BRENDA HILMON,

Grievant,

v v.

Docket No. 00-20-286

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent,

and

SHERRY BLAKE,

Intervenor.

D E C I S I O N

Grievant, Brenda Hilmon, employed by the Kanawha County Board of Education ("KCBOE" or "Board"), filed the following grievance on or about July 10, 2000. Her Statement of Grievance reads:

> I am requesting retirement benefits and earned seniority from July, 1991. I was originally hired by KCS in November, 1973 as a full-time secretary. In January, 1990 I left my position and moved out of state. Returning to KCS in July 1991, I worked as a full-time substitute Secretary until October 1998, when I accepted a position at Garnet Adult Center. At that time, I filed a grievance on this issue[,] but did not pursue it through Level I. In January, 1999, I accepted a pursuant secretarial position with the Department of Technology and am currently applying for the permanent position in that department. I contend that my current seniority date of October 7, 1998 is unfair and discriminatory and should be backdated to my reentry into the KCS system in 1991.

At Level I, Grievant's supervisor denied the grievance on July 17, 2000. A Level II hearing was held on August 8, 2000, and a Decision denying the grievance was issued on August 22, 2000. Although unclear from the record, it appears Level III was waived by Grievant. Grievant appealed to Level IV on August 29, 2000. Sherry Blake, the successful applicant, requested to intervene on September 6, 2000, and this request was granted. A Level IV hearing was held on November 14, 2000, and February 16, 2001. This casebecame mature for decision on March 27, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant made multiple arguments. Grievant's basic argument is she should receive regular seniority and retirement benefits for the time she served in a variety of non- posted, substitute positions; approximately seven years. (See footnote 2) She also argued KCBOE's failure to post her position back in 1995 or 1996 should result in her receiving these benefits, as this failure to post was a violation of statute. Grievant also argued she was the most qualified for the secretarial position in the Office of Technology, and KCBOE did not properly assess her qualifications and evaluations, and instead made its decision only on the basis of seniority. (See footnote 3)

Respondent argued the grievance was not timely filed, and that Grievant cannot pursue this grievance, as she filed a grievance on the same issue in 1998, and failed to pursue it. Respondent also asserted that pursuant to statutory and case law, Grievant cannot receive regular seniority for the time she served as a substitute because she did not receive the position through posting.

Intervenor also argued the grievance was not timely filed, and the grievance is barred as Grievant previously filed the same grievance and abandoned it. Intervenor also maintained proper hiring procedures were followed. Intervenor asserted she was the most senior applicant and was well qualified for the position. Additionally, Intervenor agreed with Respondent and noted pursuant to statutory and case law, Grievant cannot receive regular seniority for the time she served as a substitute because she did not receive the position pursuant to posting.

Grievant countered the timeliness argument stating the issue had not been raised at Level Il and could not be raised now at Level IV .

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was first employed by KCBOE as a regular Secretary in 1973. She worked in various secretarial positions until January 1990, when she voluntarily resigned her position and moved out of state.

2. Grievant returned to the Kanawha County area in July 1991 and applied for employment with KCBOE as a substitute Secretary. Her first day of substitute seniority is December 13, 1990.

3. Grievant filled a variety of non-posted, long-term substitute positions from 1991 to 1993.

4. In June 1993, Grievant was called off the substitute list to fill a secretarial position in the Office of Technology. She was hired to substitute in the position of KatieMingrone, (See footnote 4) who was off work because of medical problems. Ms. Mingrone had not requested a medical leave of absence.

5. This secretarial position is one of the highly prized 261 day positions, which includes paid vacation. (See footnote 5)

6. Although Grievant served in this position for five years, it was never posted. At the time Grievant originally received this position in 1993, KCBOE was not posting these positions unless an employee had officially requested and was granted a leave of absence.

7. Grievant was aware, at the time she received the position and during the entire time she filled the position, that she had not received it through posting. She knew she did not receive regular seniority or retirement benefits. Grievant also knew regular positions received regular seniority and retirement benefits. (See footnote 6)

8. During the time she filled the position as a substitute, Grievant applied for several vacant, regular, 261 day positions. She did not apply for any positions that were less than 261 days. As stated in Finding of Fact 5, these positions are highly prized, and she was unsuccessful in obtaining any of these positions because regular employees applied for them and received them.

9. In 1994, this Grievance Board rendered the Lambert v. Lincoln County Board of Education, Decision, Docket No. 93-22-547 (September 29, 1994). This Decision heldlong-term substitute positions were to be posted and filled pursuant to W. Va. Code §§ 18A-4-15 and 18A-4-8b. It also held an employee could not receive regular seniority when serving in a long-term substitute position that had not been awarded through posting. 10. At some point in time, the issue of failure to post long-term substitute positions was raised with KCBOE by various employees and their organizations.

11. Sometime in 1995 or 1996, KCBOE requested the Personnel Task Force ("PTF") to address this issue and to seek ways to resolve it.

12. On November 27, 1996, the PTF sent an Administrative Memo to all principals and supervisors. They were directed to post the Memo. This Memo stated changes would be made in dealing with absences and hiring substitutes to fill these positions, and noted all positions vacant for

longer than twenty working days must be posted and filled. (See footnote 7)

13. The Memo stated the change would be applied only to absences that occurred after December 1, 1996. It went on to say, "[n]ote that this is being applied prospectively so as to avoid penalizing any other substitutes called out in the past." 14. KCBOE then posted all positions that had a leave of absence of greater than twenty working days as they occurred, but did not go back and post the prior positions that were already filled. As Grievant held a position filled prior to December 1, 1996, her Secretary position was not posted. 15. Grievant discussed her situation with her Supervisor, Hillary Cowan, and with the Director of Personnel, Bill Courtney. The dates of these discussions are unclear and could not even be specified as to year. Grievant was aware KCBOE had decided not to post her position and to only post the new leave of absence positions. Grievant did not request that her position be posted.

16. Grievant knew she did not have regular seniority, had not received her position pursuant to posting, and had continued to keep this substitute position after KCBOE's decision to post all new leave of absence positions.

17. In 1995 or 1996, Mr. Courtney also discussed Grievant's position with Ms. Cowan, when Grievant was not present. Mr. Courtney informed Ms. Cowan that it was very unlikely Grievant would receive the position if it were posted. Ms. Cowan did not want to lose a valuable employee. Ms. Cowan did not want Grievant's position posted, but she did not tell Mr. Courtney not to post the position. Ms. Cowan knew Grievant did not receive seniority and retirement benefits. Ms. Cowan and Grievant discussed the situation about the time of the discussions with Mr. Courtney.

18. Grievant was issued yearly substitute contracts which she signed.

19. In approximately 1997 - 1998, Ms. Cowan started thinking about her own retirement and became concerned for Grievant as she had no retirement from KCBOE.

20. In 1998, after encouragement from her supervisor, Grievant started to apply for regular positions because she knew she had no regular seniority and was receiving no retirement. 21. Grievant applied for and received a 240 day position at Garnet School. Dr. Jorea Marple, KCBOE's former Superintendent, was her supervisor/principal.

22. Grievant began these duties and started earning regular seniority on October 7, 1998.

23. After she began work at the Garnet Center, Dr. Marple encouraged Grievant to file a grievance to obtain regular seniority for the time she work as a long-term substitute from 1993 to

1998.

24. Grievant filed the first grievance on December 10, 1998, and the Statement of Grievance reads:

> I have been employed on a full time basis since September, 1991 as a secretary for Kanawha County Schools. During this time I did not receive retirement benefits on earn seniority. I request retirement benefits and earned seniority for 7 years.

25. On December 18, 1998, Principal Marple noted she did not have the authority to resolve the issue, and the grievance required the approval of the Superintendent. Grievant appealed to Level II.

26. Shortly thereafter, Mr. Courtney discussed the possibility of extending the timelines for a Level II hearing with Grievant, as the Christmas holidays were coming up. He also informed Grievant the Grievance Board had denied grievances like hers in the past and had ruled against the employees who had filed similar grievances.

27. Grievant did not consult with anyone else, and based upon this information received from Mr. Courtney, she dropped the grievance after appealing to Level II. Grievant was aware she could still proceed with the grievance if she chose to do so. 28. After Grievant left the Office of Technology, on October 20, 1998, Grievant's former position there was posted pursuant to W. Va. Code § 18A-4-15. Grievant applied for this position.

29. Grievant received this position and was selected to fill it until the regular employee, Ms. Milgrone, returned to work or retired. Grievant returned to the Office of Technology in January 1999.

30. Ms. Mingrone resigned, and her position was posted on June 23, 2000, as a regular vacancy.

31. Grievant and several other employees applied for the position.

32. Ms. Cowan informed all the applicants, in detail, how difficult the job was, and that many former school Secretaries would not be prepared to perform the duties of the position. (See footnote 8)

33. Ms. Cowan stated the two most senior applicants turned the position down because they were "not ready" and did not want the "increased pressure."

34. The successful applicant for the position, Intervenor Blake, was a regularly employed school Secretary, whose date of hire as a regular employee was September 30, 1998. Before she

began work with KCBOE she had a broad variety of work experiences, and was familiar with many computer programs, had performed many managerial functionsin private industry, and had experience in accounting, "Word", and making travel arrangements. While a school Secretary in Putnam and Kanawha, she had experience in accounting and the WVEIS program.

35. Not only did Grievant and Intervenor Blake have positive evaluations, they were reported as either excellent (Grievant) or outstanding (Intervenor).

36. Both applicants were qualified for the position. Both were classified as Secretaries, and both had positive evaluations. Intervenor Blake had eight more days of regular seniority than Grievant.

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); 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'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.

The issues raised by the parties will be discussed separately.

A. Whether this grievance was timely filed? Grievant argues this issue was not raised in a timely manner.

W. Va. Code § 18-29-4(a) provides the following directions regarding when a grievant must file a grievance:

> 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.

If the grievance is examined in light of a timeliness issue, the following standard of review is followed. When 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. Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). 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. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry, supra.

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate 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 CountyBd. 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).

Grievant's argument is two-fold. First, Grievant states Respondent did not raise the timeliness issue at or before Level II. Second, Grievant asserts Intervenor cannot raise the issue now because it must be raised at or before Level II, and even though Intervenor was not a party at that time, it is still too late.

A review of the Level II transcript at page 53 notes Attorney Withrow as saying, "The first point I wish to make is that I think that this matter would be barred by time limitations." Mr. Withrow then went on to discuss the fact that Grievant had filed a prior grievance on this same subject. Thus the timeliness defense was properly raised by KCBOE and not waived.

Additionally, Intervenor Blake raised the issue of timeliness as soon as she became a party to the proceedings, at the start of the Level IV hearing. In Hale v. Mingo County Board of Education, 199 W. Va. 387, 484 S.E.2d 640 (1997), the West Virginia Supreme Court of Appeals at Syllabus Point 3 held "an intervenor in a grievance proceeding under W. Va. Code § 18-29-1 [1992] et seq. may make affirmative claims for relief as well as asserting defensive claims." Hale does not speak of any time limitations, but it is noted that Intervenors frequently have no notice of a grievance filed by another

employee which may effect their employment, and they do not know of the need or option to intervene until the grievance has progressed to Level IV. The West Virginia Supreme Court of Appeals also stated there could be some limitation placed on what issues the Intervenor could raise, and the administrative law judge could "for good cause and in the cautious exercise of [his] discretion" limit these matters. Examples of claims that could be limited were ones that were "remote to the subject", or ones that were "unduly burdensome, distracting or confusing." Id. at 392 and n. 7.

Later this Grievance Board held an Intervenor could raise a timeliness defense. Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 12, 1999). Given the direction from the West Virginia Supreme Court of Appeals and the prior Grievance Board ruling, the undersigned Administrative Law Judge finds an intervenor can raise the issue of timeliness, and it is properly before this Grievance Board for discussion and decision. See also Delbart v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR- 458 (Apr. 21, 2000).

Grievant was aware she did not receive seniority and retirement benefits from 1991 on. She did not grieve this issue until she filed her first grievance in 1998. Grievant cites no reason for her long delay other than to say she did not know what a "pursuant" position was. This argument is specious. Pursuant is the term used by KCBOE to define long-term substitute position which are posted and filled according to W. Va. Code § 18A-4-15, and this Code Section has been in effect since 1983. Whether or not Grievant knew the term "pursuant" has absolutely nothing to do with her substitute status as an employee from 1991 on. At the time Grievant was hired as a substitute this term was not even in use by KCBOE. What is clear is Grievant knew she was a substitute and did not receive senioryand benefits. She did not grieve this matter until seven years after she became aware of this fact, and she gave no reasonable explanation why she waited until she was no longer in the position to file a grievance. This grievance is untimely filed on the issue of seniority. The issue of selection is timely filed and is discussed later in this Decision. .

Additionally, although not clearly raised by the parties, if this grievance were to be seen as a continuing violation, this would grant Grievant no relief. She filed the first grievance on December 18, 1998, two months after she was receiving regular seniority in her position at Garnet. The second grievance was filed on July 10, 2000, long after she was a regular employee and receiving the benefits she now seeks. "As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance." Syl. Pt. 5, Martin v.

Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). Accordingly, Grievant would not be entitled to any relief even if this were seen as a continuing practice.

B. Whether this grievance can be refiled after it was abandoned?

This Grievance Board has held that when a grievant does not pursue a grievance at the next level it is deemed abandoned and the grievance cannot be refiled. Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994). See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994). See Buckley v. W. Va. Schools for the Deaf and Blind, Docket No. 99-DOE-226 (Aug. 31, 1999). Grievant withdrew her grievance over the seniority and retirement issue when she was well aware she could continue to pursue it. The fact this decision was based on the information givento her by Mr. Courtney does not matter. The information given by Mr. Courtney was correct and was not given to misguide her in any way, only to inform her that the odds of her receiving a favorable response were slim. Accordingly, Grievant cannot be allowed to file the same grievance again. (See footnote 9)

C. Whether Grievant should receive regular seniority for the time she worked in a position that was not posted or competitively bid?

This question has already been answered repeatedly by this Grievance Board in the negative. The reasoning behind this determination requires a review of various Code Sections and Grievance Board decisions. W. Va. Code §18A-4-15 requires the position of an employee on leave of absence beyond thirty days to be filled pursuant to the requirements of W. Va. Code §18A-4-8b. W. Va. Code § 18A-4-8b states:

> A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

This Code Section requires the position must be posted, and then outlines how the position must be filled. Once a position is filled in the prescribed manner, the substitute holding the position "shall be accorded all rights, privileges and benefits pertaining to such a position." W. Va. Code §18A-4-15.

W. Va. Code §18A-4-8g clarifies the seniority issue stating:

> The seniority for service personnel shall be determined in the following manner:

> Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5], article two of this chapter and continues until the employee's employment as a regular employee is severed with the county board. . . . Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen [§ 18A-4-15] of this article, ... The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter or employment as a substitute with the county board is severed. . . .
>
> For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e [§ 18A-4-8e] of this article: . . . .
>
> The county board shall establish the number of calendar days between the date the employee left the class title or category of employment in question and the date of return to the class title or classification category of employment. This number of days shall be added to the employee's initial seniority date to establish a new beginning seniority date within the class title or classification category. The employee shall then be considered as having held uninterrupted service within the class title or classification category from the newly established seniority date. . . .
>
> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen [§ 18A-4-15(2) and (5)] of this article: Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. (See footnote 10) County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.
>
> . . .
>
> Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose. . . .

(Emphasis added.)

W. Va. Code § 18A-4-8g is clear, and this portion of the grievance is very similar to the issues raised in Lambert v. Lincoln County Board of Education, Docket No. 93-22- 547 (September 29, 1994). See Cisco v. Mingo County Bd. of Educ., Docket No. 00-29- 087 (July 20, 2000); Crowder v.

Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000). In Lambert, the employee also wanted to receive regular seniority for the many years she was in a leave of absence, non-posted position. The ruling here must be the same as in Lambert. Grievant cannot be awarded any regular seniority for the years she served in a non-posted position. She did not have to bid or compete to receive this position, and was indeed lucky to serve in such a sought after position for so many years. Lambert, supra.

Grievant knew at the time she was hired she was serving in a substitute position. Id. She also knew she had not received the job through a posting and selection process as required by statute, if an employee is to receive seniority. Id. Further, it is clear KCBOE decided to post only new leave of absence positions, and it informed Grievant of this decision. Grievant could have grieved KCBOE's failure to post this position, at the time this event occurred. Further, Grievant always had the option to seek regular employment, and such action on her part would have resulted in an earlier seniority date. Grievant raised no questions about her employment status while in this position. She alsodid not question her status when she was denied prior positions for the same reasons she was denied this position. Grievant knew her status, was aware she had no regular seniority, knew she had not received prior positions because of her status, and did not grieve until she left the position. This failure to grieve before this time is certainly understandable, but cannot now be used in her favor, and it cannot be used to grant Grievant seniority to which she is not entitled by statute.

Because of KCBOE's failure to post these positions, Grievant was able to receive and maintain the position at the Office of Technology for five years without going through the selection process. It is clear that these positions are highly sought after, and are routinely filled with regular employees when they are posted. Here, Grievant kept this 261- day position, and also received all the other rights and benefits of a regular employee, with the exception of regular seniority and payment into retirement. She did, of course, accrue substitute seniority. As stated by Mr. Courtney, if this position had been posted, it is very unlikely Grievant would not have received it due to her total lack of regular seniority. Id. Thus, based on a review of the statutes and this Grievance Board's case law, Grievant cannot receive retroactive, regular seniority for a position she held which was not posted. Id.; Cisco, supra, Crowder, supra.

D. Whether the selection of Intervenor Blake was correctly and properly done?

Grievant argues her qualifications were not considered for the position, because if they had been,

it is clear Grievant would have received the position. In filling service personnel position KCBOE is to consider qualifications, evaluations, and seniority. If all applicants have satisfactory evaluations and hold the classification title, seniority is thedeciding factor in the selection. At the time the position at issue was posted and bid, both Grievant and Intervenor were regular employees, both had better than satisfactory evaluations, and both were clearly qualified for the position. All three areas were considered.

Of course, it would have been easier for Grievant to walk right into the position; she had been successfully performing the duties for years. This is not to say she was overall better qualified than Intervenor. It is noted that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, Dillon v. Bd. of Ed. of the County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). As stated in Harrison County Board of Education v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993), "the legislature's intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." See Syl. Pt. 2, Bd. of Educ. of County of Harrison v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990). (See footnote 11) In this situation, KCBOE's decision to select the applicant with the greater amount of regular seniority cannot be seen as a violation of any statutes or regulations. (See footnote 12) 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'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.

2. When 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. Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence isgenerally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

3. Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate 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).

4. W. Va. Code § 18-29-4(a) provides the following directions regarding when a grievant must file a grievance:

> 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.

5. Respondent raise the issue of timeliness at Level II.

6. An Intervenor may raise the issue if timeliness for the first time at Level IV, if the employee was not a party in the lower level proceedings. See Hale v. Mingo CountyBd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997); Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 12, 1999).

7. Since this grievance was filed many years after Grievant was aware of the events surrounding the matter, and Grievant did not provide a reasonable explanation or excuse for her late

filing, this grievance is deemed untimely filed.

8. When a grievant does not pursue a grievance, and demonstrates no excuse for this failure, it is deemed abandoned. Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994). See Holmes v. Bd. of Director/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994).

9. Because Grievant abandoned her original grievance in 1998, when she did not pursue it at the next level, she cannot now file another grievance on the same issue.

10. Pursuant to W. Va. Code § 18A-4-8g, Grievant cannot receive regular seniority for the period of time she worked in a substitute position that was not posted and competitively bid. Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-549 (Sept. 29, 1994). See Cisco v. Mingo County Bd. of Educ., Docket No. 00-29-087 (July 20, 2000); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000).

11. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, Dillon v. Bd. of Ed. of the County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). 12. "[T]he legislature's intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." Harrison County Board of Education v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993), See Syl. Pt. 2, Bd. of Educ. of County of Harrison v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990).

13. Grievant did not demonstrate KCBOE failed to consider the evaluations and qualifications of the candidates.

14. KCBOE's decision to select the applicant with the greater amount of regular seniority cannot be seen as a violation of any statutes or regulations.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 31, 2001

Footnote: 1

Grievant was represented by her Supervisor, Hillary Cowan, at Level II and Attorney James Haviland at Level IV, Intervenor was represented by Attorney Kimberly Levy, and Respondent was represented by its attorney, James Withrow.

Footnote: 2

At Level IV, Grievant appeared to limit the relief she sought to only the years she was in the non-posted position in the Office of Technology.

Footnote: 3

The selection issue was not raised by Grievant in the original Statement of Grievance. It appears this decision had not been made at the time the grievance was filed.

Footnote: 4

The exact spelling of this name is unclear from the record.

Footnote: 5

It is noted that only 261 day positions include paid vacation.

Footnote: 6

Grievant was a regular employee for some years prior to her leaving the system.

Footnote: 7

Dr. Jorea Marple, who was then the Superintendent, indicated she directed William Courtney, the Director of Employee Relations, to resolve the problem. Mr. Courtney testified the PTF was directed to resolve the issue, and he did not serve on the PTF. Since the memorandum that was posted and sent out to all areas of the county came from the PTF, it is clear the PTF resolved the issue.

Footnote: 8

Ms. Cowan was very clear that she wanted no one to fill the position but Grievant. She explained she did not have the time to train anyone to perform the duties of the position, and she did not want to take the time to retrain or relate to a

new employee. She believed the position was so difficult that a school secretary would be unable to complete the assigned tasks. The two most senior applicants refused the position, apparently partly because of Ms. Cowan's repeated concerns.

Footnote: 9

As previously stated the selection issue remains.

Footnote: 10

This portion of the Code Section was amended, effective July 1, 2000. A new portion was added which states: "Provided, however, That upon termination of a leave of absence or a suspension, the employee shall return to the status previously held. If the employee returns to substitute status, the employee shall retain any regular status accrued, however, this seniority may not be used in the bidding process for regular positions unless the employee again attains regular status or has attained preferred recall status."

Footnote: 11

The fact that this seniority is only a few days in this instance does not change the ruling.

Footnote: 12

Grievant discussed at length a number of cases where boards of education have elected to increase the requirements identified in the basic definitions listed in W. Va. Code § 18A-4-8, and because of these additional qualifications the most senior candidate was not selected. It is noted these cases dealt with administrative positions with a highlevel of supervisory and managerial responsibilities. Further, it is noted there were multiple qualifications listed for this position, and there was no indication the successful applicant did not meet those qualifications. Just because an applicant does not have experience in every little detail does not mean they are not qualified. The issue is whether the applicant can perform the duties of the position after a relatively short time of working in the position, not whether they would be perfect on the first day.