STEVEN WAYTS,

Grievant,

v. Docket No. 03-52-264

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Steven Wayts ("Grievant"), employed by the Wetzel County Board of Education ("WCBE") as a Bus Operator, filed a level one grievance on July 7, 2003, in which he alleged violations of W. Va. Code §§ 18A-4-8b, 18A-2-7, and 18-29-2 (m) and (o), when he was transferred as a result of a reduction in force. Grievant requests reinstatement to the position he held during the 2002-2003 school year, and compensation for mileage and other expenses incurred. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, and filed a level four appeal on September 3, 2003. A level four hearing was conducted on October 28, 2003, in the Grievance Board's Wheeling office. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and WCBE was represented by Larry W. Blalock, Esq., of Jackson & Kelly, PLLC. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before November 21, 2003.

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

Findings of Fact

1. Grievant has been employed by WCBE for approximately twenty years as aBus Operator. During the 2001-2002 school year Grievant held one of three New Martinsville routes.

2. In February 2002, WCBE administrators determined that due to a loss of funding, a number of positions would be eliminated, including two bus operators. The plan was later modified to require the elimination of only one bus operator.

3. WCBE Director of Transportation Jay Yeager revised the transportation plan to

accommodate the loss of two positions. Runs subject only to minor changes, which were accepted by the bus operators, were not posted. However, the three New Martinsville bus routes were combined into two, and the least senior bus operator who was assigned to the Hundred area was terminated. The three positions were subsequently posted, and the New Martinsville employees were allowed to bid on the remaining positions.

4. Grievant held the least seniority of the three displaced bus operators, and was awarded the route in Hundred.

5. Grievant's 2001-2002 route was changed to include eight to ten different stops.

6. Grievant did not file a grievance in February or March, when he learned that other drivers had signed waivers, and that he would be placed on the transfer list, but began these proceedings after learning the location of his reassignment.

7. At level two, WCBE raised the issue of whether the grievance had been timely filed.

Discussion

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); 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. "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).

Grievant asserts that because his route was subject to only minor changes, he should have been reinstated as required by W. Va. Code § 18A-4-8b(k). In the alternative, Grievant argues that WCBE engaged in discrimination and favoritism when it did not give him the option of accepting the changes in his route, as it did with other bus operators. WCBE denies any discrimination or favoritism, or that the reason for the transfer ceased to exist. Further, WCBE argues that Grievant did not file this grievance within fifteen days of learning that he was to be placed on the transfer list, making it untimely filed.

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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); 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); 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).

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 Pub. 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). An untimely filing, if proven, will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 18-29-4(a)(1) 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.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, *supra*; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). *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). However, the West Virginia Supreme Court of Appeals in Spahr, supra, stated, "W. Va. Code, 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not beginto run until the grievant knows of the facts giving rise to a grievance." An examination of when Grievant knew "of the facts giving rise to

his grievance" is in order.

At the level two hearing, Grievant testified that he knew in February that four of his co-workers had been given the opportunity to retain their runs, with minor changes, and that he was to be placed on the transfer list because the three routes were to be combined into two. Thus, Grievant's claims regarding discrimination and favoritism were not timely filed. **(See footnote 1)**

However, Grievant also testified that he did not learn how the runs had been reconfigured until they were posted on June 13, 2003. Grievant continued that he discussed the matter with Mr. Yeager shortly after the positions were posted, at which time he advised that a grievance would be filed. WCBE does not dispute that this "informal conference" was conducted. In any case, the grievance was filed the fifteenth work day after June 13, 2003, and was timely filed relating to this issue. **(See footnote 2)**

W. Va. Code §18A-4-8b(c) provides in part:

The 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 and thereafter.

W. Va. Code §18A-4-8b(k) provides that:[i]f, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular reduction in force or transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the affected employee in writing of his or her right to be restored to his or her former position of employment.

Grievant argues that because his run continues to exist virtually intact for the 2002- 2003 school year, WCBE is required by these provisions to rescind his transfer and reinstate him to the assignment. WCBE asserts that changes to the run were significant enough to warrant the transfer and posting of the position.

A map provided by Grievant illustrates that his 2002-2003 run now comprises a substantial portion of the Alt. 180/Rt. 2 assignment. However, as Grievant testified at level four, five stops have been eliminated and an additional area was added. Mr. Yeager testified there were nine

total changes made to the run. Even if the number of changes did not warrant posting, the fact that one position had been eliminated inherently changed the remaining two runs, requiring their posting. Because the eliminated run was not reinstated, the reason for Grievant's transfer continues to exist. Therefore, there was no violation of W. Va. Code §§ 18A-4-8b(c) or 18A-4-8b(k). (See footnote 3)

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. 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); 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); 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).

2. A grievance must be initiated 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, with the grievant or his representative scheduling a conference with the immediate supervisor. W. Va. Code § 18-29-4(a)(1).

3. Respondent has proven that Grievant failed to file his claim of discrimination and favoritism within the statutory time lines. Grievant's claim that the reason for his transfer no longer exists, and that he should be reinstated to his former assignment, was timely filed.

4. Grievant has the burden of proving a violation of W. Va. Code §§ 18A-4-7b (c) and (k) 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. "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).

5. If the reason for any particular reduction in force or transfer no longer exists prior to August 1, a board of education shall rescind the reduction in force or transfer and notify the affected employee in writing of his or her right to be restored to his or her former position of employment. W. Va. Code § 18A-4-8b(k).

6. Grievant failed to prove that the reason for the reduction in force and his transfer ceased to exist, or that WCBE otherwise acted in violation of W. Va. Code § 18A- 4-8b(k). Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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: DECEMBER 22, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.The evidence of record establishes that the difference in treatment was due to the fact that three of the bus operators had only one additional stop added to their run, and the fourth driver would transport students in grades K-12, when he had previously transported only those in K-8. Grievant could not have proved discrimination/favoritism even if the claim had been timely filed because he was not similarly situated to other bus operators, and WCBE stated a legitimate reason for the difference in treatment.

Footnote: 2 ***.June 20, 2003, was West Virginia Day, a public holiday.***

Footnote: 3

[2]W. Va. Code § 18A-2-7(a) provides that the superintendent shall have the authority to transfer school personnel, subject to approval of the board, and that notice shall be provided the employee in writing on or before the first Monday in April if he is being considered for transfer. It continues, "[o]nly those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer. . . ." Grievant did not address the alleged violation of this provision, and it cannot be considered.