THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

PATRICIA MILLS,

Grievant,

v. **DOCKET NO. 05-50-451**

WAYNE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Patricia Mills filed this grievance on October 14, 2005, challenging certain practices of the Respondent. In her lengthy statement of grievance, she summarizes her complaint as a challenge of:

1 1. All appointments of professional personnel by the Wayne County Board of Education for the '03-'04, '04-'05, and the '05-'06 school year.

2 2. All consultant positions appointed by the Wayne County Board of Education for the same time frame as I just became aware that these positions where [sic] not posted. This is grievable since the purpose of posting is to obtain a pool of qualified applicants.

3 3. The arbitrary and capricious actions of the Wayne County Board of Education and its representatives in the handling of my original grievance and in regards tome in professional hiring matters since then.

4 4. The discriminatory nature of the Wayne County Board of Education

> arising between substitute teachers and myself and the permanent employees placed in permanent positions for the above-mentioned timeframe [sic].

At the level four hearing, Grievant clarified that as relief she is seeking the benefits she would have earned as a regularly-employed classroom teacher had she been so employed for the three school years in question.

A level four hearing was held at the Wayne County Board of Education on February 6, 2006. Grievant was represented by Matthew Mills and Respondent was represented by David Lycan, Esq. The matter became mature for decision on, March 6, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts that it is a discriminatory practice for Respondent to employ her as a substitute teacher and then assign her an employment term and duties that are indistinguishable from a regularly-employed classroom teacher. Respondent first asserts the grievance is untimely, and also asserts Grievant was properly employed.

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

Findings of Fact

1. Patricia J. Mills has been employed by Respondent as a Substitute Teacher since the beginning of the 2003-2004 school year.

2. Grievant's first position as a “substitute” was in a newly created position at East Lynn Elementary, in a new kindergarten position that was created due to an overage of students enrolled there. The position was not posted by Respondent, and Grievant filled the position full-time for the entire school year. 3. Grievant's first contract with Respondent was entered into by mutual agreement on June 26, 2003, and employed Grievant “as a day-to-day Substitute Teacher” for the 2003-2004 school year.

4. For the subsequent school years, Grievant entered into essentially identical substitute teaching contracts on July 15, 2004, and June 23, 2005.

5. For the 2005-2006 school year, Grievant has been employed as what Respondent considers a “permanent substitute” for a position at Dunlow Elementary School, teaching fifth grade.

6. The position Grievant was filling had been vacant before the year started, and Grievant applied for the job as a regular teacher, but was not selected. Ashley Thompson- Richmond, the

teacher who was selected, “bid out” to fill a different position at Fort Gay prior to the beginning of the school year, leaving her Dunlow position again vacant.

7. Respondent placed Grievant in the Dunlow position to replace Ms. Thompson, but only as a substitute. Grievant began the school year on the first day of the school year, and will hold the position through the school year on the same schedule as the regularly-employed teachers.

8. Grievant knew of her assignment and substitute status when she accepted the assignment at the beginning of the year.

Discussion

Although Grievant has the burden of proving the allegations of her grievance, Respondent has asserted this grievance is untimely. Timeliness is an affirmative defense,and the burden of proof is upon the party asserting the grievance was not timely filed. (See footnote 1) If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. (See footnote 2) A grievance is untimely is it is not started within fifteen days following the occurrence of the event upon which the grievance is based. (See footnote 3) The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. (See footnote 4)

This grievance challenges the issuance of substitute contracts, or the failure to recognize Grievant as a regularly-employed classroom teacher, for the 2003-2004 school year, the 2004-2005 school year, and the 2005-2006 school year. This grievance was filed October 14, 2005, following a discussion in a motion hearing for a separate, related grievance. (See footnote 5) In each year, Grievant was working in a long-term substitute position employed from the first day of school to the last, the same as all the regularly-employed classroom teachers. This date was significantly later than fifteen days after Grievant knew of the practice she was grieving, but her claim of discrimination alleges a continuing practice.

Grievant argues she was similarly situated to full time, regularly-employed classroom teachers. She started working in her current position, termed a “permanent substitute” by Respondent, on August 25, 2005, the same day regular teachers started. Her duties, hours and work assignments are identical to her coworkers who are in theirpositions under regular contracts. But for her contract terms, her job is indistinguishable from the teacher she is replacing, who, oddly enough, is

substituting for another regular teacher. Superintendent Adkins admitted that full-time substitutes like Grievant are substantially similar to regular classroom teachers.

The Grievance Board has a substantial body of precedent dealing with boards of education that try to duck their obligations to pay full-price for regular classroom teachers, and this canard is no exception to the rule that it cannot be done. As the saying goes, if it looks like a duck, walks like a duck and quacks like a duck, it *most probably is a duck*. (See footnote 6) Respondent employed Grievant in a position materially identical to a regular teaching position.

Nevertheless, Respondent argues that Grievant was fully aware of the character of her assignment when she accepted it, and such foreknowledge should preclude her from arguing it should be different. Grievant argues, in part, she did not know she could challenge the status of her appointment through the grievance process. "[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive." (See footnote 7) The date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice." (See footnote 8) As recently discussed in *Blethen v. Dep't of Tax & Revenue* (See footnote 9), "continuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute. In that case, this Grievance Board held that the employer's decision to place a particular job classification in a particular pay grade, while continuing to affect grievants' salaries, was "a salary determination that was made in the past, a discrete event with lasting effects," which did not constitute a continuing practice. "[W]hen a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a)." (See footnote 10)

The set of facts at issue here describes continuing damage flowing from a discrete decision of the employer to issue Grievant a substitute contract rather than a regular contract. The discrimination she alleges is not inherent in her continued employment any more than it would be for any other substitute, who receives substitute pay and benefits while performing the job of a classroom teacher. That type of difference is built in to the statutes that allow regular salary and benefits to differ from substitute benefits.

In this case, Grievant admits to knowing the essential facts upon which her claim is based more than fifteen days prior to filing. In discussing her prior grievance, she discovered a legal theory to challenge the grievable act of the employer. She voluntarilyentered into the position and contract, knowing all the terms and conditions beforehand. Under this set of facts, the grievance is untimely.

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

2. The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen 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). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Seifert*, *supra*. *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).

3. "W. Va. Code § 18-29-2(m) defines 'discrimination' 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.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). 4. "[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive." *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). The date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989)." *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997); *See Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).

5. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,]

391 S.E.2d 739 (1990).' *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995)." *Young v. Div. of Corrections and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

6. Grievant's contract status is continuing damage flowing from a past discrete act.

7. Respondent met its burden of probing this grievance was untimely. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed." *Lynch, supra.*

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 Wayne 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 andState 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.

May 12, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).

Footnote: 2

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

Footnote: 3

W. Va. Code §18-29-4(a)(1).

Footnote: 4

Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

Footnote: 5

Mills v. Wayne County Bd. of Educ., Docket No. 05-50-280.

Footnote: 6

Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001); Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-010 (May 29, 1998); Loudermilk v. Loudermilk, 183 W. Va. 616, 397 S.E.2d 905 (1990).

Footnote: 7

Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991).

Footnote: 8

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997)

Footnote: 9

Docket No. 03-T&R- 416R (Sept. 6, 2005).

Footnote: 10

Young v. Div. of Corrections and Div. of Personnel, Docket No. 01-CORR-059 (July 10, 2001).