JOHN CASEY,

Grievant,

v. **Docket No. 01-26-394**

MASON COUNTY BOARD OF EDUCATION,

Respondent,

and

JOHN SETTLE,

Intervenor.

D E C I S I O N

Grievant, John Casey, filed a written grievance against his employer the Mason County Board of Education ("MCBOE") on December 21, 2000. (See footnote 1) His Statement of Grievance reads:

> The one-half day Leon Route was given to a substitute driver with less seniority than me. I should have been hired for that route as I am more senior[,] and I should have received credit for time I drove last year from the beginning of the school year to mid-late December as a substitute driver on the same route.

> Relief Sought: I want my position on the bus route and I want the seniority I should have gotten last year (with vacation and sick days included when I should have had regular status in accordance with the past practices of the Mason Co. Board of Educ., and the applicable statutes, rules and regulations. Grievant appealed to Level IV on June 8, 2001. On June 20, 2001, Respondent filed a Motion to Dismiss based on Grievant's failure to appeal in a timely manner to Level IV. A Level IV telephone conference was held on July 10, 2001, on this issue, Intervenor joined with Respondent in supporting the Motion, and arguments were heard. This case became mature for decision on July 25, 2001, after receipt of the parties' affidavits supporting their arguments. (See footnote 2)

After a review of the record, affidavits, and supporting arguments, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. This grievance was filed on December 21, 2000, and denied at Levels I and II.

2. Grievant chose to file to Level III instead of bypassing and going directly to Level IV.

3. Suzanne Dickens, Assistant Superintendent, sent Grievant a letter dated March 12, 2001, informing him that Superintendent Larry Parsons was going to recommend MCBOE waive the grievance directly to Level IV. She attached a copy of the MCBOE's agenda to confirm this fact.

4. At its March 13, 2001 meeting, MCBOE voted to waive the grievance directly to Level IV. 5. By letter dated March 14, 2001, Assistant Superintendent Dickens informed Grievant that at its March 13, 2001 meeting, MCBOE voted to waive the grievance directly to Level IV. The letter also noted a copy of the grievance form was attached. This letter and the grievance form were sent to Grievant with a "cc:" to Grievant's attorney. Contrary to Grievant's assertion, both sides of the grievance form were included in this mailing. See Dickens' Affidavit.

6. The back of the grievance form states,

> Grievant may appeal to [the] Grievance Board within five (5) days of receipt of . . . the action taken by the governing board at Level III. **Upon appeal the Grievant must submit the grievance form and all lower level decisions to the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.**

(Emphasis in the original).

7. Grievant believed he did not have to take any action, and MCBOE would

forward his grievance to Level IV.

8. Grievant's attorney was a lobbyist with the Legislature from February 15, 2001 to April 15, 2001. (Statement offered by Grievant's attorney during the telephone conference.)

9. Sometime during the first week of June 2001, Assistant Superintendent Dickens received a call from a paralegal in Grievant's attorney's office stating the forms that had been sent could not be found and asking Ms. Dickens to fax another copy.

10. Assistant Superintendent Dickens faxed another copy to Grievant's attorney's office. A copy of the back side of the grievance form was not sent. 11. By letter dated June 7, 2001, Grievant's attorney filed a Level IV appeal with this office. In this letter, Grievant's attorney stated the grievance had been "reviewed at Level III, however it is my understanding that the MCBOE has waived its decision on this level[,] and that the board was sending it to your office for a Level IV review."

12. Additionally, Grievant's attorney stated in this letter that he had recently contacted the Grievance Board's office to follow up on a hearing date, and was then informed that no appeal had been filed, and the grievance form had not been forwarded to the Grievance Board's office. Grievant's attorney stated that "[i]n lieu of this confusion" he was sending the relevant documents and wished to request a review at Level IV. (See footnote 3)

13. Respondent filed its Motion to Dismiss on June 20, 2001. At the telephone conference, Intervenor's attorney joined with Respondent in this Motion.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha

County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient thata contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. However, in this grievance, Respondent and Intervenor have alleged Grievant did not perfect his appeal to Level IV in a timely manner as it was not initiated within the timelines contained in W. Va. Code § 18-29-4.

Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated 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. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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).

The timeliness issue is governed by the timelines set out in W. Va. Code § 18-29-4(d) which states the action reguired by the board of education at Level III, and the required response to the Grievant.

> Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator. Within five days of receiving the appeal,such governing board may conduct a hearing in accordance with section six of this article, may review the record submitted by the chief administrator and render a decision based on such record or may waive the right granted herein and shall notify the grievant of such waiver. Any

> decision by the governing board, including a decision to waive participation in the grievance, shall be in writing and shall set forth the reasons for such decision, including the decision to waive participation in the grievance. If a hearing is held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or reversing the decision of the chief administrator within five days of such hearing.

(Emphasis Added).

MCBOE elected to waive the grievance at Level III, and so informed Grievant. This action was taken in a timely manner, and Grievant was informed in a timely manner. Attached to the notice of this decision was the grievance form which furnished Grievant with the next steps to take if he wanted to appeal this decision. MCBOE had no duty to appeal this grievance to Level IV for Grievant.

W. Va. Code § 18-29-4(d) states:

> (1) If the grievant is not satisfied with the action taken by the chief administrator or, if appealed to level three, the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to [Level IV]. . . .

(Emphasis Added.)

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997). In this case, Respondent has demonstrated Grievant did not appeal to Level IV in a timely manner. The date Grievant received the notice of Respondent's waiver was March 20, 2001. He did not file this appeal to Level IV until June 7, 2001, almost three months later. The burden of proof now switches to Grievant to demonstrate "a proper basis to excuse his failure to file in a timely manner."

Grievant's first excuse for his failure to file is that he believed MCBOE would file the grievance for him, once it waived at Level III. He asserts he did not know he was required to file to Level IV, and Respondent did not attach the back sheet of the grievance form to the letter notifying him of the waiver.

The determination of this issue requires a decision on the credibility of the two parties who completed affidavits. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993). “The fact that this testimony is offered in written form does not alter this responsibility.” Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge finds the data supplied by Assistant Superintendent Dickens more plausible. Her affidavit contained details not supplied by

the Grievant concerning the call for a second copy of the March 14, 2001 material, and this affidavit notes the second page of the grievance form was not sent at that time because the appeal time had run. Additionally, in the material Grievant's attorney sent to the Grievance Board on June 7, 2001, when he did appeal to Level IV, is a copy of the back of the grievance form sent after Level II. This demonstrates MCBOE's practice of including both sides of the grievance form. It also shows Grievant had a copy of the directions needed to perfect his appeal to Level IV.

Grievant's next argument is Respondent had asked for and received extensions earlier in the grievance process, and these extensions should, through equity, preventRespondent from asserting the Level IV appeal was untimely filed. This argument is without merit. Grievant did not ask for an extension to file this grievance at Level IV.

Grievant also argued that even if he had received the back of the grievance form the language on the form is so ambiguous that he would not have known he needed to file the grievance himself. The back of the grievance form states,

> Grievant may appeal to [the] Grievance Board within five (5) days of receipt of . . . the action taken by the governing board at Level III. **Upon appeal the Grievant must submit the grievance form and all lower level decisions to the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.**

(Emphasis in the original).

This language is clear, Grievant may continue the grievance and file at Level IV if he so desires, after receiving the decision at Level III.

Grievant further argued that pursuant to the West Virginia Supreme Court's ruling in Hale v. Mingo County Board of Education, 199 W. Va. 387, 484 S.E. 2d 640 (1997), he was entitled to a hearing because he substantially complied with the statues.

Respondent asserts the timelines and requirements of the statues are clear, and there is no authority to support Grievant's argument. The undersigned Administrative Law Judge agrees. Hale does not support Grievant's argument. In the Hale decision, dealing with the rights of the Intervenor, the West Virginia Supreme Court of Appeals cited to Spahr v. Preston County Board of Education, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990), which "'stressed again' that the grievance procedures under W. Va. Code, 18-29-1 [1992] et seq. must be 'be given a flexible interpretation in order to carry out the legislative intent . . . [that] the grievance process . . . [not] be a procedural quagmire where the merits of the cases areforgotten.' (emphasis added). We stated that the grievance process must remain 'relatively simple' because 'in many instances, the grievant will not have a lawyer . . . .'" Spahr, 182 W. Va. at 730, 391 S.E.2d at 743. See Duruttya v. Mingo County Bd. of Educ., 181 W. Va. 203, 205, 382 S.E.2d 40, 42 (1989). To hold that Grievant has not filed a timely appeal to Level IV after a three month delay with this set of facts does not create "a procedural quagmire." Grievant and his attorney had copies of the grievance form which clearly stated who was to file, and when and where they were to file.

Although it is always preferable to decide a case on the merits, such a decision is not allowed in an instance such as this where a Respondent has raised and proven the affirmative defense of untimely filing. Grievant did not meet the mandated timelines, and the undersigned Administrative Law Judge cannot rule on the issue raised by this grievance.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000);

Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep'tof Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996).

3. Respondent proved Grievant did not file his grievance within the time frames mandated by W. Va. Code § 18-29-4.

4. Grievant did not present any reasons or arguments that would excuse his failure to file his grievance within the specified timelines.

Accordingly, the grievance is **DENIED**.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 25, 2001

Footnote: 1

An informal conference was held on December 19, 2000.

Footnote: 2

Grievant was represented by Attorney James Casey, Respondent was represented by Attorney Greg Bailey, and Intervenor was represented by Attorney Kimberly Levy from the West Virginia School Service Personnel Association.

Footnote: 3

It appears Grievant's attorney did not send a copy of this letter to Respondent, but instead sent it to the Division of Personnel. A June 14, 2001 letter from this Grievance Board notified Respondent of the appeal.