THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

PAMELA WEBB,

Grievant,

v.

DOCKET NO. 07-14-334

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

This grievance was filed on May 14, 2007, by Grievant, Pamela Webb. Her statement of grievance reads:

> WV Code 18A-4-8g, 18A-4-8b
>
> My seniority date needs to be corrected as to my first day of work for the school year 1996-1997. I have documents to support this.

The relief sought by Grievant is "to have my seniority date changed."

The grievance was denied at levels one and two by decision dated May 21, 2007, without hearing, based upon "lack of documentation," and because it was not filed in a timely manner. Grievant

appealed to level three on June 13, 2007, and was verbally advised on June 19, 2007, that the board of education had waived participation at level three. Grievant appealed to level four on June 22, 2007. A level four hearing was held before the undersigned on January 8, 2008, in the Grievance Board's Westover office. (See footnote 1) Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer Carradine, Esquire, Dinsmore & Shohl. This matter became mature for decision on February 26, 2008, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued her seniority date should be changed from October 1, 1996, back to some unidentified date in September 1996, because she was working in the same position for which she ultimately attained seniority, prior to October 1, 1996. Respondent argued the grievance was not timely filed. While Grievant did demonstrate she had discovered in early 2007 that her seniority date on the seniority list was incorrect, she did not initiate the grievance procedure within 15 days of the date of this discovery, as is required by statute, choosing instead to write a letter to HBOE personnel requesting that her seniority date be changed. No one told Grievant not to file a grievance, or led her to believe the matter would be resolved by the board. The grievance was not timely filed.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

Findings of Fact

1. Grievant is employed by the Hampshire County Board of Education ("HBOE") as a Aide. She has been employed as a regular employee by HBOE since 1996. 2. Early in 2007, a co-worker told Grievant she should look at the seniority list, because her position on the list had changed. Grievant looked at the seniority list, and discovered that her seniority date was wrong.

3. By letter dated February 1, 2007, Grievant asked HBOE personnel to correct her seniority date.

4. By letter dated March 14, 2007, Grievant was notified that HBOE's Superintendent had approved a change in her seniority date, to October 1, 1996, (See footnote 2) which improved her position on the seniority list. This change was based upon minutes of a September 30, 1996 meeting

of HBOE, which approved the employment of Grievant as a "Contracted Aide at Romney Elementary for Michelle Cunningham's class, effective immediately," and a contract signed by Grievant which describes her contract term as "[f]rom October 1, 1996 to June 1997."

5. At some point Grievant obtained HBOE payroll records which showed she had been paid on September 25, 1996, and this caused her to question whether her seniority date should be some date in September 1996, rather than October 1, 1996.

6. Grievant sent a letter to HBOE personnel on April 9, 2007, asking that her seniority date be changed from October 1, 1996, to some date prior to September 25, 1996.

7. By letter dated April 30, 2006, and received by Grievant on May 4, 2007, Grievant was informed that her seniority date would remain October 1, 1996.

8. This grievance was filed on May 14, 2007. 9. During the time from February 1, 2007, through May 13, 2007, no one discouraged Grievant from filing a grievance, or made any statements to her which would have caused her to believe that the issue would be resolved.

10. Respondent raised a timeliness defense at levels one and two of the grievance procedure. (See footnote 3)

Discussion

Respondent asserted this grievance should be dismissed as untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). 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). *W. Va. Code* § 18-29-3(a) (See footnote 4) provides that:

> 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. *W. Va. 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.
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> * * * * * *
>
> 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 . . . .

Only working days are counted in determining when the time period runs for filing a grievance. Holidays are not counted. *W. Va. Code* § 18-29-2(b). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, 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). Grievant's seniority date was initially established in 1996, but this is the first time she has challenged her seniority date. Obviously, it appears at first blush that the grievance was not timely filed. Grievant argued, however, that an erroneous seniority date is a continuing practice, and also that she only recently discovered the error, and filed her grievance as soon as she became aware of it.

An error in an employee's seniority date is not a continuing practice. *Tibbs v. Hancock County Bd. of Educ.*, Docket No. 06-15-447 (April 10, 2007).

Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of *W. Va. Code* § 18-29-4, stating "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." The record does establish that Grievant only recently discovered the facts giving rise to the grievance. The time period for filing this grievance began when Grievant learned that her seniority date on the seniority list was wrong. This occurred on February 1, 2007, or shortly before that date. Grievant did not file her grievance until three and a half months later, choosing instead to send a

letter asking HBOE personnel to correct the error. Then, Grievant was told on March 14, 2007, that her seniority date would be corrected to October 1, 1996. She did not challenge this action through the grievance procedure for two months. No one told Grievant to delay filing hergrievance while HBOE considered her request, and no one ever told Grievant they would take care of this matter.

> In *Steele v. Wayne County Bd. of Educ.*, Docket No. 50-87-062-1 (Sept. 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to *W.Va. Code §*18-29-1, *et seq.*, upon denial thereof." The West Virginia Supreme Court of Appeals, in *Naylor v. W.Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

Davisson v. Lewis County Bd. of Educ., Docket No. 05-21-112 (July 27, 2005). No representations were made to Grievant which should have caused her to delay filing a grievance. Grievant's letter to HBOE personnel did not toll the time period for filing the grievance. This grievance was not timely filed. (See footnote 5)

Sometime between the time Grievant sent her February 1st letter, and the time she sent her April 9th letter, Grievant looked at the payroll records and was reminded by them that she had been paid on September 26, 1996. This caused her to wonder whetherOctober 1, 1996, was her actual seniority date. This does not fall within the discovery exception. Grievant knew in 1996 the dates she actually worked, and when she was paid. Her review of the payroll records did not tell her anything new. It just served as a reminder. However, even if this “event” were construed as a new “discovery,” the latest date this “discovery” was made by Grievant was April 9, 2007, yet she did not initiate the grievance process until May 14, 2007, well past the 15 day statutory time period. Again, Grievant chose instead to send a letter asking HBOE personnel to make a change in her seniority date. And again, no one discouraged her from filing a grievance.

Because the grievance was not timely filed, it will be dismissed, and the merits need not be addressed. However, were the merits to be addressed, the undersigned would find it difficult to grant Grievant's request. Grievant is contesting something which occurred more than 10 years ago. While it is clear from the record that during a portion of September 1996, Grievant was working in the same position for which she was officially hired on October 1, 1996, the record does not reflect the exact

date she began working in that position. Not even the Grievant could remember exactly how she came to be working in the position, or the date she began working in the position. It would be Grievant's burden to demonstrate the date she was hired into the position as a regular employee. *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. The best evidence of when Grievant was hired by HBOE to serve as a "regularemployee" (See footnote 6) are the minutes of the September 30, 1996 board meeting, and her contract, which was effective October 1, 1996.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

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

3. *Spahr v. Preston County Board of Education*, 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." The time period for filing thisgrievance began when Grievant learned that her seniority date on the seniority list was wrong.

4. "A grievant is excused for his delay in filing a grievance when the untimely filing 'was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge.' *Naylor v. W.Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989)." *Davisson v. Lewis County Bd. of Educ.*, Docket No. 05-21-

112 (July 27, 2005).

5. The time period for filing a grievance was not tolled by Grievant's letters to HBOE personnel requesting a review of her seniority date.

6. This grievance was not filed within the statutory timelines for filing a grievance.

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this dismissal order to the Circuit Court of Kanawha County, or to the Circuit Court of Hampshire County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *W. Va. Code §* 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: April 9, 2008

Footnote: 1

Grievant asked that the record be left open for submission of two exhibits after the hearing, which were to be provided to Grievant by Respondent after the hearing. This request was granted. Grievant submitted a contract for Hampshire County Board of Education employee Bonnie Schaeffer for the 1995-1996 school year, to be marked as Grievant's Exhibit 9, and a letter dated September 12, 1996, from the Superintendent notifying Ms. Schaeffer that the Board of Education had accepted her resignation onSeptember 9, 1996, as Grievant's Exhibit 10. Respondent did not object to Grievant's characterization of these exhibits, or to their admission into evidence. Grievant's Exhibits 9 and 10 are ORDERED admitted into the record.

Footnote: 2

The record does not reflect what her seniority date had been before this correction was made.

Footnote: 3

The level one and two decision was issued by the county Superintendent, without holding any conference or hearing. The record does not reflect why there was no level one conference or separate decision issued, or why there was no level two hearing. Certainly Grievant's supervisor would not have had the authority to grant the relief requested, so the procedure used here would certainly speed the process along; but the statute does not allow for the county superintendent to unilaterally omit steps of the grievance procedure. Grievant did not contest this procedure, and these flaws are not sufficient to deprive the Respondent of its right to contest the grievance as untimely filed.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 5

Respondent also argued Grievant did not timely appeal to level three. Grievant received the decision denying her grievance at levels one and two on June 1, 2007. The decision did not tell Grievant how to appeal the decision, or where any appeal should be filed. Grievant appealed the level two decision to level three on June 13, 2007, after receiving information from her representative on how to file her appeal. While Grievant did not appeal to level three in a timely manner, this was caused in part by Respondent's failure to provide the appeal information in the decision as required by statute. W. Va. Code § 18-29-3(I) states that decisions denying relief sought "shall include the name of the individual at the next level to whom appeal may be made." The level two decision issued in this case did not address an appeal to the next level. Grievant's untimely appeal to level three would be excused by this error in the level two decision. Tomblin v. Higher Education Interim Governing Bd., Docket No. 01-HE-359 (Sept. 17, 2001).

Footnote: 6

Grievant was actually hired on a "contracted services basis" with no benefits, according to the contract. HBOE is treating this as regular employment for seniority purposes based upon its understanding of an earlier Grievance Board decision.