THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BEVERLY BROWN,

Grievant,

v. **Docket No. 06-06-081**

CABELL COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Beverly Brown, filed this grievance on December 3, 2005, alleging "Violation of W. Va. Code 18A-4-7a, 18A-4-16 and 18-29-2, section "m" discrimination in regard to the posted position of evening school program counselor for Huntington High School. Grievant [sic] treated differently with regard to extra curricular position than other similarly situated employee." For relief, Grievant seeks to be awarded the position and any compensation and benefits due. The grievance was denied at Levels I and II. Grievant bypassed Level III, and a Level IV hearing was held in the Grievance Board's Charleston office on June 8, 2006. Grievant was represented by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by Rebecca Tinder of Bowles Rice McDavid Graff & Love LLP. This case became mature for decision on June 29, 2006, upon the parties' submission of findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts Respondent discriminated against her by offering her the position of evening school program counselor for Huntington High School, but requiring her to resign her coaching position. She argues the successful applicant, John Stinespring, wasa coach and was not required to

resign his coaching position. She also argues he was an adjunct professor at Marshall University and was not required to resign that position.

Respondent asserts this grievance was not filed in a timely manner. Respondent also argues Grievant could not perform the required duties while also continuing to coach.

Findings of Fact

1. Grievant is employed by Respondent as a counselor at Huntington High School.

2. Respondent posted a position for Evening Counselor at Huntington High School from August 17th through August 23, 2005. The posting stated "180 instructional days, 5 hrs per wk, flexible." Level II, Respondent Exhibit 1. The evening program operates between 3:30 p.m. and 8:30 p.m.

3. Grievant timely applied for the position.

4. The position required flexibility because the successful applicant would be required to hold conferences for drop-in students or guardians, as well as emergency events between 3:30 p.m. and 8:30 p.m. Monday through Friday.

5. After reviewing the applications, Todd Alexander, Administrative Assistant over Secondary Schools, decided Grievant was the number one candidate for the position based on her seniority. Mr. Alexander was aware Grievant held an extracurricular position as golf coach at Huntington High School. Mr. Alexander was aware Grievant coached golf because Grievant had been the assistant golf coach at Huntington High School when he was principal, and he was also aware because, as Administrative Assistant over Secondary Schools, all high school athletic schedules are provided to him by the various principals. 6. On August 24, 2005, Mr. Alexander and Grievant spoke about the extracurricular counselor position and what it entailed. He also discussed with Grievant her need to decide whether she wanted the extra curricular counseling position or the coaching position. Mr. Alexander explained the extra curricular counseling position was flexible to meet the needs of the school and the students, not the employee.

7. By letter dated August 26, 2005, Grievant informed Mr. Alexander that she did not feel any policy prohibited her from performing both the counseling position and the coaching position. She concluded the letter by saying "I am still very much a candidate for the evening school counseling position. However, I enjoy the coaching and I have made a commitment to the team members. I would like to have both positions. Therefore, I leave the decision up to you." Level II Respondent's

Exhibit 2.

8. On August 26, 2006, in response to Grievant's letter, Mr. Alexander sent her an e-mail once again detailing the need for the evening counselor to be flexible to meet the needs of the school and the students. He explained the successful applicant would have to demonstrate he/she is willing to be available up to five hours a week, Monday through Friday, from 3:30 p.m. to 8:30 p.m., whenever necessary. Mr. Alexander concluded that Grievant's coaching position would not allow her to meet this commitment and for that reason, he was offering the position to the next qualified candidate. Level II, Respondent's Exhibit 3.

9. The high school golf season had begun when Grievant was offered the position, and she had an actual conflict in schedule.

10. Mr. Alexander then contacted John Stinespring, the next most qualified candidate. Mr. Stinespring indicated he could meet the requirements of the position, andhe was recommended for the position of evening counselor at Huntington High School.

11. Because Mr. Alexander was not involved in middle school sports, he was unaware that Mr. Stinespring was a golf coach at Beverly Hills Middle School. The middle school golf season was not scheduled to begin until sometime in March or April of 2006.

12. Mr. Stinespring began working in the position immediately upon his acceptance, but was not awarded the position by Board action until September 6, 2006. Because the middle school golf season had not begun, there was no actual conflict when Mr. Stinespring started working as the evening counselor.

13. On October 6, 2006, Mr. Stinespring resigned his coaching position before the season even began. The resignation was accepted by the Board at its January 3, 2006, meeting. (See footnote 1)

14. Unbeknownst to Respondent, Mr. Stinespring was also an adjunct professor at Marshall University. Grievant was aware Mr. Stinespring was an adjunct professor because it was announced at the initial counselors' meeting. (See footnote 2)

15. Grievant knew Mr. Stinespring was a golf coach on September 6, 2005. She did not file her grievance until November 9, 2005.

16. Respondent was not aware Mr. Stinespring taught evenings at Marshall University until the Level II hearing on January 27, 2006.

17. Respondent raised the issue of timeliness at the Level II hearing.

Discussion

Respondent asserts timeliness as a defense. 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). 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).

As to when a grievance must be filed, *West Virginia Code* § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. *West Virginia 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.

* * * * * *

> 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 v. W. Va. Dep't of Trans*., Docket No. 96-DOH-445 (July 29, 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). *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of *W. Va. Code* § 18-29-4. Syllabus Point 1 states, "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."

In this case, Grievant testified she was aware Mr. Stinespring had received the evening counselor position and still held his coaching position with Beverly Hills Middle School on September 6, 2005. Grievant knew of the occurrence giving rise to her grievance on that date, but did not a request for an informal conference until November 9, 2005, almost two months after being informed of the facts giving rise to the grievance.

Grievant asserts she delayed filing the grievance because she did not know who was going to be the evening principal. However, *W. Va. Code* §18-29-4(a) requires a grievant or representative to "schedule a conference with the *immediate* supervisor." Grievant's immediate supervisor, at the time the issue arose, was the day principal at Huntington High School. Grievant, upon being informed of the grievable event should have filed with her immediate supervisor, the principal at Huntington High School, within the prescribed time frame. *See Hoffman v. Mingo County Bd. of Educ.*, Docket No. 05-29-200(Jan. 26, 2006); *Hoffman v. Mingo County Bd. of Educ.*, Docket No. 05-29-104, (June 14, 2005). Unfortunately, she did not. Therefore, this grievance is untimely filed. Given that this grievance was filed untimely, the merits must remain unaddressed.

Conclusions of Law

1. 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). 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. As to when a grievance must be filed, *West Virginia Code* § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such

> circumstances as provided for in section ten, article four, chapter eighteen-a of this code.

3. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. *West Virginia 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 agrievance, 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.

* * * * * *

> 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 . . . .

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 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).

5. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of *W. Va. Code* § 18-29-4. Syllabus Point 1 states, "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."

6. *W. Va. Code* §18-29-4(a) requires a grievant or representative to "schedule a conference with the *immediate* supervisor."

7. Grievant did not file her grievance within 15 days of the event.

8. Respondent has met its burden and proved the grievance was untimely filed.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or Cabell 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 GrievanceBoard 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: August 10, 2006

_____

Wendy A. Campbell

Administrative Law Judge

Footnote: 1 *No evidence was received to explain why it took the Board several months to accept Mr. Stinespring's resignation as middle school golf coach.*

Footnote: 2 *The date of that meeting was never provided to the undersigned.*