MICHAEL WOLF,

Grievant,

v. **Docket No. 05-52-468**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Michael Wolf, ("Grievant") employed by the Wetzel County Board of Education ("WCBE") as a teacher, filed a level one grievance on October 17, 2005, in which he alleged his 2004-2005 performance evaluation was in violation of *W. Va. Code* §§ 18A-2- 12 and 18-29-2(m), as well as State Board of Education Policy 5310. For relief, he requested the evaluation and plan of improvement be rescinded. After the grievance was denied at levels one and two, Grievant waived consideration at level three and filed a level four appeal on December 30, 2005. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on March 9, 2006. Grievant was represented by Owens Brown of the West Virginia Education Association, and WCBE was represented by counsel, Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on April 12, 2006.

The following facts have been derived from a preponderance of the evidence made part of the record at level two and level four.

Findings of Fact

1. Grievant has approximately nineteen years of teaching experience, and has been employed by WCBE for twelve years. He has been assigned as a special education teacher at Magnolia High School at all times pertinent to this grievance. 2. One of Grievant's duties is to function as a case manager for the special education department. In that role, a number of students receiving special education services are assigned to Grievant who is to ensure that they have a proper Individual Education Plan ("IEP") for the year, and are receiving the education and related services required by the IEP. Grievant is required to schedule and attend the IEP meetings, request and arrange for reevaluations, and complete progress reports for each of the students.

3. During the 2004-2005 school year, Grievant was assigned as case manager for ten students. One of those students had a current IEP in his file; however, Grievant did not review the file until May. The student had received none of the special education services to which he was entitled that school year.

4. Upon learning of this matter, the Director of Special Education Kathi Schmalz and the Assistant Principal Debbie Talkington reviewed the files of other students who were assigned to Grievant. They found that another student who was scheduled for an IEP review in January, did not get one until May, and that information was missing in two other files.

5. Grievant did not timely prepare the progress reports for his students at the end of the first six-week period of the school year.

6. Grievant was presented with his annual performance evaluation on May 27, 2005. The evaluation rated his performance as meeting standards in six areas of responsibility, but as unsatisfactory in the area of “Professional Work Habits.” Written comments explained the rating was due to the previously described deficiencies. 7. On June 15, 2005, Grievant met with MHS Principal Tim Haught, Assistant Principal Talkington, and Director Schmalz to discuss th evaluation. The group met on August 31, 2005 to develop a plan of improvement.

8. On September 13, 2005, Grievant was presented with a plan of improvement. The plan was successfully completed prior to the level four hearing.

9. On September 16, 2005, Grievant advised his principal that he desired to initiate this grievance regarding his evaluation. An informal conference was conducted, and the grievance was denied, the same day. A level one grievance was subsequently filed on October 17, 2005.

10. WCBE raised the issue of whether the grievance was timely filed at the level two hearing, as is required by statute.

Discussion

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 his grievance and was unequivocally notified at the time of the evaluation on May 27, 2005. He did not request an informal discussion until September 16, 2005. Thus, the grievance was untimely filed.

At the level four hearing, Grievant explained the delay was because he “felt” Principal Haught was reluctant to place him on a plan of improvement, and he believed that his evaluation would be changed. There is no evidence in the record that Principal Haught, or any other supervisor, ever had

any intention of revising the evaluation. Grievant's hopefulness apparently led to a misperception; however, that does not constitute a proper excuse for the untimely filing.

Even if the grievance had been timely filed, Grievant failed to prove a violation of *W. Va. Code* §18A-2-12 or Policy 5310. A professional employee must be placed on an improvement plan when his performance is deemed unsatisfactory, so that he has the opportunity to correct the deficiencies. In this regard, *W. Va. Code* § 18A-2-12 states:

(f) A professional whose performance is considered to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

. . .

(h) Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight of this article.

W. Va. Code § 18A-2-12(3)(A) & (D) states the purpose of an evaluation is to "[s]erve as a basis for the improvement of the performance of the personnel in their assigned duties . . ." and "[s]erve as a basis for programs to increase the professional growth and development of professional standards." Evaluations should contain the standards for "satisfactory performance and the criteria for professional personnel to be used to determine whether the performance of each professional meets such standards . . .". *W. Va. Code* § 18A-2-12(4).

State Department of Education Policy 5310 provides that the immediate supervisor is responsible for the employee's evaluation, and must share the evaluation with the employee. The employee has a right to attach a written addendum to the evaluation. 126 C.S.R. 142 §§ 10.4, 10.5, and10.6. *Jones v. Braxton County Bd. of Educ*., Docket No. 97-04-311 (Apr. 28, 1998). The WCBE administrators complied by providing Grievant his evaluation; however, Grievant did not exercise his right to attach a

written addendum.

An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State Department of Education Policy 5310 and *W. Va. Code* §18A-2-12. *See Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact that a grievant disagrees with an unfavorable evaluation does not indicate it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *Romeo v. Harrison County Bd. of Educ*., Docket No. 17-88-013 (Sept. 30, 1988). *See Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7, 2000). Neither did Grievant prove that he has been treated differently than other teachers at Magnolia High School. Discrimination is defined in *W. Va. Code* § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant argues that a number of other teachers and/or administrators also did not track the student in question, therefore, he was not the only one who dropped the ball in this case. While that may be true, Grievant was the only case manager for the student, and it was primarily his responsibility to ensure that services were provided. Grievant failed to establish that other individuals were similarly situated to him and were unsatisfactory in their professional performance.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and . . . Grievant has the burden of proving [his] case by a preponderance of the evidence." *Baker v. Fayette County Bd. of Educ*., Docket No. 94-10-

427 (Jan. 24, 1995).

2. 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).

3. 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).

4. "[W]ithin fifteen days of the date on which the event became known to the grievant . . . the grievant . . . shall schedule a conference with the immediate supervisor todiscuss the nature of the grievance and the action, redress or other remedy sought." *W. Va. Code* § 18-29-4(a)(1).

5. Grievant did not request an informal conference within fifteen days of the date the event became known to him, and did not offer a proper basis to excuse his failure to file in a timely manner. *Higginbotham, supra*.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Wetzel 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: MAY 18, 2006

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE