CHARLES FORTNEY,

Grievant,

v. **Docket No. 03-30-349**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Charles Fortney ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a teacher, filed a level one grievance on August 4, 2003, in which he alleged a violation of W. Va. Code § 18A-4-7a when a position at Cass Elementary School (CES) was not posted. For relief, Grievant requested the position be posted. 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 his appeal to level four on November 10, 2003. A level four hearing was conducted on January 20, 2004, at which time Grievant was represented by Don Craft of the West Virginia Education Association, and MCBE was represented by counsel Kelly J. Kimble of Kay Casto & Chaney, 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 February 18, 2004.

The following facts are undisputed by the parties.

Findings of Fact

1. Grievant has been employed by MCBE as a regular physical education teacher since March 2001. During the 2002-2003 school year, Grievant was employed as a .8 FTE (full-time employee), or for four days per week. Grievant achieved full-time status in September 2003, after he bid on and received an additional .2 FTE position at CES. This position was posted and filled following a discussion between Grievant and MCBE Superintendent Michael Vetere regarding the WVU contract at CES. Grievant was reassigned for the 2003-2004 school year to Mason-Dixon Elementary School four days a week and Easton Elementary School one day a week.

2. Since 1981, MCBE has contracted with the West Virginia University School of Physical Education (WVU) to provide a developmentally appropriate physical education program in a county

school, in conjunction with a clinical setting for WVU teacher training and research. This program originally served Sabraton Elementary School, but for the past twelve years it has functioned at CES. This school serves approximately 265 students from Kindergarten through fifth grade, and is located in an economically depressed area. The contractual period is for one academic year, i.e., August 16, 2003 to June 15, 2004, at a cost to MCBE of $37,310.00.

3. The terms of the contract require WVU to provide a certified physical education teacher to teach and oversee the program at CES. This teacher is employed by WVU under a non-tenure, ten-month academic appointment at the rank of Clinical Instructor in the Physical Education Teacher Education Department of the School of Physical Education. The position is currently held by Heather Rinkevich.

4. As a full-time member of the WVU faculty Ms. Rinkevich is responsible for teaching clinical elementary physical education classes in the public school system (CES), providing supervision to approximately forty WVU students who are assigned to the clinical placement, conducting applied research, and performing departmental responsibilities as assigned. 5. At CES Ms. Rinkevich, along with the WVU students, teaches thirty to forty physical education classes per week. To facilitate integration of her program into the CES curriculum, she also attends staff meetings, and supervises students during breakfast, lunch, recess and bus duty. Ms. Rinkevich is supervised and evaluated by both the CES principal and her WVU supervisor.

6. Should the WVU contract be discontinued, CES would be assigned a half- time physical education teacher, consistent with assignments at similarly-situated schools.

Discussion

Initially, MCBE contends that this grievance was not filed within the statutory time frame, and should be denied on that basis. 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).

As to when a grievance must be filed, 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 thenature 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, stating "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."

The matter being challenged by Grievant is the posting for a position of physical education teacher at CES. MCBE argues that the grievable event, the creation of the position, was well over a decade ago. MCBE further argues that Grievant may not pursue this matter under the discovery exception to the time lines because Grievant was well aware of the contract with WVU for the services during the 2002-2003 school year, and did not file a grievance until August 2003. Grievant asserts that he filed this matter within fifteen days of MCBE voting to renew the contract with WVU on July 22, 2002. Viewing the renewal of the contract as the grievable event, the grievance was timely filed.

As the merits of 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); Hollyv. 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant argues that the position at CES must be posted and filled in compliance with W. Va. Code § 18A-4-7a, which provides, in part:

Openings in established, existing or newly created positions shall be processed as follows:

(1) Boards shall be required to post and date notices which shall be subject to the following:

(A) The notices shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

(B) The notice shall be posted within twenty working days of the position openings and shall include the job description.

Grievant also relies upon Boner v. Kanawha County Board of Education, 197 W. Va. 176, 475 S.E.2d 176 (1996), in which the West Virginia Supreme Court of Appeals determined that a board could not abolish full-time homebound teaching positions and provide the instructional services with hourly employees. The plan was found to be in contravention of the contractual scheme of employment contemplated by statute. Grievant also cites Jones v. Braxton County Board of Education, Docket No. 00-04-090 (July 28, 2000), which held that the hiring of independent contractors to perform the full-time dutiesof service personnel positions was inconsistent with the contractual scheme of employment for school personnel.

MCBE asserts that the present situation is clearly distinguishable from those cases relied upon by Grievant since they have not contracted with Ms. Rinkevich, but with WVU, for a program that is vastly different from the typical teaching situation. In fact, MCBE advises that should the WVU program cease to exist at CES, it would be replaced with only a .5 FTE teacher, consistent with other schools of similar size.

This Grievance Board has examined the issue of contracting out services in a variety of situations. See Jones, supra. However, this case differs in that MCBE is not seeking to supplant employees through private contractors, but is cooperating with WVU in a mutually beneficial program. This program provides services to CES which could not be provided by even a full-time teacher employed by MCBE. Because the program involves WVU students, CES students are able to enjoy

physical education classes on a daily basis with a very low teacher/pupil ratio. A regularly-employed teacher could not provide the individual attention the students now receive. Because the type of services provided by this program cannot be provided by MCBE alone, and because WVU hires and supervises the teacher for the program, there has been no violation of W. Va. Code § 18A- 4-7a.

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 andBrown 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).

2. 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.

3. The grievance was timely filed within fifteen days of MCBE voting to enter into the agreement with WVU for the 2003-2004 school year.

4. A board of education must post vacancies for existing or newly created positions for at least five working days. W. Va. Code § 18A-4-7a.

5. In general, a board of education may not employ independent contractor to fulfill the duties of regular, full-time employees, because such an arrangement would be in contravention of the contractual scheme of employment contemplated by statute. See Boner v. Kanawha County Board of Education, 197 W. Va. 176, 475 S.E.2d 176 (1996); Jones v. Braxton County Board of Education, Docket No. 00-04-090 (July 28, 2000).

6. Because MCBE's contract with WVU is for a program which MCBE could not provide, the fact that it includes a full-time teacher for one school is an exception to the W. Va. Code § 18A-4-7a requirement that all positions be posted.

Accordingly, the grievance is **DENIED**. Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia 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: MARCH 8, 2004 _____

SUE KELLER SENIOR ADMINISTRATIVE LAW JUDGE