

**VIRGINIA GOODWIN,**

**Grievant,**

**v.**

**Docket No. 00-30-163**

**MONONGALIA COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Grievant, Virginia Goodwin, employed by the Monongalia County Board of Education (MCBOE) as a substitute teacher's aide, filed a level one grievance on November 9, 1999, in which she alleged violations of W. Va. Code §§18A-4-8b and 18A-4- 8g, when a substitute with less seniority was awarded positions at Mountainview Elementary School in December 1998, and at South Middle School in September 1999. For relief, Grievant requested seniority from December 1998, retroactive wages with interest, and benefits from both vacancies. [\(See footnote 1\)](#)

The grievance form indicates that the matter was processed at levels one through three, although only the level two decision was made part of the record. Appeal was made to level four on May 10, 2000, and an evidentiary hearing was conducted at the Grievance Board's Morgantown office on July 11, 2000. Grievant was represented by John E. Roush, Esq., of West Virginia School Service Personnel Association, MCBOE was represented by Harry M. Rubenstein, Esq., of Kay Casto and Chaney. The matter became mature for decision on August 18, 2000, the due date for final post-hearing submissions.

The essential facts of this matter are undisputed and may be set forth as follows.

#### **Findings of Fact**

1. At the time this grievance was filed, Grievant was employed by MCBOE as a substitute aide with a seniority date of October 1996.
2. Joanne Yost was employed by MCBOE as a substitute aide with a seniority date of October 1, 1999.
3. MCBOE posted a vacancy for the position of Aide (BD Aide, 10 month, full time) at Mountainview Elementary School from December 10 - 23, 1998. Grievant applied for the position which was ultimately awarded to Ms. Yost, effective February 24, 1999.

4. On September 3, 1999, MCBOE posted a position of Aide (Floating, 10 month, full-time) at South Middle School. Grievant submitted an application; however, the position was awarded to Joanne Yost, effective October 27, 1999, based upon her regular seniority earned as a result of the Mountainview assignment.

### Discussion

MCBOE contends that this grievance is barred from consideration at Level IV because it was not initiated in a timely manner. 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. Wounaris v. Bd. of Directors/ W. Va. State College, Docket No. 99-BOD-033D (May 18, 1999); 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).

W. Va. Code §18-29-4. That statute provides, in pertinent part:

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 ..., 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.

MCBOE has met its initial burden of proof by establishing that the Mountainview position was filled effective February 24, 1999, and that Grievant did not file a level one grievance until November 9, 1999. In response, Grievant contends that this case falls within the "discovery rule" exception to the

fifteen-day filing limit. In Spahr v. Preston County Board of Education, 182 W. Va. 726; 391 S.E.2d 739 (1990), the West Virginia Supreme Court of Appeals held that, until an employee knows of the relevant facts giving rise to his grievance, the time limitations contained in W. Va. Code §18-29-4(a)(1) are tolled.

Grievant testified that she was never notified the position had been filled, but had called the school to inquire about it as late as March or April, and had been advised that it remained unfilled at that time. She stated that she eventually concluded that the position was not going to be filled. Grievant testified that she learned that Ms. Yost had been awarded the Mountainview position only after she had inquired as to how Ms. Yost had been selected over her for the South Middle School assignment.

Grievant's explanation of the delay does not constitute a discovery rule exception to the statutory time lines. Although not addressed in Spahr, a grievant may be expected to act reasonably to learn the facts of the matter. In this case, Grievant knew that a position had been posted, and was to be filled. She stated that she checked at the school a number of times, but did not identify the individual who allegedly told her in late Spring 1999, that the position remained unfilled. It is very unlikely that such misinformation would be issued, and without any evidence to confirm it, that portion of Grievant's testimony is determined to be not credible. Further, Grievant should have contacted the Personnel Office, where she applied, to obtain the information. Certainly, employees in that office could not only have advised her whether the position had been filled, but also tell her of any delays, or other decisions which had been made regarding the assignment. Finally, Grievant stated that she just assumed the position was not going to be filled. She did not state that she made any inquiry to confirm whether that decision had been made. An individual may not develop her own erroneous conclusion about a matter, and then many months later, after learning the actual facts, rely upon the discovery rule to begin grievance proceedings. Therefore, the grievance was untimely filed.

Even if the grievance had been timely filed, Grievant could not prevail. Because the grievance does not involve a disciplinary matter, Grievant has the burden of proving 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.

Grievant argues that as the substitute with most seniority, she was entitled to the position at Mountainview Elementary School. MCBOE concurs that Grievant had accrued more seniority than Ms. Yost, but asserts that it acted properly within its discretion to select the individual who had been assigned as a substitute to that particular Behavioral Disorders class because of the extraordinary number of turnovers experienced that year with both teachers and aides. Assistant Superintendent Jacob Mullett testified that the decision was based upon concerns and considerations for both programmatic needs and the needs of the children.

W. Va. Code §18A-4-8b provides in pertinent part:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. . . If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies.

Both Grievant and the successful applicant were qualified within the statutory definition of that term. Past evaluations were either not completed, or were considered good in both instances. Grievant had more seniority than Ms. Yost, and MCBOE complied with the statutory requirement that Grievant be provided a reason for her nonselection. Grievant argues that the position should have been filled based on a strict application of qualifications, evaluations, and seniority; however, Code §18A-4-8b requires only that qualified applicants be given first opportunity when filling a vacancy, and the Grievance Board has consistently recognized exceptions to the narrow statutory definition of qualifications. Gender has been held to be a bona fide occupational qualification in Keith v. Harrison County Board of Education, Docket No. 99-17-242 (Feb. 24, 2000), and Sall v. Wood County Board of Education, Docket No. 54-86-311-3 (Mar. 20, 1987). Individuals who were not physically capable of performing the duties of the position were found not entitled to the respective assignments in Nelson v. Summers County Board of Education, Docket No. 99-45-461 (Apr. 7, 2000) and Montelione v. RESA VI, Docket No. 98-RESA-368 (Apr. 30, 1999). Finally, a Grievant who did not have

specialized training to work with a specific medical device was deemed not qualified to hold an aide position in Browning v. Lincoln County Board of Education, Docket No. 98-22-039 (May 19, 1998).

In the present matter, MCBOE determined that Ms. Yost was the best applicant for the position in a unique situation involving special needs children and a significant turnover of personnel which had caused disruption to the classroom and the educational program. Because Ms. Yost had most recently been assigned to the classroom as a substitute aide, the students were familiar with her, and she with them. MCBOE's claim that her continued presence helped calm the otherwise disturbing situation in the classroom establishes that the decision was made in the best interest of the students, and constitutes a viable exception for not placing Grievant, the most senior applicant, in the position. See Carr v. Monroe County Bd. of Educ., Docket No. 99-31-483 (Mar. 9, 2000). In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

#### Conclusions of Law

1. Under the "discovery provision" of W. Va. Code §18-29-4(a)(1), "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739, 742 (W. Va. 1990); Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992).
2. The "discovery provision" does not apply where Grievant erroneously concluded that a position would not be filled, and many months later learned that another applicant had, in fact, received the appointment.
3. Because the grievance does not involve a disciplinary matter, Grievant has the burden of proving 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.
4. W. Va. Code §18A-4-8b requires that a board of education fill service personnel positions on the basis of seniority, qualifications and evaluation of past service, with qualifications defined as the applicant holding a classification title in his category of employment. Qualified applicants must be given first opportunity for filling vacancies, and, at the employee's request, the board must show valid

cause why the employee with the most seniority is not promoted or employed in the position for which she applied.

5. In consideration of the unique circumstances surrounding the position at Mountainview Elementary School, MCBOE properly exercised its discretion in personnel matters by assigning Ms. Yost to the aide position.

Accordingly, this Grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 25, 2000 \_\_\_\_\_

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

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[Footnote: 1](#)

*In fact, the Mountainview position was not filled until February 1999.*