JUDY MULLINS,

Grievant,

v. **Docket No. 00-15-371**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Judy Mullins, employed by the Hancock County Board of Education (HCBOE) as a bus operator, requested an informal conference with her supervisor regarding this grievance on August 7, 2000. The conference was held with Coordinator of Transportation Robert Pantuso on August 9, 2000, and a level one grievance was filed on August 23, 2000, in which Grievant alleged a violation of W. Va. Code §18A-4-8b when two positions of bus operator trainer were not posted prior to filling.

The grievance was denied at levels one and two. Grievant elected to bypass level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the claim to level four on December 4, 2000. Grievant was represented by Owens Brown of WVEA, who advised the undersigned that the matter could be submitted for decision based upon the lower-level record. HCBOE counsel, William T. Fahey, voiced no objection, and the matter became mature for decision on February 23, 2001, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant, Judy Mullins, has been a regular, full-time employee of HCBOEsince 1992, and has held the classification of bus operator at all times pertinent to this decision.

2. In Spring of the 1999-2000 school year, the Coordinator of Transportation determined that two additional Driver Trainers were needed. Driver Trainer is neither a classified position pursuant to W. Va. Code § 18A-4-8, nor is it an extra-curricular position.

3. The assignment of Driver Trainer exists on an as-needed basis, and has no specified hours or time to be performed.

4. Grievant was aware in May 2000 that two employees were to be certified as Driver Trainers.

5. HCBOE did not post the Driver Trainer assignments, and Mr. Pantuso recruited two bus operators who completed the instruction for certification in June 2000.
Both of the employees have less seniority than Grievant.

6. Because Mr. Pantuso is not employed by HCBOE throughout the summer, Grievant delayed pursuing a grievance until August 2000.

7. Grievant requested an informal conference on August 7, 2000.

Discussion

As this 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 §4.21 (2000); 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 asa 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. Dept. of Health and Human Res., 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.

Grievant argues that Driver Trainers are extra curricular positions which must be posted, and that she was more senior than either of the two employees who were selected to be Driver Trainers. Grievant additionally notes that she had been a Driver Trainer for a number of years when she was employed in Logan County, making her more qualified than the selected employees.

HCBOE argues that the assignments are neither classified nor extra-curricular, and are not subject to posting or selection in compliance with W. Va. Code §18A-4-8b. HCBOE further asserts that the grievance was not timely filed since Grievant knew of the assignments in May but did not begin these proceedings until August. Grievant's statement that she could not begin proceedings because Mr. Pantuso was not available, is discounted by HCBOE, which notes that any grievance matter was to be forwarded to Richard Barnabei, Director of Transportation, in Mr. Pantuso's absence.

An assertion that a matter was untimely filed is an affirmative defense which the employer must establish by a preponderance of the evidence. Hawranik v. Dep't of Health and Human Resources,

Docket No. 98-HHR-010 (July 7, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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). W. Va. Code §18-29-4(a)(1) provides in 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 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.

Grievant testified at level two that she had heard a rumor in May that Driver Trainers would be selected, and that following a committee meeting she confirmed the fact with Mr. Pantuso, who advised that he had already selected two employees to receive the certification training. Grievant certainly was aware at the conclusion of that conversation that the positions had not been posted, yet she failed to take any action until the end of June or the first part of July after she learned the two employees had, in fact, been sent for training to receive their certification.

Although the dates are not specific, Grievant's testimony establishes that even in the most favorable light, she waited a month after learning of the assignments before taking any action, i.e., calling the Transportation Department, and then did nothing when advised that Mr. Pantuso was on leave. A supervisor's absence does not toll the grievance procedure. Grievant should have initiated grievance proceedings with the Director of Transportation, but instead she waited nearly another month for Mr. Pantuso to return. Grievant has been involved in prior grievances, and knew or should have known, that thegrievance needed to be filed within fifteen days. This grievance was not filed within the time lines set forth in W. Va. Code §18-29-4(a)(1). (See footnote 2)

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. It is incumbent upon a grievant to prove the allegations constituting the 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); 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. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Hawranik v. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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. W. Va. Code §18-29-4(a)(1) requires that a grievant or the grievant's representative schedule an informal conference with the grievant's immediate supervisor 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, to discuss the nature of the grievance and the action, redress or other remedy sought.

4. Grievant failed to schedule an informal conference with her supervisor within fifteen days of learning that two employees had been selected as Driver Trainers, without the positions having been posted, therefore, this claim was not timely filed pursuant to W. Va. Code § 18-29-4.

Accordingly, the grievance is **DENIED** as untimely.

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

Date: March 13, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Neither party elected to file proposed findings and conclusions.

Footnote: 2

Even if the grievance had been timely filed, the Grievance Board has previously determined that the bus operator trainer assignment in question is neither a classified service position, nor is it an extra-curricular assignment pursuant to Code §18A-4-16, since a trainer works "as needed" and the trainer's duties do not "occur on a regularly scheduled basis," such as those defined by the statute. Under Code § 18A-4-16, an extracurricular assignment must have a clearly defined number of hours per school year. Thus, HCBOE was not required to post these positions, and Grievant had no entitlement to the trainer's job under the seniority-based statutes, or under any other statute relative to the employment of school service personnel. Connor v. Barbour County Bd. of Educ., Docket No. 94-01-1108 (July 18, 1996).