RAYMOND G. SEIFERT,

Grievant,

v. **Docket No. 02-15-079**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Raymond Seifert ("Grievant") initiated this proceeding on November 7, 2001, challenging the posting of the Play Director position at Weir High School. He seeks to be placed in the position. After denial at level one, a level two hearing was held on March 13, 2002. The grievance was denied in a written decision dated March 18, 2002. Level three consideration was waived, and Grievant appealed to level four on April 1, 2002. A hearing was held in the Grievance Board's office in Wheeling, West Virginia, on June 12, 2002. Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent was represented by counsel, William T. Fahey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 10, 2002.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as the Music Director at Weir Senior High School ("WHS").

2. On August 12, 2001, Grievant became aware that the previous Play Director at WHS would no longer be holding that position.

3. Grievant submitted a letter to the principal of WHS, Martin Hudek, on August 14, 2001, expressing his interest in the position and describing his qualifications.

4. On August 15, 2001, Mr. Hudek called Grievant into his office to discuss Grievant's qualifications for the Play Director position. At the conclusion of the discussion, Mr. Hudek told Grievant he would recommend him for the position. While Grievant was in his office, Mr. Hudek telephoned the central office to inquire whether the position would be posted, and the secretary who took the call said she would have to ask the superintendent.

5. Grievant left town for a family vacation on August 16, 2001, and returned late in the day on August 22, 2001.

6. From August 16, 2001, through August 22, 2001, the Play Director position was posted. Applicants were required to apply in person by 4:00 p.m. on August 22, 2001, and complete an official bid response form.

7. Upon learning that the position had been posted, Mr. Hudek telephoned Grievant's home and his mother's home, leaving messages.

8. Grievant did not discover the position had been posted until he returned home around 5:00 p.m. on August 22, 2001, and received Mr. Hudek's phone message. 9. Kelsey Hayward was the only applicant for the Play Director position during the posting period.

10. Upon returning from his trip, Grievant telephoned Mr. Hudek, who explained to him that it was too late for Grievant to apply for the position, because the posting had closed that day. Mr. Hudek suggested that Grievant might discuss the situation with Mr. Hayward, explaining how badly he wanted the job.

11. Grievant spoke with Mr. Hayward the following day, August 23, 2001, and asked if he would consider withdrawing his application. Mr. Hayward stated he would like to think about it, but he never notified Grievant of his decision.

12. Prior to 2001, Respondent did not post extracurricular positions, like the Play Director position.

13. At a regular meeting on October 22, 2001, Respondent hired Mr. Hayward as Play Director at WHS.

14. Grievant filed this grievance on November 7, 2001.

Discussion

Respondent contends that this grievance was not filed within the statutory timeframe, so it should

be denied on that basis alone. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). As to when a grievance must be filed, West Virginia Code § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. West Virginia Code § 18-29-4(a) provides, in pertinent 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.

* * * * * *

> Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. 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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Grievant testified that he waited until after the

Board officially hired Mr. Hayward to file his grievance. This is understandable under the circumstances, especially in light of Grievant's request to Mr. Hayward that he consider resigning the position, which Mr. Hayward was supposedly considering. In addition, there was a significant delay between the closing of the posting and the Board's official action, further supporting Grievant's “wait and see” attitude. Accordingly, Grievant was not “unequivocally” notified that Respondent was hiring Mr. Hayward for the position until its action on October 22, and this grievance was filed within 15 days of that date. It is, therefore, timely.

Grievant contends that his letter of intent should be considered as a timely application for the position. With regard to posting of positions, West Virginia Code § 18A- 4-7a provides as follows:

> Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period. . . .

Contrary to Respondent's obvious assumption that Grievant was required to apply during the posting period, there is no such statutory requirement. Respondent had been notified of Grievant's interest in the position, in writing no less, and could have considered his letter of intent as an application. Completion of an “official” bid response form could have been accomplished the day following the closing of the posting, when Grievant had returned from his trip. An administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". W. Va. Code § 18-29-5(b). Because Grievant did submit a written letter stating his interest in the position and his qualifications, prior to the posting, he should have been given the opportunity to have his qualifications considered. Accordingly, Respondent is directed to allow Grievant to submit an official bid form for the Play Director position and have his qualifications compared to those of Mr. Hayward. Because Mr. Hayward has not yet received any compensation for the position, Grievant is not entitled to back pay, but should be placed in the position if his qualifications are deemed to be superior.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4a.

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. SeeRose 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).

4. This grievance was timely filed.

5. An administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". W. Va. Code § 18-29-5(b).

6. Grievant is entitled to have his qualifications for the Play Director position considered and compared to those of the successful applicant.

Accordingly, this grievance is **GRANTED.** Respondent is directed to allow Grievant to apply for the position as set forth in this Decision, and place him in the position if his qualifications are determined to be superior to Mr. Hayward's. Any further relief requested is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock County, and 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: July 17, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge