THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MARY C. HIGGINS, et al.,

Grievants,

v. **Docket No. 06-42-120**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, (See footnote 1) employed by the Randolph County Board of Education ("Board") in the finance department, initiated this grievance on December 2, 2005, alleging that certain positions related to duties performed in the "Gear-Up" grant program should have been posted for the 2005-2006 school year. They request placement in these alleged extracurricular assignments, with back pay. The grievance was denied at all lower levels, and was appealed to level four on April 3, 2006. A hearing was conducted in the Grievance Board's office in Elkins, West Virginia, on July 10, 2006. Grievants were represented by John E. Roush, Esquire, of the School Service Personnel Association, and Respondent was represented by counsel, Ashley Hardesty. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 14, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievants are employed in the Board's central office in the finance department. Mary Higgins is a Computer Operator/Accountant III/Secretary III. Kelly Collett is a

Coordinator/Secretary/Accountant/Computer Operator, and Sharon Howell is an Accountant III.

2. Beginning in 2000, the Board received funds through a federal grant known as the “Gear-Up” program. Gear-Up provides funding to encourage students to prepare for and attend college, and follows a specific group of students for several years as they proceed through the public school system. Fairmont State University oversees the Gear- Up grant and administers the program, and works in conjunction with the RESA for each area where the program is used.

3. Grievants performed accounting duties related to the Gear-Up grant from 2000 through the summer of 2005. They were paid up to four hours of overtime each week for this work, regardless of the actual time spent performing the work.

4. In 2001, the Board determined that it was improper for Grievants to be paid overtime for the Gear-Up program, and posted a position for one individual to perform the duties they had previously done. (See footnote 2) The successful applicant was not one of the grievants.

5. Grievants filed a grievance regarding the removal of the Gear-Up duties, which was settled in January of 2002. Pursuant to that settlement, Grievants were allowed to continue performing the duties and be paid overtime for them, until the grant expired. The agreement also provided that any future positions arising from the grant would be properly posted as required by West Virginia law.

6. The previous Gear-Up grant, which is discussed above, expired at the conclusion of the 2004-2005 school year.

7. A new Gear-Up grant began with the 2005-2006 school year. Unlike the previous grant, this grant did not provide funding for any salaries related to accounting, secretarial, or clerical services. It only provided funding for a county coordinator, along with a coordinator and parent liaison at each school where the program is used. The grant was specific regarding how the funds were to be used, allotting specific amounts for all related expenses, such as teaching materials and field trips. The previous grant allowed the county discretion regarding use of funds for salaries and the positions which could accomplish the goals of the grant, while the new grant was very specific regarding what positions would exist in each county.

8. In September of 2005, RESA VII posted a vacancy for a County Coordinator/Facilitator for the Gear-Up program in Randolph County. A bachelor's degree or higher was required, and the successful applicant would oversee implementation of all grant requirements, coordinate with site coordinators and liaisons, manage the budget, order supplies and materials, and attend local and

state meetings. Carla Lambert was placed in this position.

9. Grievants continue to perform accounting functions under the new Gear-Up grant, but they do not work overtime to accomplish these tasks, and they receive no additional compensation. 10. A timeliness defense was asserted by the Board at level two of this grievance.

11. Grievants knew by early October of 2005 that RESA had not posted any accounting positions in connection with the Gear-Up Grant, and that they were continuing to perform duties associated with the grant, without additional compensation or overtime. This grievance was filed on December 2, 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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.

As a preliminary issue, Respondent contends that this grievance is untimely. 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, W. Va. 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 the nature of the grievance and the action, redress or other remedy sought.

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> 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."

Grievants have provided no explanation for their delay in filing. Accordingly, the undersigned finds that the Grievants knew by at least October of 2005 that they would continue to perform duties associated with the new Gear-Up grant, with no positions postedand no additional compensation. Accordingly, the filing of this grievance on December 2, 2005, was untimely. (See footnote 3)

The following conclusions of law support this Decision.

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 and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

2. A grievance must be initiated 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. W. Va. Code § 18-29-4(a).

3. 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).

4. Grievants did not initiate their grievance within fifteen days of discovering the grievable event.

Accordingly, this grievance is **DISMISSED** as untimely filed.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Randolph 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 7, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The other grievants are Kelly Collett and Sharon Howell.

Footnote: 2

Although not specifically stated in the record, it appears that this was an extracurricular assignment.

Footnote: 3

It should be noted that, even on the merits, Grievants have established no entitlement to relief. The previous grant ceased to exist, and a new one with specific restrictions regarding salaries and positions was implemented. Grievants had no continuing right to "overtime" pay for positions which no longer exist. The evidence shows Grievants are compensated for their work and do not work overtime, so there is no entitlement to additional pay under these circumstances.