MARSHA WEAVER,

Grievant,

v. DOCKET NO. 05-22-348

LINCOLN COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Marsha Weaver filed this grievance on September 13, 2005, challenging her classification. At level two, the grievance was denied and dismissed on the grounds that it was untimely. Level three was waived, and the decision was appealed to level four. The parties have agreed that the sole issue now at level four is timeliness, and have requested that if the grievance is found to be timely, it should be remanded to level two for a hearing on the merits.

A level four hearing was held in the Grievance Board's office on October 18, 2005. For purposes of hearing only, this matter was combined with a similar case, *Pritchard v. Lincoln County Bd. of Educ.*, Docket No. 05-22-349. Grievant was represented by Gary Archer of the West Virginia Education Association, and Respondent was represented by counsel, Rebecca Tinder, of Bowles Rice McDavid Graff & Love, LLP. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

At issue is whether Grievant timely challenged a promotion decision that dropped her classification title of Executive Secretary.

No record was developed at level two. Based on a preponderance of the evidence adduced at level four, I find the following material facts have been proven:

Findings of Fact

1. Until August 1, 2005, Grievant was employed by Respondent as an Executive Secretary in the finance office.

2. In late- or mid-July, 2005, Grievant's supervisor sent Superintendent William Grizzell a letter recommending that Grievant be promoted to Coordinator of Human Benefits.

3. Superintendent Grizzell approved the recommendation and told Grievant of the proposed promotion. (See footnote 1) He then made the recommendation to the Board of Education, which approved the change at its August 1, 2005, meeting.

4. On August 2 or 3, 2005, Grievant was sent a letter from the Board's secretary notifying her of the promotion, and the action also appeared in the Board's meeting minutes.

5. Grievant assumed, without foundation for doing so, that her promotion to Coordinator would be to a multiclassified Coordinator/Executive Secretary. When she saw the Board meeting minutes on August 3, 2005, she learned she was not multiclassified.

6. Grievant, on August 4, 2005, approached the Personnel Director, Randy Huffman, about being reclassified with a multiclassification title of Coordinator/Executive Secretary. The Personnel Director brought the request to Superintendent Grizzell, who thought it was a good idea and planned to make the recommendation at the next Board meeting to be held on August 22, 2005.

7. Grievant attempted to set up a meeting with the Superintendent, and was unsuccessful. Mr. Grizzell finally met with Grievant on August 12, 2005, in Mr. Huffman's office, when she came in while he was there on other matters. Superintendent Grizzell toldGrievant he did not have a problem with the multiclassification, that he was “working on the issue,” and that he would put it on the agenda for the next Board meeting.

8. Before the next Board meeting, another employee filed a grievance about pay (See footnote 2) for multiclassified Executive Secretaries. Superintendent Grizzell decided to defer a recommendation on Ms. Weaver's request until after that grievance is resolved, and did not mention it at the August 22 Board meeting. He did not inform Grievant that he had decided to wait.

9. When the Board meeting minutes came out on August 23, 2005, Grievant saw that her multiclassification request was not discussed.

10. Grievant met with Mr. Huffman again on August 26, 2005, and was told about the pending grievance and Superintendent Grizzell's decision to defer action on Grievant's multiclassification request.

11. Grievant called her union representative, Gary Archer, who met with Superintendent

Grizzell on September 1, 2005. Superintendent Grizzell told Mr. Archer no action on the reclassification request would occur until after the *Barrett* grievance was resolved.

12. This grievance was filed September 13, 2005, and was denied at level two by letter dated September 13, 2005, on the grounds that it was not filed in a timely manner.

Discussion

The underlying grievance in this matter does not challenge a disciplinary action, so Grievant normally would bear the burden of proving she should be reclassified, by apreponderance of the evidence. (See footnote 3) However, since the issue now is one of timeliness, the burden shifts to Respondent to prove the grievance was not timely filed. "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." (See footnote 4)

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. (See footnote 5) The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. (See footnote 6) Given the particular facts of this case, the time for filing this grievance began to run on August 26, 2005. The grievance was filed 13 days (See footnote 7) after this event, hence it was within the required time limit.

As in most personnel matters involving a school board, few things are unequivocal until after a Board meeting, which is the only time something definitive can happen. Respondent argues the time for filing the grievance should begin on August 3, 2005, when Grievant found out she has lost her Executive Secretary title. However, Grievant had not requested that title at the time, and had never requested multiclassification. The grievable event did not arise until she had made such a request and been turned down. It appears from the evidence that the parties to this matter were all attempting in good faith to resolve the matter. Grievant was told that Superintendent Grizzell approved the request and would recommend it to the Board. Up until he failed to do so, Grievant could not have filed a grievance because nothing adverse had happened to her. She was never notified prior to the August 22 Board Meeting that Superintendent Grizzell had changed his mind. On August 23, when Grievant saw the Board meeting minutes, there was only an absence of information,

nothing unequivocally indicating Superintendent Grizzell had decided not to recommend the requested reclassification. It was not until August 26, 2005, when Superintendent Grizzell told Grievant in no uncertain terms that he would not recommend her reclassification, if he did so at all, until after the *Barrett* grievance was finished.

"The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" (See footnote 8) In the absence of bad faith, substantial compliance is deemed acceptable. (See footnote 9) Grievant was working to have her reclassification request resolved informally, though the proper channels, and was assured by those decision-makers that the matter was being worked on. She had no complaint until she found out that progress had stopped indefinitely. When that occurred, she had fifteen days to file her grievance, and she timely did so.

Even if the grievable event was considered to be the initial action of the Board on August 1, Grievant's untimely filing would be excused by the actions of Superintendent Grizzell in reassuring her that he “was working on” the matter and that it would be resolvedin her favor. Grievant, under these circumstances, would be reasonable in believing her complaint would be resolved without the need to file a grievance. The principle of equitable estoppel excuses an untimely filing if it resulted from deliberate conduct by the employer or actions which the employer should have known would cause the employee to delay filing her claim. (See footnote 10) In this case, Superintendent Grizzell affirmatively told Grievant he would propose her requested multiclassification at an upcoming Board meeting, and she had no reason to believe he would do otherwise until after that meeting, at which time she promptly filed her grievance. On this basis, Respondent is estopped from asserting she should have filed earlier.

The following conclusions of law support this discussion:

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. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

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)(1). *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002).

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

4. "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra*; *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Toothman v. Marion County Bd. of Educ.*, Docket No. 05-24-036D (Apr. 15, 2005).

5. An untimely filing will only be excused on grounds of equitable estoppel if the untimely filing resulted from deliberate conduct by the employer or actions which the employer should have known would cause the employee to delay filing his claim. *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989)*; Pryor v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-341 (Oct. 29, 1997); *Lilly v. Raleigh County Bd. of Educ.*, Docket No. 94-41-195 (Nov. 28, 1994).

6. Grievant timely filed her grievance after she was unequivocally notified her classification request had been denied by the Superintendent. Respondent's assurances that her request would be granted effectively tolled the time for filing and estopped Respondent from asserting the grievance was untimely.

For the foregoing reasons, this appeal is hereby **GRANTED**. The level two decision denying the Grievance on timeliness grounds is hereby vacated, and this matter is **REMANDED** to level two for further proceedings. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County. Any such appeal must be filed within thirty 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.

November 9, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

At the same time, Superintendent Grizzell recommended another then-Executive Secretary, Angela Pritchard, for a promotion to Coordinator. Grievant and Ms. Pritchard took the actions mentioned in the following Findings of Fact together.

Footnote: 2

That grievance has advanced to level four as Barrett v. Lincoln County Bd. of Educ., Docket No. 05-22-381. It was recently submitted on the record and is not yet mature for decision.

Footnote: 3

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 4

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).

Footnote: 5

W. Va. Code § 18-29-4a. Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

Footnote: 6

Seifert, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).

Footnote: 7

"'Days' means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with [W. Va. Code § 18A-5-2]." W. Va. Code § 18-29-2(b).

Footnote: 8

Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998).

Footnote: 9

Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

Footnote: 10

See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).