DALE LEE & RALPH BALL,

Grievants,

v. **DOCKET NO. 05-27-374**

MERCER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants filed this grievance on or about August 9, 2005, challenging Respondent's selection to fill a basketball coach position. Both grievants sought placement in the position, but Mr. Ball conceded that Mr. Lee would be entitled to it over himself.

A level four hearing was held in the Grievance Board's Beckley office on March 13, 2006. Grievants were represented by Ben Barkey of the West Virginia Education Association, and Respondent was represented by counsel, John H. Shott. The matter became mature for decision on April 10, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievants claim the selection for the coaching position was made in violation of W. Va. Code § 18A-4-7a, because it was not filled in accordance with the posting. Due to an error, the posting for the position required applicants to be professional employees of Mercer County Board of Education. The successful applicant was not. Respondent asserted the grievance was not timely filed, and even if it had been, Grievants could not prevail becausethey were not harmed by the inaccurate language of the posting. Respondent asserted that the grievance was not timely filed. Grievants also presented evidence the interviews were not conducted properly and improper criteria were used for the selection, but this issue was not stated in the grievance.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants are employed by Respondent as classroom teachers.

2. Respondent posted a position for head boys' basketball coach at Princeton Senior High School on April 27, 2005, and both grievants were among the applicants.

3. The position was filled on June 28, 2005 when the Board of Education adopted the recommendation of the interview committee. John Flournoy was the successful applicant.

4. Mr. Ball learned of the selection the same day the selection was made, and Mr. Lee found out the next day.

5. Grievants filed a prior grievance over the selection on July 26, 2005, asserting a different flaw in the selection process. That grievance progressed to level four, where it was denied. (See footnote 1)

6. Mr. Lee had applied for the position without seeing the actual job posting. He first saw the posting during the grievance process for the prior grievance.

7. Because an old posting template was used, the job posting required applicants to be employed by Respondent. This was not actually a valid criterion, and all applicants wereconsidered. Mr. Flournoy, who was hired, was an employee of the Fayette County Board of Education.

8. Neither grievant was the second choice of the interview committee.

9. Grievants filed this grievance on or about August 9, 2005.

10. Respondent has asserted the untimeliness of this grievance since level one.

Discussion

Respondent bears the burden of proving the grievance was not timely filed. *(See footnote 2)* Since an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed, (See footnote 3) Respondent's assertion will be addressed prior to considering the merits of Grievants' claim.

West Virginia Code § 18-29-4(a)(1) mandates that the grievance process be started within fifteen days following the occurrence of the event upon which the grievance is based. The posting and selection process at issue here concluded with the board meeting on June 28, 2005, and both Grievants knew of the outcome by June 29, 2005. The grievants filed a separate grievance over the same facts in July, 2005. In that grievance, they argued that Respondent employed Mr. Flournoy without the consent of either board of education, in violation of Secondary Schools Activity Commission regulations. While that grievance was pending, the grievants filed this claim that the

interview committee used arbitrary and capricious standards in selecting the most qualified applicant. There is no record of Grievants having attempted to amend their prior grievance statement, and the timeliness of that claim, which was decided on its merits, does not appear to have been challenged. Grievants now put forth a new challenge to the same Board action, but under a different legal theory. However, "It is not the discovery of a legal theory which triggers the statute, but the event" that forms the basis of the grievance. (See footnote 4) Mr. Lee claims, however, that he did not become aware of the challenged language of the job posting until August, and timely filed this grievance as soon as he knew. Mr. Ball had seen the posting, and knew of its language all along. Respondent argues that, because of the joint grievance filed previously, Mr. Lee should be charged with constructive knowledge of the posting.

With respect to Mr. Ball, this grievance is untimely. But the “discovery rule” built in to the grievance procedure applies to Mr. Lee's claim that he did not know of the posting requirement until much later. “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.” (See footnote 5) There is no specific evidence of the date Mr. Lee found out about the posting, and his claim that he filed timely after so learning is unrebutted. As to Mr. Lee, then, the grievance is timely.

However, the error in the posting did not harm Mr. Lee. Although the posting, in one place, stated that all applicants must be current employees of Respondent, this was an error and contravened Board policy. West Virginia Code § 18-4-7a requires boards of education to post new positions so as to encompass the largest possible pool of applicants, and prohibits them from including or considering criteria “which are not necessary for the successful performance of the job.” Respondent therefore properly considered all the applicants, at least one of whom was not then employed by Respondent. Grievant suffered no harm, because thepart of the posting he seeks to have enforced is unenforceable, and despite its inclusion, it was properly ignored by Respondent.

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. Dep't of*

Transp., 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. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra.*

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. "It is not the discovery of a legal theory which triggers the statute, but the event" that forms the basis of the grievance. *Lynch supra*; *Velez v. Higher Educ. Policy Comm'n*, Docket No. 03-HEPC-320 (June 13, 2005). 6. As to Mr. Ball the grievance is untimely, as to Mr. Lee it is timely because he learned of the fact being complained of within fifteen days of filing his grievance.

7. West Virginia Code § 18A-4-7a requires boards of education to post new positions so as to encompass the largest possible pool of applicants, and prohibits them from including or considering criteria “which are not necessary for the successful performance of the job.”

8. Grievant Lee did not meet his burden of proving Respondent violated W. Va. Code § 18A-4-7a by considering and hiring an applicant who was not then employed by Respondent.

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 Mercer 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.

April 28, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Ball and Lee v. Mercer County Bd. of Educ., Docket No. 05-27-431 (Jan. 20, 2006).

Footnote: 2

Heckler, infra.

Footnote: 3

Lynch, infra.

Footnote: 4

Id.

Footnote: 5

Syl Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).