JANICE L. CHASE,

Grievant,

v. **Docket No. 05-20-406**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

Decision

Grievant Janice Chase filed a grievance on July 22, 2005, claiming discrimination in employment practices. Grievant's requested relief was a quality pair of glasses and reimbursement of sick days, along with disclosure of the reasons she was not compensated for her loss initially. At Level II, the grievance was denied and dismissed on the grounds that it was untimely filed. Level III was waived, and the decision was appealed to Level IV. Level IV hearing was held in the Grievance Board's office on December 1, 2005. (See footnote 1) Grievant appeared pro se, and Respondent was represented by James Withrow, counsel for Kanawha County Schools. The matter became mature for decision on January 6, 2006, the date parties were to have filed proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant believes she was discriminated against by Respondent because Respondent agreed to replace a substitute teacher's broken glasses, but refused to do the same for her. At Level II, Respondent asserted the defense of timeliness, but made no mention of it during it the Level IV hearing.

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

Findings of Fact

1. Grievant is employed as a teacher at Elkview Middle School.
2. On January 20, 2005, she was accidentally struck in the head by a ball while in the school

gymnasium.

3. On that same day, a substitute physical education teacher also had her glasses broken while working at Elkview Middle School.

4. On January 20, 2005, Grievant completed a liability form to be submitted to the West Virginia Board of Risk and Insurance Management.

5. In that form she did not say her glasses were broken, but instead stated, “Glasses weakened by force. Nose pieces flattened on impact _ frame and glasses weakened.”

6. On March 7, 2005, she received notification that the county would not replace her glasses, as that type of property loss is not covered by the insurance.

7. Grievant filed a Workers' Compensation claim, and as a result she received compensation for a basic pair of glasses. Grievant was responsible for payingfor any additional amenities she desired.

8. On May 26, 2005, Grievant became aware that the county had replaced the substitute teacher's glasses that were broken on the same day. (See footnote 3)

9. This grievance was filed on July 22, 2005, and was denied at Level II on the grounds that it was not filed in a timely manner. Grievant did not explain her delay in filing.

Discussion

Typically when there is a grievance alleging discrimination on the part of Respondent, Grievant bears the burden of proving the grievance by a preponderance of the evidence. However, since Respondent has raised the issue of timeliness, the burden shifts to Respondent to prove the grievance was not timely filed. “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). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Id.

West Virginia Code §18-29-4(a)(1) requires the grievance process to be started within 15 days following of the date on which the event became known to the grievant. In Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), the Court stated that there is a discovery rule exception to the time limits for instituting agrievance. Under this exception, the time in which to invoke a grievance procedure does not begin to run until the Grievant knows of the fact giving rise to the

grievance. Given the facts of this particular case, it is clear that Grievant was aware that Kanawha County had paid for the substitute teacher's glasses on May 26, 2005. Yet, this grievance was not filed until July 22, 2005, almost two months from the discovery of the alleged discrimination and is deemed to be untimely. Given that this grievance was filed untimely, the merits must remain unaddressed.

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. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

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

3. A grievance must be 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 with fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. W. Va. Code § 18-29- 4(a)(1).

4. Grievant did not file her grievance within 15 days of May 26, 2005, the date she was notified that the county had paid for the substitute teacher's glasses. 5. Respondent has met its burden of proving this 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. 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.

DATE: February 22, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

This case was originally assigned to ALJ Marteney who conducted the hearing, but due to administrative reasons, it was later transferred to the undersigned Administrative Law Judge who reviewed the record in its entirety.

Footnote: 2

Proposed findings of fact and conclusions of law were not submitted by either party.

Footnote: 3

There was evidence submitted that indicated Grievant had been aware that the county was working with the substitute discussing the possibility of replacing her glasses. However, May 26, 2005, was the date Grievant conclusively discovered that the county had replaced the substitute's glasses.