STEPHEN P. MALCOLM,

Grievant,

v. **Docket No. 01-30-593**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Stephen P. Malcolm, previously employed by the Monongalia County Board of Education (MCBE) as a substitute teacher, filed a grievance directly to level four on December 4, 2001, challenging a decision not to re-employ him for the 2001-2002 school year. MCBE did not object to the matter proceeding directly to level four, where a hearing was held on January 18, 2002. Grievant was represented by Teresa J. Lyons, Esq., of Byrne & Hedges, and MCBE was represented by Teresa J. Dumire, Esq., of Kay Casto & Chaney. The matter became mature for decision with the final post-hearing submission on February 14, 2002.

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

Findings of Fact

___1. Grievant was employed by MCBE as a substitute teacher holding certification in Physical Education (K-12) and Mathematics (7-12), in August 1992, and continued in this capacity through the 2000-2001 school year. 2. As a substitute teacher, Grievant was employed on a day-to-day basis by annual contracts which expired by their own terms at the end of each school year. Grievant's 2000-2001 contract expired on June 30, 2001.

3. MCBE does not regularly conduct evaluations of substitute teachers, and did not evaluate Grievant at any time during his employment.

4. By Spring 2001, eight administrators requested that Grievant no longer be assigned to their schools. Reasons given for the requests consisted generally of complaints that he experienced difficulty with classroom control, did not follow lesson plans, was late, disorganized, and dressed inappropriately. One principal additionally stated that Grievant would not accept an extra duty assignment, and that his relationships with staff members were very poor.

5. As a result of these requests, Grievant was not recommended for re- employment as a substitute teacher for the 2001-2002 school year.

6. Prior to 2001, it had been the practice of MCBE to issue letters to substitute employees in the Spring, inquiring whether they wished to be re-employed the following school year. These letters were not sent in Spring 2001, but rather currently employed substitutes were simply recommended, or not recommended, for re-employment.

7. Grievant did not inquire about his employment until August 2001. After being advised that he had not been employed for 2001-2002, he met with MCBE Manager of Human Resources Dan McGinnis on October 9, 2001, to discuss his non-retention. Mr. McGinnis advised Grievant that he would further investigate the matter, but did not report his findings to Grievant, who subsequently completed a grievance form dated November 28, 2001.

Discussion

Initially, MCBE raises the issues of whether Grievant has standing to file a grievance under the provisions of W. Va. Code §§ 18-29-1, et seq., and, if so, whether the grievance was timely filed. MCBE asserts that Grievant is not an employee, defined by W. Va. Code §18-29-2(c) as:
any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

MCBE argues that Grievant was no longer an employee as of June 30, 2001, and that his complaint does not raise issues concerning “a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to” him. Further, MCBE asserts the non-renewal of a contract is not a grievable act, as defined in W. Va. Code § 18-29-2(a), but rather is the reasonable exercise of its substantial discretion. Grievant cites a number of Grievance Board decisions which hold that substitute employees may file grievances.

It is well established that substitute employees may file grievances. See Vest v. Nicholas County Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Moore v. Mason County Bd. of Educ., Docket No. 26-88-210 (Mar. 1, 1989); Lemery v. Monongalia County Bd. of Educ., Docket No. 91-30-494 (Apr. 30, 1992). However, Grievant was not a substitute employee at the time he filed this grievance, and had not been employed by MCBE for nearly five months. MCBE next argues that the

grievance was not timely filed. Grievant asserts that the matter was timely filed under the discovery provision of Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

W. Va. Code § 18-29-4 requires that the grievance process begin "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. . .". A discovery rule exception to these time lines was recognized by the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), which held that under this exception, 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.

The grievable event, the failure to recommend Grievant for re-employment, occurred in Spring 2001. It is undisputed that Grievant did not learn of his change in status until August; however, even under the Spahr discovery exception, the delay until November renders the grievance untimely filed.

Even if Grievant had timely filed this complaint while still an employee, he could not prevail. Grievant asserts that the reasons given for his non-renewal were not genuine, and that the actual reasons were that he has a speech impediment, and has offended people while serving as an elementary basketball league referee, during his active participation in local politics, or because of his religious beliefs. No evidence was presented to support Grievant's propositions, and, in any event, he has no right to continued employment upon expiration of his contract. 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. W. Va. Code §18-29-2(c) defines an employee, for purposes of this grievance procedure, as "any person hired as a temporary, probationary or permanent employee by an institution either full or part time."

2. Grievant was not an employee of MCBE in November 2001, and was not eligible to pursue a claim under the grievance procedure for education employees set forth in W. Va. Code §§ 18-29-1, et seq.

3. W. Va. Code § 18-29-4 requires that the grievance process begin "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. . .".

4. A discovery rule exception to the statutory time lines provides that 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 Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

5. Grievant did not initiate grievance proceedings within the statutory time lines or in a timely manner upon learning of the facts giving rise to this grievance.

Accordingly, the grievance is **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) daysof 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: February 28, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE