SHERRI J. LILLY,

Grievant,

v. **Docket No. 03-41-373**

RALEIGH COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

This grievance arose out of the non-selection of the grievant, Sherri J. Lilly ("Grievant") for a posted position as assistant coach for the boys' basketball team at Shady Spring Middle School ("Shady Spring"). The respondent, the Raleigh County Board of Education ("BOE"), raised the affirmative defense that the grievance was not timely filed. Grievant filed her Level I grievance on October 30, 2003. It was denied as untimely whereupon Grievant appealed to Level II. A Level II hearing was conducted on November 25, 2003, after which the grievance was again denied as untimely. Level III was waived. A Level IV hearing was conducted on June 10, 2004, in the hearing room of the West Virginia Education and State Employees Grievance Board in Beckley, West Virginia. Grievant was represented by Greg A. Hewitt, Esquire. (See footnote 1) BOE was represented by Kathryn Reed Bayless, Esquire. The case matured for decision on June 25, 2004, by which date both parties had submitted their respective proposed findings of fact and conclusions of law.

Grievant combined the substantive predicate for her grievance with her request for relief by asserting "I want to be named Boys Asst. Basketball Coach for SSMS because I hold a professional teaching degree/certificate. Ross Lewis does not." There is a factual dispute as to whether Grievant orally withdrew her name from consideration for the position and, instead, offered to volunteer to help with the team in order to develop her coaching skills. This is a critical fact for purposes of resolving this grievance on the merits. However, it need not be addressed until the threshold question of timeliness has been answered.

After careful review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. During the times pertinent to this grievance, Grievant was employed by BOE as a substitute teacher.

2 2. On or about May 30, 2003, Grievant applied for a posted position as assistant boys' basketball coach at Shady Spring.

3 3. Ross Lewis had filled that position the preceding school year.

4 4. Ross Lewis is a non-professional.

5 5. On September 16, 2003, Grievant saw a written schedule for the boys' basketball team that had been brought home by her son, a student at Shady Spring.

6 6. Said schedule identified Jeff Hayworth ("Coach Hayworth") as the coach and Ross Lewis as the assistant coach

7 7. Grievant, who was keeping a written record of events relating to her application for the position of assistant coach, made a notation that she needed to "check on this."

8 8. Grievant did not make any inquiries as to why she was not listed as the assistant coach on the boys' basketball schedule.

9 9. In her capacity as a basketball referee, Grievant attended a basketball clinic for coaches and referees that was held on October 13, 2003.

10 10. Both Coach Hayworth and Ross Lewis were in attendance at the basketball clinic.

11 11. On or about October 21, 2003, Grievant confronted Coach Hayworth because she believed that he had ignored her during the basketball clinic. Coach Hayworth informed her, at that time, that Ross Lewis had received the post of assistant coach.

12 12. On or about October 28, 2003, Grievant confronted Charles Meadows, the principal of Shady Spring ("Principal Meadows"), who confirmed that Ross Lewis was the assistant coach. (See footnote 2)

13 13. Grievant filed her grievance on October 30, 2003.

14 14. Grievant did not grieve within fifteen days of September 16, 2003, when she learned that she was not the assistant boys's basketball coach at Shady Spring.

Discussion

The timeliness of this grievance is the initial issue to be addressed. In resolving the question of whether this grievance was timely, the date on which Grievant first became aware of the basis for her grievance must be determined. BOE argues that Grievant was on notice of the fact that Ross Lewis had been named as the assistant coach on September 16, 2003, when she saw the names of the coaches on the boys' basketball schedule that her son brought home from school. Grievant claims that the time for filing a grievance was not triggered until October 28, 2003, when “the administration,” in the person of Principal Meadows, confirmed that Ross Lewis was the assistant coach.

At one point Grievant testified that she “didn't think anything about it” when she noticed that Ross Lewis, and not Grievant, was placed on the basketball schedule as the assistant coach. This was not a circumstance in which her name was merely omitted from the schedule. Rather, Ross Lewis was expressly identified as the assistant coach. Grievant's testimony minimizing the significance of seeing his name on the schedule was inconsistent with her testimony that, upon seeing the schedule, her initial reaction was that there was “a problem.”

Grievant's testimony that she thought there was a problem is corroborated by her journal entry in which she noted that she needed to “check on this.” Common sense and her own journal entry lead to the conclusion that the credible testimony on this issue was that Grievant recognized that there was a problem when she saw that Ross Lewis was the assistant basketball coach according to the printed schedule that had been distributed to the students.

At that point, Grievant knew or should have known that she was not the assistant coach. Her subsequent discussion with Principal Meadows, over a month later, merelyconfirmed what she already knew. Accordingly, September 16, 2003, is the date from which the filing period must be counted.

Pursuant to West Virginia Code section 18-29-4 (a)(1), an aggrieved employee must seek a level I conference “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[.]” As noted, Grievant became aware of the fact that Ross Lewis was the assistant coach for boys' basketball at Shady Spring on September 16, 2003. Her grievance, which was filed on October 30,

2003, was untimely because it was not filed within the requisite fifteen-day period.

Based upon the foregoing facts, a review of the applicable law, and consideration of the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (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).

2 2. Grievant's allegations must be proven by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "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 Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. An assertion that a grievance should be dismissed as untimely is an affirmative defense, which BOE must prove by a preponderance of the evidence. *Macri v. Wayne County Bd. of Educ.*, Docket No. 04-50-120 (June 29, 2004).

4 4. Grievant's testimony to the effect that she did not think anything about the fact that Ross Lewis, and not Grievant, was named as assistant coach on the boys' basketball schedule was not credible in light of her other testimony, common sense and her own journal entry.

5 5. An aggrieved employee must seek a Level I conference “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[.]” W. Va. Code § 18-29-4 (a)(1),

6 6. Grievant knew of the existence of the grounds for her grievance by September 16, 2003.

7 7. This grievance, which was filed on October 30, 2003, was not timely and must be dismissed. *Hedrick v. Pendleton County Bd. of Educ.*, Docket No. 01-36-419 (Nov. 7, 2001).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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 tosuch appeal, and should not be so named.

However, the appealing party is required by West Virginia Code section 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 30, 2004 _____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

At lower levels Grievant was represented by Ben Barkey, Uniserv Representative for the West Virginia Education Association.

Footnote: 2

Principal Meadows asserted that Grievant had withdrawn her application on the understanding that she would be able to assist as a volunteer to develop her coaching skills. Grievant denied that she had withdrawn her application.