MEREDITHE D. NAPPER,

Grievant,

v. **Docket No. 05-19-347**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Meredithe Napper ("Grievant") initiated this proceeding on July 1, 2005, alleging "three postings for 'Special Education Teacher' were not processed in accordance with WV Code 18A-2-1" and also that [Code §] 18A-2-8a was violated. She seeks "reinstatement to position for contract year 2005-2006," along with punitive damages. After denials at the lower levels, Grievant appealed to level four on September 21, 2005. A hearing was conducted in Westover, West Virginia, on January 23, 2006, at which time Grievant was represented by Pat Murphy, and Respondent was represented by counsel, Amy Brown. This matter became mature for consideration upon receipt of the parties' responsive written submissions on March 9, 2006.

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

Findings of Fact

1. Grievant began employment with Respondent as a special education teacher in the middle of the 2003-2004 school year at Charles Town Middle School. Because shehad not yet completed the requirements for full certification, she was employed pursuant to a First Class Permit in Multi-Categorical/LD/BD/MI, K-Adult.

2. Grievant was again employed for the 2004-2005 school year in the same position, pursuant to a new one-year permit, which expired on June 30, 2005.

3. During her employment as a special education teacher on permit, Grievant failed to obtain or provide evidence that she had completed the required six semester hours of education for permit

renewal.

4. On May 2, 2005, Grievant was notified in writing by Superintendent Steven Nichols that she would not be rehired as a probationary employee for the 2005-2006 school year.

5. Grievant did not request written explanation of the reasons that she was not rehired, nor did she request a hearing regarding this issue before the Board.

6. On May 13, 2005, Respondent posted vacancies for three special education teacher positions at Charles Town Middle School.

7. Grievant applied for all three vacancies within the posting period and was interviewed for the positions on June 13, 2005.

8. The three special education positions were reposted in late June in order to attempt to obtain fully certified applicants for all the positions.

9. Grievant attempted to file this grievance on June 24, 2005, after learning that the positions had been reposted, but there were no personnel working at Charles Town Middle School on a daily basis at that time. Grievant ultimately was able to contact Ann Workman, Assistant Principal, and filed the grievance at the end of the first week of July, 2005. 10. The special education teacher positions were filled by Kristin Fox, Amanda Pardine, and John Glymph. Ms. Fox and Ms. Pardine are fully certified special education teachers, and Mr. Glymph was issued a temporary permit for the 2005-2006 school year.

11. At the end of the 2004-2005 school year, 19 teachers were issued non- renewal letters. Of those teachers, eight were rehired for the 2005-2006 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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.

Respondent contends first, that this grievance is untimely as to the non-renewal of Grievant's contract, and second, that she was no longer an employee at the time she filed this grievance, therefore lacking standing. 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). 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). There are three "triggers" to the running of the ten-day time limit in which a grievance must be filed. West Virginia Code section 29-6A-4(a) specifies that a grievance must be filed:

> 1) Within ten days following the occurrence of the event upon which the grievance is based; or
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> 2) Within ten days of the date on which the grievable event unequivocally became known to the grievant; or
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> 3) Within ten days of the most recent occurrence of a grievable continuing practice.

See Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002); *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Spahr v. Preston Co. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

As Respondent has correctly argued, the non-renewal of Grievant's contract was a grievable event, and this claim was undisputedly filed well beyond the statutory ten-day time limit. However, Grievant contends that she did not believe she had been subjected to unlawful discrimination until she discovered that other teachers who received similar letters were ultimately rehired for the 2005-2006 school year. This situation is quite similar to the grievant's assertions in *Wilson v. Department of Health and Human Resources,* Docket No. 05-HHR-378 (Nov. 14, 2005). In that case, the grievant had accepted a voluntary demotion and pay cut. Years later, she claimed discrimination occurred when other employees were not required to accept similar conditions upon demotion. Because the grievable event was the Grievant's own demotion and salary cut, her claims were held to be untimely. Similarly, in this case, Grievant knew in May of 2005 that her contract wasnot being renewed, did not request reasons or a hearing before the Board, and did not file a grievance until July.

Moreover, the simple fact that other employees were eventually re-employed for the ensuing school year does not establish that Grievant has been subjected to discrimination.

A grievant must establish a case of discrimination, as defined by W. Va. Code § 18-29- 2(m), by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004). With no evidence regarding the specific details of the other employees' situations, it is impossible for Grievant to establish they were similarly situated. It is unknown whether these employees needed to obtain education which they provided proof of after receiving non-renewal letters, or whether some of them may have applied for entirely different positions, for which they were qualified, for the upcoming school year. Therefore, Grievant cannot establish discrimination with regard to her non- renewal. In addition, as discussed below, Respondent acted within its discretion not to continue Grievant's employment, when she had failed to obtain the required college credit hours for permit renewal.

As to Grievant's claims regarding the posting of the special education position, Respondent contends that she has no standing to grieve this issue, because she is nolonger an employee. “Grievance” is defined as “any claim by one or more affected state employees . . . .” W. Va. Code 29-6A-2(i). The Grievance Board has determined that

> persons who no longer hold employment status [were] generally not eligible to use the grievance procedure once the employment relationship was terminated, unless such termination is the subject of their grievance, **or their grievance was initiated before their employment relationship was severed, and the subject matter of such grievance was not rendered moot by termination of their employment status**. [Citations omitted.]

Jackson v. Div. of Corrections, Docket No. 97-CORR-345 (Jan. 30, 1998)(Emphasis added). Because Grievant was, in fact, still an employee when she attempted to file this grievance (which efforts were thwarted by the lack of any employees being physically present at the school), she does have standing to pursue it.

As to the merits of Grievant's contentions regarding the three special education positions, it appears that she is arguing that she was one of the top three most qualified applicants and that the positions should not have been reposted. Respondent contends that it had no obligation to even consider Grievant for these positions, or any other uncertified applicant, because she was not qualified. Indeed, W. Va. Code § 18A-4-7a(d), states that the applicants' qualifications are to be evaluated pursuant to the statutory criteria if one or more teachers apply “and meet the standards set forth in the job posting[.]”

Grievant argues that, while two of the successful applicants were fully certified special education teachers, Mr. Glymph, like her, was granted a one-year permit. This Grievance Board has previously determined that under State Board of Education Policy 5202, a county board of education may only apply for a permit to fill the post when no certified applicant applies for a position. *Hoffman v. Mingo County Bd. of Educ.*, Docket No. 97-29-266 (June 15, 1998); *Peters v. Putnam County Bd. of Educ*., Docket No. 90-40-027 (Aug. 16, 1991). *See Ashworth v. Putnam County Bd. of Educ.*, Docket No. 89-40-560 (Oct. 31, 1989). Grievant contends that it was improper for Respondent to seek a temporary permit for Mr. Glymph, when she was more qualified.

In order to be eligible for a first-class permit, Policy 5202, § 11.1.3, provides as follows:

> The applicant for the First-Class/Full-Time Permit for Professional Teaching and Student Support Personnel must submit evidence of satisfying the following:
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> a. College/University Coursework. - For all endorsement areas except school psychologist, verification by the designated official at the institution of higher education through which the program is being completed that the applicant has completed 25% or six semester hours, whichever is greater, of the state approved program in the specialization(s) for which the permit is requested. For the endorsement area of school psychologist, verification by the designated official at the institution of higher education through which the program is being completed that the applicant has completed 70% of the state approved program in the specialization for which the permit is requested; **AND**

b. Professional Commitment. - Submission of the Professional commitment verifying the applicant's enrollment in the state approved program; **AND**

c. Recommendation of Superintendent. - Receive the recommendation of the county superintendent verifying that the applicant is the most qualified candidate for the position, and has been hired for the position.

In addition, and pertinent to the instant case, such one-year permits may only be renewed if the employee provides proof of “completion of six semester hours of required coursework from an accredited institution of higher education . . . reflecting a minimum 3.0 GPA within the institution,” along with a recommendation from the superintendent that the individual is the “most qualified applicant for the position.” 126 C.S.R. 136-11.2. Accordingly, it is clear from these provisions of the policy that an employee is ineligible for renewal if the appropriate educational requirements are not met, or if the superintendent deems the employee not to be the most qualified person for the position in question.

Grievant does not deny that she did not attend any college courses between 2004 and the end of her contract in June of 2005. Therefore, she was not eligible for a permit, and, accordingly, not qualified for special education teaching positions for the 2005-2006 school year. Respondent also acted within its discretion in such matters when it chose to seek a permit for Mr. Glymph, but not for Grievant. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). The arbitrary and capricious standard of review of a county board's decision requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

Grievant has failed to prove an abuse of discretion with regard to Respondent's decision to post these positions twice, in order to obtain certified applicants. Moreover, although she was provided with documentation showing the successful applicants for these positions several weeks prior to the level four hearing, Grievant did not subpoena Mr. Glymph, nor did she introduce any evidence

regarding his qualifications or lack thereof. Therefore, the undersigned finds that Grievant has failed to prove she should have beenplaced in the position and/or granted a renewal of her teaching permit, especially in light of her failure to obtain the required college credit hours.

The following conclusions of law are consistent with the foregoing.

Conclusions of Law

1. Grievant has the burden of proving her 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.

2. 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).

3. West Virginia Code section 29-6A-4(a) specifies that a grievance must be filed:

> 1) Within ten days following the occurrence of the event upon which the grievance is based; or
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> 2) Within ten days of the date on which the grievable event unequivocally became known to the grievant; or
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> 3) Within ten days of the most recent occurrence of a grievable continuing practice.

See Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002); *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Spahr v. PrestonCo. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Grievant's claims regarding the non-renewal of her contract in the spring of 2005 are untimely.

5. "Grievance" is defined as "any claim by one or more affected state employees . . . ." W. Va. Code 29-6A-2(i). Grievant was an employee of Respondent when she attempted to file this grievance on June 25, 2005.

6. Under State Board of Education Policy 5202, a county board of education may only apply for a permit to fill the post when no certified applicant applies for a position. *Hoffman v. Mingo County Bd. of Educ.*, Docket No. 97-29-266 (June 15, 1998); *Peters v. Putnam County Bd. of Educ*., Docket No. 90-40-027 (Aug. 16, 1991). *See Ashworth v. Putnam County Bd. of Educ.*, Docket No. 89-40-560 (Oct. 31, 1989).

7. Permits for non-certified teachers may only be renewed if the employee provides proof of "completion of six semester hours of required coursework from an accredited institution of higher education . . . reflecting a minimum 3.0 GPA within the institution," along with a recommendation from the superintendent that the individual is the "most qualified applicant for the position." 126 C.S.R. 136-11.2.

8. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). 9. Because she did not obtain the required educational credits, Grievant was not eligible for a permit for the 2005-2006 school year, and Respondent did not abuse its discretion by seeking a new applicant for her position.

10. Grievant has failed to prove by a preponderance of the evidence that she met the requirements for permit renewal, or that she was the most qualified applicant for the teaching position at issue.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jefferson 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: March 22, 2006

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DENISE M. SPATAFORE

Administrative Law Judge