PEGGY GOINS,

Grievant,

v. **Docket No. 04-27-208**

MERCER COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

The grievant, Peggy Goins ("Grievant"), seeks back pay for a period of time she claims she was underpaid by her employer, respondent Mercer County Board of Education ("BOE"). She also claims entitlement to be compensated at pay grade E during the 2003- 2004 school year. The grievance process was initiated on February 6, 2004. At Level I, Grievant's immediate supervisor took the position that she was not the appropriate person to resolve this grievance.

A Level II hearing (See footnote 1) was held on April 28, 2004, during which Grievant clarified that she was seeking back pay from September 2001 to December 2002. BOE objected to the grievance as untimely. A Level II decision denying the grievance as untimely was issued on May 26, 2004. Although the grievance was denied as untimely, the Level II grievance evaluator directed that Grievant's job title be corrected and her pay rate adjusted "to theappropriate rate" for the entire period that Grievant had questioned. Level III was bypassed.

This Level IV appeal was filed with the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on June 3, 2004. A Level IV hearing was held on September 1, 2004, at the Grievance Board's hearing room in Beckley. At the Level IV hearing, Grievant was represented by attorney John Roush of the West Virginia School Service Personnel Association. BOE was represented by attorney Kathryn Reed Bayless. This grievance matured for decision on October 4, 2004, after both parties submitted proposed findings of fact and conclusions of law. (See footnote 2)

The statement of grievance, dated May 31, 2004, framed the issues for Level IV as follows:

> Grievant, a teacher's aide, contends that the Respondent [BOE] incorrectly paid her on a pay grade “C” rather than pay grade “E” from September 2001 through January 2003. Respondent has now reduced Grievant's pay to pay grade “D.” Grievant alleges a violation of . . . West Virginia Code §§ 18A-4- 8, 18A-4-8a, & 18A-5-8.

For relief, “Grievant seeks back pay with interest, repayment of any alleged overpayments deducted from her salary, and reinstatement to pay grade 'E'.” BOE has represented that it is not seeking, and does not intend to seek, reimbursement of overpayments. With respect to the issue of back pay, BOE asserts that this grievance is not timely. BOE also argued that Grievant was properly compensated for her position during the 2003-2004 school year. Upon 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. Grievant has been employed by BOE as a service employee since approximately 1997.

2 2. Initially she worked as a custodian but, in 1999 or 2000, Grievant became a teacher's aide.

3 3. During her tenure as a teacher's aide, Grievant has transferred a number of times, not only between schools but also from one type of assignment to another. Her status as a part-time or full-time employee has varied, as well.

4 4. In each of her positions, Grievant has served as a supervisory aide within the meaning of West Virginia Code section 18A-5-8(a), which provides, in pertinent part, that “any aide who agrees to do so shall stand in the place of the parent or guardian and shall exercise such authority and control over pupils as is required of a teacher[.]”

5 5. When acting as a supervisory aide, Grievant was entitled to receive “a salary not less than one pay grade above the highest pay grade” she would otherwise hold. W. Va. Code § 18A-5-8(c).

6 6. Grievant's classification within the hierarchy for aides (Aide I through Aide IV) varied with her assignments. The appropriate classification for a given aide assignment depends upon variables such as whether the aide works with special education students or has college credit.

7 7. Similarly, the appropriate pay grade for Grievant, as for all aides, depended upon the classification that was applicable to her during a given assignment. As noted, she was bumped up an additional pay grade for performing supervisory duties.

8 8. Grievant and other aides are eligible for certain monthly salary supplements based upon a variety of factors, such as holding a high school diploma (See footnote 3) or obtaining a certain number of credits for college or vocational classes. (See footnote 4)

9 9. In September 2001, Grievant provided BOE with documentation that she had successfully completed two semesters of an Office Technology course at the Mercer County Vocational Technical Center during the 1993-1994 academic year. Grievant received 3 credits for 501 hours of instruction during the first semester. She also received 3 credits for 516 instructional hours during the second semester.

10 10. Grievant's understanding, when she submitted the documentation of her vocational credit, was that such credit would entitle her to receive a salary supplement.

11 11. Grievant noted that she received an increase in the amount she was being paid after she submitted the documentation of her vocational credit.

12 12. At some point in time, which was never specified, Grievant's pay stubs began to carry an inaccurate notation of “60 hours college credit.”

13 13. The credit Grievant received for the office technology classes was not college credit.

14 14. Grievant has never taken any college classes.

15 15. Grievant was unaware that there is a difference between vocational credit and college credit. Level II Tr. 15.

16 16. In December 2002, Grievant received a copy of “The Board of Education of the County of Mercer Service Personnel Salary Schedule for July 1, 2002 - June 30, 2003.” Grievant's Exhibit 3 at Level II. This led Grievant to question BOE's payroll coordinator as to why she was being compensated at pay grade C.

17 17. Grievant informed BOE's payroll coordinator of her opinion that she should be compensated at pay grade E on the grounds, albeit incorrect, that she was “a supervisory aide with college hours[.]” Level II Tr. 11.

18 18. As a result of Grievant's inquiry, she was raised to pay grade E, effective January 2003. This change in pay grade was prospective only.

19 19. Thereafter, Grievant and her representative, Douglas Hale, president of the Mercer County Service Personnel Association, made informal efforts to obtain back pay for Grievant. These efforts did not produce the desired results.

20 20. On February 6, 2004, which was over a year after her pay grade was changed to E, Grievant filed her grievance at Level I seeking “back pay from December 1999 to December 2002” on the grounds that she was “being paid on pay grade C and should have been paid on pay grade E as supervisory pay.” During the Level II hearing, Grievant changed the dates for which she sought back pay to September 2001 to December 2002. Level II Tr. 3.

21 21. Prior to being moved to pay grade E in January 2003, Grievant had been paid at pay grade C. This grade was based upon her classification as an Aide II, which would have placed her, initially, at pay grade B. In light of the fact that she was functioning as asupervisory aide, Grievant was entitled to be compensated at one additional level above what her pay grade would otherwise have been, which placed her at C.

22 22. During the review of her employment record, BOE came to the conclusion that Grievant should not have been elevated to a pay grade E in January 2003.

23 23. Based on its review of Grievant's employment records, BOE also noted that, as a result of mistakes on the part of BOE's payroll department, Grievant had been overpaid for a period of time. These overpayments arose when BOE failed to adjust Grievant's pay grade when she transferred from one position to another with a lower pay grade. BOE is not seeking reimbursement from Grievant for any resulting overpayments.

24 24. BOE has raised the affirmative defense that this grievance is untimely.

25 25. At the time she filed this grievance, Grievant was working as an aide in a kindergarten program for four-year old children. This did not entail working with special education students.

26 26. The Level II grievance evaluator determined that, in her capacity as an aide with the kindergarten program for four-year old children, Grievant was an Aide II, which falls within pay grade B. She further determined that, with the bump up for supervisory duties, Grievant was at pay grade C for the 2003-2004 school year.

Discussion

This grievance does not involve a disciplinary matter. Therefore, Grievant bears the burden of proving this grievance by a preponderance of the evidence. “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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

The chief thrust of this grievance is Grievant's claim of entitlement to back pay from September 2001 to December 2002. This claim is predicated upon her assertion that she was compensated at the wrong pay grade throughout that time. Determining Grievant's proper pay grade for a given period of time requires identification of both her classification and her duties throughout that period. This information is not readily discernible from the record. It is, however, not necessary to put together the jigsaw pieces of Grievant's entire employment history because, as BOE correctly asserts, this grievance is untimely as it relates to Grievant's claim of entitlement to pay grade E during the time in question.

In pertinent part, West Virginia Code section 18-29-4(a) requires that a grievance be filed

> 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 the nature of the grievance and the action, redress or other remedy sought.

In the case of an on-going practice, such as compensating an employee at the wrong pay grade level, the deadline for filing a grievance is measured from the last occurrence of the grievable practice. Grievant's pay grade was adjusted from C to E at the beginning of January 2003. Therefore, even if it were assumed for purposes of argument, that Grievant had been paid at the wrong pay grade from September 2001 through December 2002, this practice clearly stopped as of Grievant's January 2003 upgrade to pay grade E.

Grievant did not file this grievance until February 6, 2004, well over a year after the last occurrence of what Grievant claims was a grievable practice. This clearly falls outside of the fifteen-day statute of limitations for grieving the pay grade or grades at which shewas compensated during September 2001 through December 2002. As to the back pay claim, the grievance is untimely.

A grievant may avoid dismissal for lack of timeliness by providing an adequate explanation for her delay in filing the grievance. By way of explanation for her delay in this case, Grievant points to the fact that she and her representative were seeking relief through informal avenues. It is well-established that such informal efforts, while laudable, do not toll the statutory deadline for filing a grievance. *Livesay v. Upshur County Bd. of Educ.*, Docket No. 04-49-187 (Sept. 15, 2004); *Smith v.*

Hancock County Bd. of Educ., Docket No. 93-15-358 (Mar. 31, 1994). Grievant would have been well-advised to file her grievance and stay the proceedings while she and her representative pursued a resolution of her dispute with BOE. Grievant's explanation for her delay fails to excuse the untimely filing.

The fact that Grievant's back pay claim is untimely eliminates any need to address the fact that BOE now asserts that it made a mistake in elevating Grievant to a pay grade E. Therefore, Grievant's back pay claim for the period of September 2001 through December 2002 will not be addressed on the merits.

As noted, BOE is not attempting to recover any overpayments Grievant may have received. The only issue that remains to be addressed is Grievant's assertion that she should have been compensated at pay grade E during the 2003-2004 school year. This claim of entitlement is based upon Grievant's perception that she should have been classified as an Aide IV during her work with the four-year old kindergartners. An Aide IV starts at pay grade D. An Aide IV with supervisory responsibilities would be bumped up a level to pay grade E. The flaw in Grievant's argument is that she does not qualify as an Aide IV, which is defined as follows:

> "Aide IV" means personnel referred to in the "Aide I" classification who hold a high school diploma or a general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education, or who have completed fifteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in- service training program determined by the state board to be the equivalent of three hours of college credit[.]

W. Va. Code § 18A-4-8(i)(11). Grievant lacks the requisite college credit in order to meet the foregoing definition. Grievant essentially asks the Grievance Board to expand the definition for an Aide IV. Such expansion of a statute is beyond the scope of the Grievance Board's authority.

Grievant relies upon the provisions of West Virginia Code section 18A-4-8a(3) to support her argument that vocational school credit should be treated as synonymous with college credit for purposes of determining whether Grievant falls within the Aide IV classification. The cited statute provides for discrete monthly salary supplements for service personnel who meet specified criteria. The supplements are based upon a specified number of “college hours or comparable credit obtained in a trade or vocational school as approved by the state board[.]” Grievant reasons that if college hours and vocational school credits are comparable for purposes of West Virginia Code

section 18A- 4-8a(3), the terms should be interchangeable within the statutory definition of an Aide IV.

To the contrary, it is clear that the legislature recognizes that there is a distinction between college and vocational credit. Otherwise, there would have been no point in writing the salary supplement criteria in the alternative. Supplementing the statutoryqualifications for being classified as an Aide IV falls within the scope of the legislature's authority, not the Grievance Board's. Further, a *de facto* amendment of the statute, which would result from importing additional qualifications into the statutory definition of Aide IV, would violate the well-established rule that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

Grievant simply does not fit into the Aide IV category. Therefore, she was properly determined to be an Aide II, which is a pay grade C. Based on a bump up of one level for her supervisory duties, Grievant's proper pay grade for the 2003-2004 school year was D.

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

Conclusions of Law

1 1. A claim of untimeliness is an affirmative defense. The burden of proof rests upon the party asserting the defense to prove it by a preponderance of the evidence. *Hale v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996). A grievant may then attempt to demonstrate that she 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 2. With respect to her back pay claim for September 2001 through December 2002, BOE met its burden of proving that Grievant failed to comply with the requirement, set forth in West Virginia Code section 18-29-4(a), that 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.

3 3. Informal efforts to resolve the grievable issue do not relieve a potential grievant of the requirement to bring a grievance within the statutory time frames. Accordingly, Grievant was unable to demonstrate that there were legitimate grounds for excusing her failure to timely file her grievance relating to her compensation for the period from September 2001 through December 2002.

4 4. Grievant's request for “repayment of any alleged overpayments deducted from her salary” are moot due to BOE's representations that it has not, and will not, seek repayment from Grievant of any prior overpayments to her.

5 5. Grievant's request to be reinstated to pay grade E does not relate to a disciplinary matter. As such, Grievant bears the burden of proving her claim of entitlement to pay grade E. 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).

6 6. 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).

7 7. To be compensated at a pay grade E, Grievant would need to prove that she was functioning as an Aide IV with supervisory responsibilities. She cannot meet this burden because she lacks the college credit necessary to satisfy the requirements, set forth in West Virginia Code section 18A-4-8(i)(11), for the Aide IV class title. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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 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: December 20, 2004

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Jacquelyn I. Custer

Administrative Law Judge

Footnote: 1

References to pages in the transcript of the Level II hearing shall appear as "Level II Tr. ___."

Footnote: 2

Grievant's submission was outside of the deadline agreed upon by the parties. However, it was received without objection from BOE and has, therefore, been given due consideration.

Footnote: 3

W. Va. Code §18A-4-8a(3).

Footnote: 4

W. Va. Code § 18A-4-8a(3)(E).