SHIRLEY BLAND & ALICE BRADLEY,

Grievants,

v. Docket No. 98-31-120

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Shirley Bland (Bland) and Alice Bradley (Bradley)(Grievants) are teacher aides currently employed by Respondent Monroe County Board of Education (MCBE). Grievants were previously employed as teacher aides for the Monroe County Head Start program, which is administered by MCBE. Grievants filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that they should not be required by MCBE to pay for college courses they attended while working for Head Start. Bland's grievance was denied at Level I on February 27, 1998, by Frank R. Upton (Upton), Principal of Union Elementary School. In Bradley's grievance, Danny G. Lively (Lively), Principal of Peterstown Elementary School, was without authority to grant relief at Level I on March 3, 1998. The grievances were consolidated at Level II, and denied by Grievance Evaluator Lyn Guy, Superintendent of Monroe County Schools, on or about March 27, 1998. As authorized by W. Va. Code § 18-29-4(c), MCBE waived participation at Level III. A Level IV hearing was held before the undersigned Administrative Law Judge at the Grievance Board's Beckley, West Virginia office on August 4, 1998. The parties were invited to submitproposed findings of fact and conclusions of law, and the matter became mature for decision on September 25, 1998. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. At the beginning of the 1997-1998 school year, Grievants became substitute teacher aides employed by Respondent MCBE in its kindergarten program.

2. Before starting work in MCBE's kindergarten program, Grievants had worked for at least three months as teacher aides for the Monroe County Head Start program, which is federally funded but administered by MCBE.

3. Grievants left their jobs in Respondent's Head Start program because the nature and location of the kindergarten positions made them more desirable. Head Start workers frequently moved on to such positions as they became available. Because of their low seniority, Grievants were surprised to be selected to these positions.

4. During the 1996-1997 school year, Head Start's continuing education policy, which is developed locally by a Policy Council consisting of parents of children enrolled in Head Start, permitted employees to attend college classes, subject to limitations set forth in the policy, with Head Start paying for their tuition.

5. During the Spring, 1997, semester, Grievant Bland took two classes, at a cost of $180.00.

6. During the Spring, 1997, semester, Grievant Bradley took one class, at a cost of $90.00.

7. To participate in Head Start's continuing education program, a Head Start employee must have been employed by the program for at least three months, and musthave planned to remain with the program for two years. This policy was adopted to retain for Head Start the benefit of the training provided to employees.

8. Because Grievants had been employed by the program for at least three months, and planned to remain with the program for two years. they were eligible to participate in Head Start's continuing education program.

9. To be eligible for tuition payments by Head Start, an employee must have agreed either to complete the class or classes, or, should the employee drop out in a non-emergency situation, to reimburse the program for the cost of tuition.

10. Grievants completed the classes.

11. Grievants were eligible for tuition payments, and their tuition was paid by the Head Start program.

12. By letter dated August 26, 1997, Head Start Director Mary Beth Mustain (Mustain) informed Grievant Bland that she must reimburse the Head Start Program for her tuition.

13. By letters dated December 16, 1997, Mustain informed both Grievants that they must reimburse the Head Start Program for their tuition.

14. By letter dated January 14, 1998, Grievants wrote to Mustain, requesting a meeting to resolve the matter. The meeting was rescheduled at least twice because of snow. The meeting, held on February 12, 1998, did not resolve the matter.

15. Both grievances were filed on or about February 12, 1998.

16. On January 21, 1998, Grievant Bradley held a meeting with Principal Lively to attempt to resolve the matter. The meeting did not resolve the matter. A follow-up meeting, held on February 25, 1998, also did not resolve the matter. 17. Lively's Level I decision on Bradley's grievance, dated March 3, 1998, held that her grievance was timely filed, that she would not have to repay the Head Start program for her tuition, that Lively did not have the authority to grant the relief Bradley sought, and that her grievance would proceed to a level vested with the authority to grant relief.

18. The Level II decision on Bradley's grievance, issued on or about March 27, 1998, held that her grievance was timely filed, but that she would have to repay the Head Start program for her tuition.

19. MCBE raised a timeliness defense to Bland's grievance at Level II.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W.Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

MCBE has raised a timeliness defense to Bland's grievance. 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.

"Days" is defined as "days. . . exclusive of Saturday, Sunday, official holidays or school closings[.]" W. Va. Code § 18-29-2. 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).

The testimony regarding the timeliness of these grievances was uncontested. Both grievances were filed on or about February 12, 1998. Grievant Bland first received unequivocal notice that Mustain expected her to repay the Head Start program for her tuition by letter dated August 26, 1997. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). By letter dated January 14, 1998, she joined Bradley in asking for a meeting to resolve the matter. MCBE raised a timeliness defense to Bland's grievance at Level II. The Level II grievance evaluator ruled that Head Start's second letter, dated December 16, 1997, did not represent the most recent occurrence of a continuing practice. The undersigned agrees. The "event" that started the fifteen day filing deadline running was MCBE's letter of August 26, 1997. Bland failed to timely request a conference or file her grievance because she did not request a conference for nearly five months, and did not file her grievance for nearly six months. Because the "event"occurred, and ended, in August, 1997, the "event" does not constitute a continuing practice. See Hazelwood v. Mercer County Bd. of Educ., Docket No. 94-27-258 (Apr. 27, 1995). There is no exception to the fifteen day filing deadline for a school board employee's discovery that a certain event may have been grievable. See Kish v. Mercer County Bd. of Educ., Docket No. 94-27-080 (Apr. 27, 1995). Similarly, the 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 or the practice. Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

Accordingly, MCBE has met its burden of establishing that Bland's grievance was not timely filed. See Lilly v. Raleigh County Bd. of Educ, Docket No. 94-41-195 (Nov. 28, 1994), Naylor v. W.Va. Human Rights Comm'n, 180 W.Va. 634, 378 S.E.2d 843 (1989).

However, Grievant Bradley's grievance was filed under different circumstances. Bradley first

received unequivocal notice that Mustain expected her to repay the Head Start program for her tuition by Head Start's letter of December 16, 1997. She requested a conference with Lively on January 14, 1998, approximately 18 days later. However, it is not necessary for the undersigned to decide whether Bradley's grievance was timely filed, because MCBE never raised a timeliness defense to it. Indeed, Lively's Level I decision on Bradley's grievance specifically held that she had ”followed all proper procedures in a timely fashion and requested the Level I grievance conference in accordance with state statutes, 18-29-3 & 4.”

MCBE, in seeking to recoup Head Start's tuition payments from Grievant Bradley, relies on Head Start's personnel policy entitled “Monroe County Head Start ContinuingEducation Policy Staff.” All parties agree that this policy controlled Head Start's continuing education program at the time these grievances arose. That policy states, in pertinent part:

> 1. A staff member must be employed by the program for three (3) month [sic] and plan to remain in the program for two (2) years prior to enrolling in classes. . .
>
> 5. In order for staff to be eligible to receive monetary assistance, they must agree to either;
>
> a. complete the class
>
> b. reimburse the program for the cost of tuition
>
> if they drop out, unless it is an emergency
>
> situation approved by the director.

MCBE believes that section one of this policy controls this situation, and that this section requires an employee to remain in Head Start's employ for two years or reimburse the program for tuition. MCBE's argument relies on this interpretation, and on the fact that this interpretation was repeatedly conveyed to its employees, both in writing and through discussion at staff meetings. This reliance is misplaced, because MCBE's interpretation of this policy is incorrect.

Section one merely establishes a threshold for participation in Head Start's continuing education program. Section one requires that a Head Start employee must be employed by the program for at least three months, and must plan to remain with the program for two years, before enrolling in classes. It is section five that determines which employees are “eligible to receive monetary

assistance" in the form of tuition payments. It requires that, to receive monetary assistance, an eligible employee must agree either to complete the class or classes, or, should the employee drop out in a non-emergency situation, to reimburse the program for the cost of tuition. The fact that MCBE and Head Start have consistently and repeatedly misinterpreted this policy to mean that an employeewho leaves the Head Start program within two years must repay any tuition does not change the plain meaning of the words of the policy. (See footnote 1)

All parties agreed that Grievants completed their classes. While the testimony concerning whether Grievants agreed to complete their classes was equivocal, the undersigned finds it reasonable to conclude that, because Grievants enrolled in classes and later completed them, they constructively agreed to do so.

Grievants also argue that no part of Head Start's policy authorizes MCBE or Head Start to recoup tuition payments from its employees. Policy 5300, § 2.8, of the West Virginia Board of Education, entitled Board of Education Relations with School Personnel, provides that "[a]ll official and enforceable personnel policies must be written and made available to every employee of each county board of education." As Head Start's policy contained no written mention of recoupment of tuition payments, it had no enforceable recoupment policy in effect. Grievants' argument on this issue must prevail.

Head Start's desire to retain the benefit of the training it provides to employees is commendable. However, it must do so through a correctly interpreted written policy. As several witnesses pointed out, the training provided to Head Start employees who later move on to the Monroe County school system may be lost to the Head Start program, but it is not lost to the children of Monroe County. In Grievants' case, Head Start's students will receive the benefit of Grievants' training one year later, when they reach kindergarten. As all involved in this grievance clearly had the best interests of the children foremost in their consideration, the outcome of this grievance should not be completely unwelcome.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievants have the burden of proving their 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. W. Va. Code § 18-29-4(a)(1) requires that Grievants request a conference or file their grievance within fifteen days of the event giving rise to it, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. “Days” is defined as “days. . . exclusive of Saturday, Sunday, official holidays or school closings[.]” W. Va. Code § 18-29-2.

3. 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 grievable. Kish v. Mercer County Bd. of Educ., Docket No. 94-27-080 (Apr. 27, 1995). If a grievant knows of the event or practice, she must file within fifteen days of the event or the practice. Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

4. 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).

5. Respondent MCBE has established, by a preponderance of the evidence, that Grievant Bland's grievance was not timely filed, and she demonstrated no valid excuse for her late filing.

6. A policy that established threshold requirements for participation in a continuing education program, requiring that an employee must have been employed by the employer for at least three months, and must have planned to remain with the employer for two years, before enrolling in classes, does not require that an employee who leaves the employer within two years repay any tuition paid by the employer.

7. Head Start's continuing education policy requires that, to receive monetary assistance, an employee must agree either to complete the class or classes, or, should the employee drop out in a non-emergency situation, to reimburse the program for the cost of tuition.

8. Grievant Bradley agreed to complete her class, enrolled in class, and later completed it.

9. Policy 5300, § 2.8, of the West Virginia Board of Education, entitled Board of Education Relations with School Personnel, provides that all official and enforceable personnel policies must be

written and made available to every employee of each county board of education.

10. Because Head Start's policy contained no written mention of recoupment of tuition payments, it had no enforceable recoupment policy in effect. 11. Grievant Bradley need not reimburse the Head Start program of MCBE for her tuition.

Accordingly this Grievance is hereby **GRANTED IN PART** and **DENIED IN PART**. Grievant Bradley's grievance is **GRANTED**, and the Head Start program of Respondent Monroe County Board of Education is **ORDERED** to cease its efforts to recoup its $90.00 tuition payment from her. Grievant Bland's grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated October 6, 1998

Footnote: 1 *Respondent appears to concede that this policy, as written, does not support its position. In its proposed Findings of Fact and Conclusions of Law, Respondent argues that the words of the policy should not be given their plain meaning, and offers alternative policy language that would have, had it been in effect, won the day for MCBE. However, under Policy 5300, Grievants are entitled to rely upon the actual policy in effect at the time this grievance arose.*