SANDRA SANDERS,

Grievants,

v. Docket No. 04-03-370

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sandra Sanders, filed this grievance against her employer, the Boone County Board of Education ("BCBOE") on September 8, 2004. The Statement of Grievance reads, "I was wrongly denied an extracurricular assignment." The relief sought is "reinstatement to the position and back pay."

This grievance was denied at Levels I and II, and Level III was waived by BCBOE. Grievant appealed to Level IV on October 13, 2004, and the parties agree to submit this case on the record developed below. This case became mature for decision on November 15, 2004, the date the parties' proposed findings of fact and conclusions of law were received. (See footnote 1)

Issues and Arguments

Grievant asserted she should have automatically received the position of Evening Adult Education Coordinator at the Boone Career Center ("BCC") for the 2004 - 2005 school year because she held the position the year before. Grievant also asserted BCBOEhad violated W. Va. Code §§ 18A-2-7 and 18A-4-16. (See footnote 2) **Grievant does not assert she was more qualified for the position than the successful applicant.** (See footnote 3)

BCBOE averred the contract for the position ended at the close of the 2003 - 2004 school year, BCBOE is required to post positions at the BCC annually pursuant to W. Va. Code § 18-5-19b, the grievance was untimely filed, and Grievant was not the most qualified applicant for the position.

The parties agree BCBOE was required to post the Evening Adult Education Coordinator annually.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as an Allied Health Instructor at BCC, and she has held this position for 31 years.

2. Grievant applied for and received one of the two Evening Adult Education Coordinator positions at BCC for the 2003 - 2004 school year.

3. Grievant signed a contract for this position on August 14, 2003, which stated, "The period of this assignment shall be from 8-18-03 to 6-30-04 and has been mutually agreed upon by the Board, the Superintendent and the teacher, coordinator/curriculum writer or other assignee." This contract also states, "The parties to this contract herebyacknowledge that this ASSIGNMENT AGREEMENT is entered into pursuant to West Virginia Code § 18-5-19b and is subject to its provisions(as applicable)." The maximum number of hours Grievant could work in this position was stated in the contract as 550 hours. Admin. Ex. 1 at Level II.

4. Grievant was aware at the time she signed this contract that it ended on June 30, 2004. Test. Grievant, Level II Hearing.

5. The Evening Adult Education Coordinator answers the phone, copies materials, completes paperwork, oversees the classes and the building, and locks up.

6. Rodney Smith, the successful applicant, had held the Evening Adult Education Coordinator for five to six years prior to 2003 - 2004 school year, was previously the Director of the Vocational Education, and had extensive experience in the adult education area.

7. The position was posted for the 2004 - 2005 school year on or about July 30, 2004, with the deadline for applications listed as August 4, 2004. Grievant applied on August 2, 2004.

8. Grievant knew at the time of her application that BCBOE could select someone else for the position. Test. Grievant, Level II Hearing.

9. Grievant did not discuss her assertion that she should have automatically received

the position with her supervisor until August 30, 2004, and she did not file her grievance until September 8, 2004.

10. The Evening Adult Education Coordinator positions are posted every year as required by W. Va. Code § 18-5-19b. Many times the individuals who previously held theEvening Adult Education Coordinator positions the year before received it the following school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 (2004); 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). 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant's assertions are somewhat confusing, as she agreed at Level II that BCBOE is required to post the position every year, no one promised her she would receive the position for the 2004 - 2005 school year, but she still believed she should have received the position because she held it the year before and completed her duties in a satisfactory manner.

I. Timeliness

At the Level II hearing, BCBOE properly raised the issue of timeliness. Respondent notes Grievant, by her own testimony, was aware when her contract ended, knew the position would be posted for the 2004 - 2005 school year, was aware someone else could be selected for the position, and applied for this posted position August 2, 2004. Grievant did not file this grievance until September 8, 2004. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26- 394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health & Human Res., Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket

No. 96-BEP- 484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate that 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), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). 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). An untimely filing, if proven, 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).

W. Va. Code § 18-29-4(a)(1) 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 the nature of the grievance and the action, redress or other remedy sought.**

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). 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). However, the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), stated "W. Va. Code, 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance."

Grievant knew "of the facts giving rise to [her] grievance," at the very least by the date the Evening Adult Education Coordinator position was posted in late July 2004, and did not file her grievance until September 8, 2004. This grievance is untimely filed.

II. Entitlement to position based on having held it the year before

Respondent is required to post all adult teacher/coordinator positions at BCC every year. W. Va. Code § 18-5-19b (c) states:

> **The board of education of any county shall have authority to enter into contracts of agreement with temporary teachers for the purpose of teaching adult education classes or programs which do not exceed ninety days or seven hundred twenty hours. The appointment of a temporary teacher is a contract of agreement for the duration of the class or program, and the temporary teacher shall not accrue benefits of retirement, personal leave, medical or life insurance, seniority rights, or any other provisions relating to salaries, wages and benefits pursuant to article four, chapter eighteen-a of this code: Provided, That such temporary appointment does not precludethe benefits mandated by federal law, workers' compensation and liability insurance coverage for the duration of the class or program.** (See footnote 4)

(Emphasis added).

W. Va. Code §18-1-1(g) defines "Teacher" as "teacher, supervisor, principal, superintendent or public school librarian; registered professional nurse, licensed by the West Virginia board of examiners for registered professional nurses and employed by a county board of education, who has a baccalaureate degree; or any other person regularly employed for instructional purposes in a public school in this state. " (Emphasis added).

It is clear from the record that Grievant was hired as a supervisor for the adult education evening classes for the 2003 - 2004 school year only, and her contract did not exceed the specified seven hundred twenty hours. Her contract succinctly stated these facts and the applicable law. Grievant was not entitled to the position the following year. Additionally, since she does not contend she was more qualified than the successful applicant, there can be no finding that Grievant should be have received the Evening Adult Education Coordinator position for the 2004 - 2005 school year.

Another issue should also be noted. Grievant's Evening Adult Education Coordinator contract ended according to its own terms on June 30, 2004. The starting and ending dates of the contract were known on the date the contract was issued and signed. As previously held by this Grievance Board, when a contract "entered into pursuant [to statute] ceases to exist and that cessation is expressly provided for in the terms of the contract, the contract comes to an end by its own terms and is not subject to theprocedural requirements of [W. Va. Code 18A-2-8a]." Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994). See Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995). Grievant's contract ended by its own terms, thus, no violation of statute occurred.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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); 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). 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. This grievance was untimely filed, as Grievant was aware of the facts giving rise to her grievance at the time she signed her contract on August 18, 2003, and again when the position was posted in late July 2004, and she did not file this grievance until September 8, 2004.

3. Respondent is required by W. Va. Code § 18-5-19b(c) to post all adult teacher/coordinator positions at the BCC every year.

4. Grievant's contract of employment expired under its own terms as contemplated by the parties when the 2003 - 2004 school year ended. Underwood v.Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995); Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

3. Grievant received adequate notice at the time of her hiring and in her contract that her assignment was for the 2003 - 2004 school year only. Underwood, supra.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: January 14, 2005

Footnote: 1

Grievant was represented by Gary Archer of the West Virginia Education Association, and Respondent was represented by counsel, Tim Conaway, Esq. Mr. Archer elected not to submit proposals

---

Footnote: 2

See note 3 supra.

Footnote: 3

During the Level II hearing, there was some discussion about whether retired BCBOE employees could hold these positions, but as this issue was not addressed with any specificity, and no Code Sections were mentioned this issue will not be considered further.

Footnote: 4

As this Code Section clearly states the provisions of W. Va. Code § 18A-1-1, et seq. do not apply to these contract Grievant's assertions about W. Va. Code §§ 18A-4-16 and 18A-2-7 will not be discussed.