provisions, and another employee was placed in that position. The grievant argued that it was arbitrary and capricious for the Board to post the position after she had held it for two years. There was no evidence of what prompted the Board to post the position after all of that time. Nevertheless, theAdministrative Law Judge found that “[f]ailing to post the vacancy and allowing Grievant to remain in the position after 30 days without posting were violative of W. Va. Code §§ 18A-4-8b and 18A-4-15. LBOE corrected this violation and did what it was required by statute to do. The fact that it did not post the position in 1994 when it should have does not mean it was excused from the statutory posting requirement. Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).”

Grievants argue that Adkins applies in this case, in that the Board here also is not excused from failing to post and fill the position held by Intervenor in accordance with the applicable statutory provisions. However, the time for Grievants to have challenged Intervenor's placement in Mr. Butler's

long-term vacant position was when the Board officially changed its practice or policy in December 1996. It was known to Grievants that Intervenor was in that position at that time without the benefit of posting. Once they were unequivocally informed that the Board was discontinuing its practice of filling long-term vacancies from the substitute rotation list, except for those already holding such positions, Grievants should have raised their challenge.

There is little explanation why Grievants chose to wait until February 1998 to file this grievance over Intervenor's position, other than their claim that it constitutes a continuing practice. Grievants also claim they did not see the November 27, 1996, memorandum regarding the institution of the new practice. However, it is undisputed that they knew of the practice, and that Intervenor was in the long-term assignment at least one year prior to the filing of the grievance. What Grievants are really challenging is the prospective application of the Board's change in policy in December 1996. This is clearly an untimely filing in that respect, and the undersigned will not address the legality of the Board'sdecision at this late date, when Intervenor is the only substitute left who is holding one of the positions in effect at the time the policy was changed. There was no challenge to the policy when it was implemented in December 1996. To find now that it was not done correctly only serves to harm those who relied on that system, either those who held long- term assignments, or those who could have held the long-term assignments, but did not challenge the policy.

CONCLUSIONS OF LAW

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. 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).

2. A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the action being challenged. Kessler v. W. Va. Dept. of Transp., Docket No. 96- DOH-445 (July 29, 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).

3. The Board has proven by a preponderance of the evidence that Grievants were aware at

least one year prior to the filing of this grievance that Intervenor continued in his long-term assignment without the benefit of posting in accordance with W. Va. Code§ 18A-4-15(2), and that the Board amended its policy regarding filling long-term assignments, but only prospectively, leaving Intervenor in his position.

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 the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 17, 1998