DELORES HAYNES,

Grievant,

v. Docket No. 03-02-134

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

___Delores Haynes ("Grievant"), a Bus Operator, filed a level one grievance on February 3, 2003, in which she alleged her employer, Berkeley County Board of Education ("BCBE") acted in an arbitrary and capricious manner, and in violation of W. Va. Code §§ 18A-1-1, 18A-4-8b, and 18A-4-16, when less senior employees were hired to fill Bus Operator Trainer positions, which were not posted. (See footnote 1) For relief, Grievant requested instatement as a Trainer, with back pay from February 3, 2003, if applicable. The grievance was denied at levels one and two. Grievant elected to bypass level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced her appeal to level four on May 27, 2003. A level four hearing was conducted in the BCBE offices on August 12, 2003. Grievant was represented by John E. Roush, Esq. of the West Virginia School Service Personnel Association, and BCBE was represented by Laura L. Sutton, Esq. The matterbecame mature for decision on September 9, 2003, the due date for submission of proposed findings of fact and conclusions of law.

The following facts have been derived from the record developed at level two and level four.

Findings of Fact

1. Grievant has been employed by BCBE as a Bus Operator since December 1983. In addition to her regular duties, Grievant was also employed as a certified Bus Operator Trainer from 1992 to 1999. Grievant discontinued her work as a Trainer at her request, due to personal reasons.

2. Sometime at the beginning the 2000-2001 school year, Grievant advised Transportation Director Larry Carte that she was ready to resume working as a Trainer. Grievant's requests that she be scheduled as a Trainer in 2001, and December 2002, were

denied.

3. Bus Operator Trainers are employed on an as-needed basis. The positions are not posted, but are filled by the Director of Transportation based upon competency, ability to teach, and work performance.

4. Grievant has been issued two letters of reprimand. The first, dated May 27, 1998, involved falsifying staff development and finance records. The second, dated February 2001, stated that she failed to bring her school bus to a complete stop at a railroad crossing.

5. BCBE currently employs three Trainers, none possessing a disciplinary record comparable to Grievant's.

6. BCBE argued at level two that the matter was not timely filed.

Discussion

Because the issue of whether the grievance was timely filed may be dispositive of this matter, it will be addressed first. BCBE argues the grievance was not timely filed, as Grievant's request to work as a Trainer was denied in early 2001, but the grievance was not filed until February 2002. 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 time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). "If, proven, an untimely filing 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)." Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

As to when a grievance must be filed, W. Va. 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 must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. 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 becameknown 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."

At the level four hearing, Grievant testified that her most recent inquiry of Mr. Carte regarding her return to work as a Trainer was in December 2002. During that conversation he advised her that he could select whomever he wanted for the Trainer positions. The grievance was not filed until approximately two months later. By her own admission, Grievant did not initiate these proceedings until well beyond the statutory time limits.

Grievant offers no valid reason why the time lines should not apply in this matter, but argues that the grievable event is continuing in nature, with each training session she is not employed. When determining whether a grievance falls within the continuing practice exception, it is necessary to determine whether the violation is ongoing, or whetherthere was a single violation from which damages continue to accrue. “Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance . . . . See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002).

Grievant's representation that she merely took a leave of absence as a Trainer undermines

her continuing practice exception argument since, had that been the case, she would have simply returned to work as a Trainer in early 2001. There is no evidence; however, that a leave of absence was requested or granted. In any event, this situation involves a decision made by Mr. Carte in 2001, and is not a continuing violation. However, if viewed in a light most favorable to Grievant, the grievance was still not filed within the statutory time frames after her conversation with Mr. Carte in December 2002.

Even had the grievance been timely filed, Grievant could not prevail. Grievant argues that the position of Trainer was an extracurricular, service personnel position, as defined by W. Va. Code §§18A-1-1, and 18A-4-16(1), and must be posted and filled in compliance with the provisions of W. Va. Code § 18A-4-8b.

As this Grievance Board has previously pointed out, "Bus Operator Trainer" is not a classified service position defined by W. Va. Code § 18A-4-8. Nor is it an extracurricular assignment, as defined by Code §18A-4-16, since a Trainer does not work " on a regularly scheduled basis," but only "as needed." Thus, Grievant had no entitlement to the Trainer's assignment under the seniority-based statutes she cited, or under any other statute relative to the employment of school service personnel. Kester v. Putnam County Bd. of Educ., Docket No. 02-40-133 (Nov. 19, 2002); Conner v. Barbour County Bd. ofEduc., Docket No. 94-01-1108 (July 18, 1996)(footnotes omitted). See also, Byrd v. Cabell County Bd. of Educ., Docket No. 97-16-071 (July 10, 1997).

Neither has Grievant proven BCBE's failure to reassign her as a Trainer is arbitrary and capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential

ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Mr. Carte testified that in consideration of Grievant's disciplinary record, he believed that other individuals were better instructors. Grievant denies the accusations in both letters, and notes that she continued to serve as a Trainer after the first letter of reprimand was issued. Unfortunately for Grievant, since she did not grieve the prior discipline, the merits of those actions cannot be placed in issue now. Aglinsky v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-256 (Oct. 27, 1997); Jones v. W. Va. Dep't of Health & HumanResources, Docket No. 96-HHR-371 (Oct. 30, 1996). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).

While one letter of reprimand may not have prohibited Grievant from continuing her work as a Trainer, a second letter was apparently enough to keep her from being re- employed in this area. Since the second letter involved unsatisfactory operation of her school bus, the Transportation Director has provided a rational basis for his decision, and BCBE's action was not arbitrary and capricious.

In addition to the foregoing findings of fact and discussion, 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 time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). "If, proven, an untimely filing 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)." Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

2. In a grievance involving an education employee, the grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is

based. W. Va. Code § 18-29-4(a).

3. BCBE has proven that Grievant did not file this grievance within fifteen days of the occurrence of the event upon which the grievance is based.

4. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §18-29-4(a). See, Spahr v. Preston Co. Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002).

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Berkeley 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 norany 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 29, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Section 18A-1-1, provides: "Service personnel" means those who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and as aides.

Section 18A-4-16(1) states in part that, "all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, or extra-duty assignments . . . .

Section 18A-4-8b requires the posting and filling of all school service personnel assignments "on the basis of

seniority, evaluations, and qualifications."