JAMES JOHNSON,

Grievant,

v. **Docket Nos. 02-17-066 & 125**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

James Johnson ("Grievant") initiated a grievance on November 7, 2001, alleging an extension of his contract by one hour per day since 1999 was improperly taken from him in October of 2001 (Docket No. 02-17-066). He seeks reinstatement of that assignment, plus back pay and interest. The grievance was denied at level one on November 14, 2001. A level two hearing was conducted on February 11, 2002, at which time Grievant sought to amend his grievance by alleging that the removal of the assignment also constituted an unauthorized schedule change, in violation of W. Va. Code § 18A-4-8a. This amendment was denied by the level two hearing examiner. Accordingly, a separate grievance was filed on February 19, 2002 (Docket No. 02-17-125).

Both grievances were denied at level two, by decisions dated March 7, 2002, and April 25, 2002, respectively. Level three consideration was bypassed in both cases, and Grievant appealed the grievances to level four on March 14, 2002, and May 2, 2002. The parties elected to have a level four decision rendered based upon the record developed below, supplemented by fact/law proposals submitted by August 23, 2002, at which time these matters became mature for consideration. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Basil Legg, Jr. The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent for approximately five years as an aide.

2. Beginning in February of 1999, Grievant's workday was extended by one hour per day, (See footnote 1) so that he could provide before and after school assistance to a special education student. This extension was voted upon and approved by the Board. Grievant received pay for the additional hour at his regular rate of pay.

3. The extension of Grievant's workday was not posted for bid, and he did not receive a separate contract for it.

4. At the beginning of each school year in 1999-2000 and 2000-2001, this practice continued, and Grievant's contract was extended for the additional hour by memorandum, without benefit of a separate employment contract.

5. Grievant began performing the additional one-hour assignment at the onset of the 2001-2002 school year. Grievant received compensation for the additional hour he worked each day.

6. In order to correct what it believed to be an illegal practice of not posting extracurricular assignments, on October 22, 2001, Respondent posted the one-hour extended portion of Grievant's workday as an extracurricular assignment.

7. Grievant and Linda Meinig bid on the extracurricular position. 8. Ms. Meinig has more seniority as an aide than Grievant and was awarded the position.

Discussion

As a preliminary issue, Respondent asserts that the second grievance, regarding the “change in schedule” argument, was not timely filed. 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.
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> 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."

However, in the instant case, the second grievance was filed only because Grievant was denied the right to amend his original grievance at the level two hearing on February 11, 2002. West Virginia Code § 18-29-3(j) addresses such amendments, providing as follows:

> (j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same; the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling.

Clearly, Grievant's request to assert an additional argument regarding the removal of this assignment was merely that, an additional argument. The level two evaluator erredin denying this

"amendment," because it was not new evidence which altered the grievance. The grievance has always been that Respondent should not have removed the assignment from Grievant and posted it. Grievant's arguments do not change the grievance or the relief sought. "A grievant is not required to identify each argument he intends to make in his statement of grievance. In many instances, a grievant will not know what arguments can be made until evidence is presented to clarify exactly what has occurred." Snyder v. Preston County Bd, of Educ., Docket No. 98-39-509 (May 26, 1999).

Accordingly, the undersigned finds that Grievant should not have been required to file a separate grievance regarding the "schedule change" argument. Nevertheless, even if properly filed as a separate grievance, Grievant filed that claim five days after the level two hearing evaluator's denial of the amendment, rendering it timely pursuant to West Virginia Code § 18-29-3(j). Therefore, that grievance and the arguments contained within it are properly before this Grievance Board and will be addressed in this Decision.

West Virginia Code § 18A-4-16 defines extracurricular assignments as "activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis[.]" Extracurricular assignments must be filled "in accordance with section eight-b of this article," unless an alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within the classification category of employment. In turn, W. Va. Code § 18A-4-8b requires that all vacancies be posted and filled by competitive bid. There appears to be no dispute that this assignment would be extracurricular, because it occurs on a regularly scheduled basis. Rather, Grievant contends that the assignment should not have been taken from him for two reasons. First, he argues that his position should be "grandfathered" into the enactment of W. Va. Code § 18A-4-8b, which states in paragraph (c) that "[t]he county board may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section." Presumably, Grievant believes that he should be allowed to retain the extra hour of his position, because he was performing it when this statute was enacted. However, he has provided no evidence to support this claim. W. Va. Code § 18A-4-8b was initially enacted in 1981, and amended in 1996 and 2001. The undersigned takes administrative notice that the portion of the statute requiring posting of vacancies has been in existence for several years, and was in the statute when Grievant began his position in 1999.

Accordingly, his position would not be “grandfathered,” excepting it from the posting requirements.

Grievant's second argument is that the removal of the extra hour from his duties constituted a schedule alteration, prohibited by a portion of W. Va. Code § 18A-4-8a, stating that “[n]o service employee may have his or her daily work schedule changed during the school year without the employee's written consent[.]” Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, must be decided on a case-by-case, fact-specific basis. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992). This Grievance Board has previously observed that a literal interpretation of Code § 18A-4-8a would essentially prohibit any changes in a schoolpersonnel employee's work schedule. Froats v. Hancock County Bd. of Educ., Docket No.
89-15-414 (Dec. 18, 1989). It has also been observed that the apparent legislative intent of this statute is to protect school service employees from involuntary changes in their shift assignments. Sipple, supra. See State ex rel. Frazier v. Meadows, 193 W. Va. 20, 454 S.E.2d 65 (1994).

The undersigned does not agree with Grievant's characterization of the removal of this extra assignment as a “change in his daily work schedule.” The removal of a portion of an employee's assignment that has not been properly posted and filled pursuant to statutory mandates does not constitute an involuntary change in an employee's schedule which is meant to be protected by the provisions of Code § 18A-4-8a. This Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible. See Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997). In the instant case, Respondent realized that it was required by statute to post this extracurricular assignment. The fact that Grievant was displaced from performing the assignment, because he was not awarded the position, is merely an unfortunate consequence of Respondent's compliance with the law. Grievant was given the opportunity to bid upon the position, and does not appear to dispute that Ms. Mienig was the more senior, qualified applicant. He is not entitled to any further relief, much less instatement to the position.

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. Haleand Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. If new evidence is offered during the grievance process that constitutes a new grievance, within the discretion of the hearing evaluator, the grievant may be ordered to file a separate grievance, and the statutory time limitations begin to run from the date of such ruling. W. Va. Code § 18-29-3(j) .

3. Grievant's request to amend his grievance by asserting a new legal theory at the level two hearing on February 11, 2002, was not an amendment as contemplated by W. Va. Code § 18-29-3(j).

4. Grievant's claim that the removal of his extra assignment in October of 2001 constituted a schedule change was timely filed.

5. In a non-disciplinary matter, Grievant has the burden of proving his claims 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.

6. W. Va. Code § 18A-4-16 provides that extracurricular assignments must be posted and filled pursuant to the provisions of W. Va. Code § 18A-4-8b.

7. Grievant's extracurricular position was not excepted from the posting and filling requirements of W. Va. Code §§ 18A-4-8b and 18A-4-16.

8. “No service employee may have his or her daily work schedule changed during the school year without the employee's written consent[.]” W. Va. Code § 18A-4-8a.

9. The removal of Grievant's extracurricular assignment for posting and bid was not a schedule change prohibited by W. Va. Code § 18A-4-8a.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison 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: September 5, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant's normal workday is six hours.