

DEBRA BARNETTE,

Grievant,

v.

DOCKET NO. 00-40-089

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent,

and

PEGGY SILVESTER,

Intervenor.

D E C I S I O N

Grievant, Debra Barnette, filed this grievance against her employer, the Putnam County Board of Education ("Board"), on December 23, 1999:

Grievant discovered an error in her seniority date and is requesting to have her seniority date changed from January 3, 1996 to November 7, 1995. This is a violation of WV Code 18A-4-8b.

Peggy Silvester intervened pursuant to W. Va. Code § 18-29-3(u), by letter dated January 27, 2000. A level two hearing was held on February 1, 2000, and a decision denying the grievance was issued by Barbara Brazeau, the Superintendent's designee, on March 2, 2000. Grievant by-passed level three and appealed to level four on March 7, 2000. The parties agreed to submit the grievance on the evidence presented at level two, and this case became mature for decision on March 27, 2000, the

deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Rosemary Jenkins, West Virginia Federation of Teachers, Intervenor was represented by Kimberly Levy, Esq., West Virginia School Service Personnel Association, and the Board was represented by John Grafton, Esq.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

Grievance Form.

Ex. 2 -

January 27, 2000 letter from Kimberly A. Levy, Esq., to Dr. Samuel P. Sentelle.

Grievant's Exhibits

Ex. 1 -

October 24, 1995 Vacancy Bulletin for Monitor Aide/Classroom Aide.

Ex. 2 -

October 14, 1999 letter from Rosemary Jenkins to Chuck Hatfield.

Ex. 3 -

December 16, 1999 letter from Harold Hatfield to Debra Barnette.

Ex. 4 -

December 23, 1999 memorandum from Rosemary Jenkins to Harold Hatfield.

Testimony

Grievant testified in her own behalf and presented the testimony of Harold Hatfield and Peggy Silvester.

FINDINGS OF FACT

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

1. Grievant is employed by the Board as a monitor aide/classroom aide.
2. Grievant began working in her current position as a substitute in October 1995.
3. Intervenor is currently employed by the Board as a library/classroom aide. She has been employed as a substitute since 1993, and as a regular employee since December 5, 1995.
4. The Board posted the position of monitor aide/classroom aide on October 24, 1995. Both Grievant and Intervenor applied for the position. Intervenor was the most senior substitute who applied for the position, and was told she would be offered the position.
5. The posting indicated an effective date of employment of November 5, 1995.
6. Intervenor decided to withdraw her application for the subject position on December 5, 1995, and accepted another position on that same date.
7. Thereafter, Grievant was informed that she would be offered the position, as she was the next most senior substitute applicant.
8. The Board acted to place Grievant in the subject position on January 3, 1996, and that date became her seniority date for regular employment with the Board.
9. Grievant saw several seniority rosters over the next few years, which indicated her seniority date was January 3, 1996.
10. In the summer of 1999, Grievant wrote a letter to Mr. Harold Hatfield, Director of Personnel, and told him she believed her seniority date should be November 5, 1995, the effective date listed on the posting.
11. Grievant received no response from Mr. Hatfield, but spoke to his secretary, Ms. Atkinson, who informed her that her seniority date would remain January 3, 1996.
12. Grievant contacted her AFT representative in October 1999, who wrote a letter to Mr. Hatfield inquiring about Grievant's seniority date.
13. Mr. Hatfield responded by letter dated December 16, 1999.
- 14.

Grievant filed this grievance over her seniority date on December 23, 1999.

15. Respondents raised an untimeliness defense at the level two hearing.

DISCUSSION

Grievant alleges she should receive the seniority date of November 5, 1995, instead of January 3, 1996, because that is the date that was listed on the posting as the effective date of employment. Respondents argue that it is the date the Board acted to place her in the position that governs, which was January 3, 1996, and further, that the grievance was untimely filed. As the issue of timeliness may be dispositive of the grievance, that issue will be discussed first.

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 decision being challenged. Harvey, supra; 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 this instance, Grievant testified she had seen service personnel seniority rosters posted at her school soon after she began working in the subject position in January 1996, and continued to see them posted continually thereafter. The seniority rosters indicated Grievant's seniority date was

January 3, 1996. At the very latest, Grievant acknowledged that she was informed in the Summer of 1999 by Mr. Hatfield's secretary that her seniority date was January 3, 1996. Grievant did not file this grievance until December 23, 1999, some six months later.

Grievant argues that she was not "officially" told of her seniority date until Mr. Hatfield responded to her inquiry in writing on December 16, 1999. Even giving Grievant the benefit of the doubt that she needed something in writing to make her seniority date official, the service personnel seniority rosters which are distributed and posted throughout the county would suffice as "official" written notice of her seniority date. Grievant has failed to offer a valid reason for waiting until December of 1999 to file a grievance over a seniority date that was attributed to her in January 1996.

CONCLUSIONS OF LAW

1. 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 decision being challenged. Harvey, supra; 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).

2. Grievant knew soon after she began employment in her current position that her seniority date was January 3, 1996. She did not file this grievance until December 23, 1999. The grievance is untimely filed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Putnam County. Any 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: April 5, 2000