**DON MACRI,**

**Grievant,**

**v.**

**WAYNE COUNTY BOARD**

**OF EDUCATION,** **DOCKET NO. 04-50-120**

**Respondent,**

**and**

**BARBARA BRANDAU,**

**Intervenor.**

**DECISION**

On November 5, 2003, Grievant filed a grievance against Wayne County Board of Education, Respondent, claiming:

1 1.
A Pervasive pattern o[f] unfairness exists in the Wayne County Board of Education's hiring practices that has damaged me both professionally and financially.

1.a a.
The recent hiring of a Diagnostician/IEP coordinator was in violation of [W. Va. Code §] 18A-4-7a "the vacancy shall be selected by the board within thirty working days of the end of the posting period."

1.b b.
The Board did not select on the, "basis of the applicant with the highest qualifications."

1.c c.
The Board creates positions without following proper procedures outlined in [W. Va. Code]. Examples: positions have been created that work during the summer months without any bids, notifications or any regard to proper procedures.

1.d d.
The Board grants "temporary" positions without consideration of qualifications, or posting or any other required procedures. Those favored receive experience

and training and pay until they become the most qualified.

1.e e.
[The Board] [b]id the Diagnostician/IEP coordinator position multiple times, and different ways to create a climate of confusion to give an unfair advantage to those it wishes.

The Grievance form does not state what relief Grievant sought, but at the level two hearing, his representative said he is seeking instatement into the Diagnostician position, with back pay, and also wishes to be compensated for temporary summer positions that he was denied the opportunity to apply for because they were not posted.

Barbara Brandau was the successful applicant for the Diagnostician position, and joined the grievance as Intervenor at level two.

Having been denied at levels one and two. Level three was waived, and a level four hearing was held in the Grievance Board's Charleston office on May 7, 2004. Grievant was represented by Susan Hubbard of the WVEA. Respondent was represented by counsel, David Lycan. Intervenor was represented by Judy Davis of the AFT. The matter became mature for decision June 7, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a special education teacher at Buffalo Middle School, with approximately 31 years of experience. 2. Respondent posted a 200-day position for a Diagnostician/IEP Coordinator on November 22, 2002, with a closing date of December 4, 2002. Due to an error in the posting, it was rescinded and re-posted as a 240-day position on December 19, 2002, with a closing date of January 7, 2003.

3. Grievant and Intervenor applied for the position, and it was awarded to Intervenor on August 21, 2003.

4. Respondent incorrectly evaluated the seven selection criteria in W. Va. Code § 18A-4-7a, resulting in the erroneous conclusion that Intervenor was more qualified than Grievant. Grievant was

the most qualified applicant, and should have been awarded the position. (See footnote 2)

5. Grievant was aware Intervenor was working as a Diagnostician in September, 2003, but it was not until he received an anonymous note in his school mailbox in November 2003 that he was aware she was working in the position for which he applied.

6. The anonymous note also said there were other people working in the Board office in positions that had never been posted.

7. The Diagnostician position became vacant after the incumbent, Randall Webb, became ill and subsequently resigned, two years ago. Special Education Director Della Ryan did not post the position initially because she did not know how long Mr. Webb would be off. When Mr. Webb resigned after being on sick leave for nine months, his job was posted and filled by Ted Collins.

8. Ms. Ryan asked Vanessa Chadwick if she would assume the position while Mr. Webb was on sick leave, because she thought Ms. Chadwick was well-organized. 9. Another Diagnostician/IEP Coordinator was Dinah Ledbetter. She was placed in another job, that of Mary Elliot, as a substitute while Ms. Elliot was on sick leave. When Ms. Elliot eventually retired, her job was awarded to Ms. Ledbetter. Ms. Ledbetter's Diagnostician position was then posted, and was the position that is the subject of this grievance.

10. While Ms. Ledbetter was filling in for Ms. Elliot, Elaine May filled in for Ms. Ledbetter. Again, Ms. Ryan made this appointment without posting the position.

## DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. However, both Respondent and Intervenor claim this grievance should be dismissed because it was not timely filed. The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4a; *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16,

1997). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra*. Because timeliness is dispositive of the grievance, it will be addressed before discussing the merits of the case. Grievant's first issue is with the posting for the Diagnostician position, and he claims the position was not awarded within thirty days of the end of the posting period, as required by W. Va. Code § 18A-4-7a. Grievant also contends that the most-qualified applicant was not chosen. The Code section cited by Grievant states, in part: “If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the posting period.” W. Va. Code § 18A-4-7a(o)(3).

Grievant stated he did not know the position had been filled until the week he filed his grievance. However, he admits he saw Intervenor working in the position prior to that and even worked with her, so he knew she was a new Diagnostician. Grievant knew the date set for the end of the posting period was January 3, 2003, so he knew when thirty days had elapsed after the end of the posting period. However, Grievant contends he did not know the position was filled at all, and points out the Board has the right not to fill a posted position. He correctly points out that, until Respondent filled the position, it had not violated any statute, therefore he had nothing to grieve.

Respondent contends Grievant should have known it did fill the position improperly at the time it did so, because he saw Intervenor working, and because the Board's actions are public and reported in the local newspapers. However, the grievance statute requires actual knowledge, not just constructive knowledge. “The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged.” *Seifert*, *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). Although Grievant saw Intervenor working as a Diagnostician, he had no way of knowing she was filling the position he applied for, especially givenRespondent's known and admitted way of ignoring the legal process for filling positions, as is discussed below. Respondent presented no evidence to rebut Grievant's assertion that he did not unequivocally know of Intervenor's hiring into the position in question sooner than fifteen days prior to his grievance filing, so it has not met its burden of proving the grievance was untimely. Given that Respondent has admitted Grievant should have been the successful applicant, he must be awarded the position.

Grievant's claim that Respondent created summer positions without following proper posting procedures is also timely. Grievant testified he received an anonymous note in his school mailbox that some summer positions had been filled without posting, and he got this note only two or three days before he filed his grievance. He stated he filed the grievance as soon as he was informed this had happened, and before he knew whether the information was true or not.

Boards are required to post and date notices of openings in established, existing or newly created positions, in conspicuous working places for all professional personnel to observe for at least five working days, and within twenty working days of the position openings. W. Va. Code § 18A-4-7a(o). However, Grievant, who admittedly filed his grievance on that issue without verifying the veracity of his information, failed to present any evidence to support the claim. He did not identify any of these summer positions or who worked in them. Mr. Ross testified, on the other hand, that there were extended summer special education positions, but that they had been posted and filled properly. Grievant presented no evidence to rebut this assertion.

Ms. Ryan and Personnel Director James Ross do not agree on the chain of events leading up to the posting of the subject position. However, their testimony does show Respondent has a pattern of filing at least temporary vacancies without regard to properstatutory procedure. However, Grievant's claim specifically targets summer positions filled last year, and the irregularities preceding the Diagnostician posting are not at issue and do not support his claim about later events.

Even if Grievant had proven this claim, he presented no evidence to support a finding that, had summer positions been posted and had he applied for them, he would have been the successful candidate. His conjecture that he “would have at least been a contender for those positions” (See footnote 3) is not enough to meet his burden of proving he should have been awarded the jobs.

The following Conclusions of Law support this decision:

## CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the

evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). 3. The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4a; *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002).

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Seifert*, *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).

5. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra*.

6. Grievant was never unequivocally notified by Respondent that another candidate had been hired into the position he was seeking, and he did not know this had occurred until November, 2003. His grievance filing on November 5, 2003 was, therefore, timely.

7. Grievant was the most qualified applicant for the Diagnostician/IEP Coordinator position.

8. Boards are required to post and date notices of openings in established, existing or newly created positions, in conspicuous working places for all professional personnel to observe for at least five working days, and within twenty working days of the position openings. W. Va. Code § 18A-4-7a(o).

9. Grievant did not meet his burden of proving Respondent failed to properly post and fill summer positions for which he would have been a successful applicant.

For the foregoing reasons, this grievance is **GRANTED in part**. Respondent is ordered to instate Grievant into the Diagnostician/IEP Coordinator position retroactive fromthirty days after the closing date of the posting, and to pay Grievant for any difference in salary between that position and his current one and to grant Grievant full seniority credit for the time he should have worked in the position, and any other benefits that would have inured to Grievant had he been hired. All other relief requested by Grievant is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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 West Virginia 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: June 28, 2004** _____

**M. Paul Marteney**

**Administrative Law Judge**

---

Footnote: 1

*The undersigned received an anonymous note from "A Wayne Co. Teacher" setting out the writer's baseless and skewed version of the facts, that played no part in the making of this decision. Copies of the note were forwarded to the parties. It is ironic that such an ex parte communication would accuse Respondent of having "a disregard for the rule of law that borders on contempt," when the sender himself displays just such a flagrant violation of propriety by attempting to illegally influence the outcome of this matter.*

---

Footnote: 2

*Respondent stipulated to these facts at the level four hearing, but maintained the grievance should nevertheless be dismissed as untimely, as is discussed below.*

---

Footnote: 3

*Level two transcript, p. 49.*