BARBARA PERKINS,

Grievant,

v. **DOCKET NO. 04-29-214**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Barbara K. Perkins filed this grievance against her employer, the Mingo County Board of Education ("Respondent") on April 5, 2004 , claiming personnel positions at a newly-created Burch PreK-6 school should have been posted.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on July 21, 2004. Grievant represented herself with the assistance of Leah Musgrave, and Respondent was represented by counsel, Kelly Kimble of Kay, Casto & Chaney, PLLC. This matter became mature for decision on August 20, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent as a secretary at Varney Grade School ("VGS"). 2. At the end of the 2003-2004 school year, VGS and Burch Middle School were closed, and the Burch Middle School building will be used to house a new Burch PreK-6 School.

3. Following its general practice, Respondent did not terminate the positions of the service personnel based at the Burch Middle School building and post those as new positions assigned to the new Burch PreK-6 School that will use the same physical plant.

4. Grievant has greater seniority than the secretary currently assigned to Burch PreK-6, who

was formerly the secretary of Burch Middle School.

5. Respondent held public hearings and approved the school closure and consolidation in November, 2003. In January, 2004, it posted several service personnel positions for the 2004-2005 school year, and included none specifically for the new Burch PreK-6 School, and no secretarial positions.

6. On February 13, 2004, Grievant met with Randy Keathley, Assistant Superintendent of Schools and Board member Nell Hatfield to discuss her displacement. (See footnote 1) Respondent had already posted the new service personnel positions associated with Burch PreK-6, and did not post a secretarial position. She was told that position would not be posted.

DISCUSSION

Respondent has asserted as a defense in this matter that the grievance was not timely filed. 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). Timeliness is an affirmative defense, and the burden of provingthe 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, supra.*

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4(a); *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Seifert*, *supra*.

By her own admission, Grievant knew unequivocally as early as February 13, 2004, that the secretary position she seeks would not be posted. She was told this by the Assistant Superintendent, so she had reason to rely on the information. Nevertheless, she waited until April 5, 2004, to initiate her grievance. Respondent has met its burden of proving the grievance untimely.

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). Grievant makes no excuse for the delay, but asserts the grievance was not untimely because it was filed after she received a letter, on

March 31, 2004, informing her officially that her position at VGS was abolished due to the closure of the school. However, in her lengthy Statement of Grievance, Grievant only takes issue with the non-posting of the service personnel positions, specifically the secretarial position. She asserts that Burch PreK-6 is a “New School” as discussed in *Jarvis, et al. v. Mason County Bd. of Educ.*, Docket No. 03-26-103 (June 6, 2003), and therefore all its positions are newly-created andshould be posted. She never takes issue with the closure of VGS, the elimination of her position there, or her resultant transfer. Thus, the March 31, 2004 letter was not the event from which the time limits are measured.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. 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. Dep't of Transp./ 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.*

2. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4(a); *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). 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).

3. Grievant was unequivocally notified that no secretarial position would be posted for the new Burch PreK-6 School more than fifteen days prior to her initiation of this grievance. That being the event grieved, this grievance is untimely.

4. 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). *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).

5. Grievant did not demonstrate a proper basis to excuse her untimely filing.

6. This grievance is untimely, and its merits are therefore beyond the purview of this Grievance Board.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: August 31, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant was to be transferred unassigned upon closure of VGS.