THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA SHANTIE,

Grievant,

v. **DOCKET NO. 2013-1104-PutED**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On January 30, 2013, Debra Shantie ("Grievant") filed a grievance at Level One of the grievance procedure against her employer, the Putnam County Board of Education ("Respondent" or "PCBOE"), which stated the following:

> Grievant had a five day supplementary run in the first semester of the 2012-13 school year. Grievant was entitled to the benefits of a "200 day" contract for this run for the 2011-2012 school year. However, such benefits were not paid in the first semester of the 2012-13 school year. This is a violation of Grievant's rights under the non-relegation provision of W. Va. Code 18A-4-8(m) and constitutes discrimination as defined at WV Code 6-2-2(d) (*sic*.).

As relief, Grievant is seeking back pay with interest. A Level One conference was held on February 12, 2013, and a written decision denying the grievance was issued by Penny Fisher, the Superintendent's designee, on February 25, 2013. In that decision, Respondent also asserted that the grievance was untimely. Grievant appealed to Level Two on March 11, 2013. Grievant proceeded through mediation at Level Two, and appealed to Level Three on June 25, 2013. A Level Three hearing was held on August 29, 2013, in the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Andrew J. Katz, Esquire, with the Katz Working Families' Law Firm.

Respondent was represented by Rebecca Tinder, Esquire, with Bowles Rice LLP. This matter became mature for decision on October 2, 2013, upon receipt of the parties' written post-hearing proposals.

Synopsis

Grievant contends the extracurricular "supplemental" bus run she drove during both semesters of the 2011-2012 school year which entitled her to the benefits of a "200-day contract" in accordance with this Grievance Board's ruling in *Lanham v. Putnam County Bd. of Educ*., Docket No. 2008-1691-CONS (July 14, 2009), *aff'd*, Circuit Court of Kanawha County, No. 09-AA-146 (Dec. 21, 2012), further entitled her to continue receiving those same benefits during the following semester, the first semester of the 2012-2013 school year. However, Grievant failed to timely file her grievance asserting that PCBOE violated the non-relegation clause in W. Va. Code § 18A-4-8(m) within fifteen days of the date when Grievant knew, or reasonably should have known, that she would not receive these additional benefits, unless her services were needed for the same four or five day per week extracurricular run during the second semester of the 2012-13 school year.

Although this grievance was not timely initiated, the merits of this grievance were considered to make a complete record. Grievant failed to establish that PCBOE's failure to award Grievant additional compensation during the first semester of the 2012-13 school year violated the non-relegation clause in W. Va. Code § 18A-4-8(m).

The following Findings of Fact are made based upon the record developed at the Level Three hearing:

Findings of Fact

1. Grievant is employed by Respondent Putnam County Board of Education ("PCBOE") as a bus operator.

2. On July 14, 2009, the West Virginia Public Employees Grievance Board issued a Level Three decision in *Lanham v. Putnam County Board of Education*, Docket No. 2008-1691-CONS (July 14, 2009) ("*Lanham* decision").[1] The *Lanham* decision was affirmed by the Circuit Court of Kanawha County on December 21, 2012.

3. Grievant successfully bid on an extracurricular run, labeled SR 83, which is commonly referred to by PCBOE as a "college run." This extracurricular bus run involves transporting students from one high school to another to facilitate participation in college level courses offered to PCBOE students exclusively at specific schools in the county.

4. PCBOE bus operators who work under "as needed" contracts do not receive pay for snow days, holidays, sick days or personal days, or for non-instructional professional days. However, as a result of the *Lanham* decision, PCBOE began paying additional benefits to those bus operators who hold "as needed" extracurricular contracts and drive their assigned bus runs four or five days per week in both the first and second semesters of the school year.

5. The "additional benefits" which qualifying bus operators receive, as referenced in Finding of Fact Number 5, above, are limited to receiving the same daily compensation for operating their assigned extracurricular bus run on days when their

[1] In the *Lanham* decision, the Grievance Board determined that certain PCBOE bus operators were being paid in a non-uniform manner for like assignments and duties when compared to at least one other PCBOE bus operator.

services are not needed due to inclement weather, holidays, non-instructional professional days and sick days.

6. During the 2011-12 school year, Grievant drove the SR 83 college run five days per week in both the first and second semesters. Consistent with the *Lanham* decision, PCBOE paid additional benefits to Grievant because she drove her extracurricular bus run at least four or five times per week during both semesters of the school year.

7. During the 2012-13 school year, Grievant continued to drive the SR 83 college run five days per week during the first semester. Consistent with its interpretation of the *Lanham* decision, PCBOE did not continue to pay additional benefits to Grievant during the first semester.

8. Grievant was aware that PCBOE would not be paying additional benefits to bus operators who drove only one semester during the 2012-13 school year. On November 6, 2012, Grievant wrote "dispute" on her Supplemental Transportation Payroll Time Sheet because she recognized that she would not be compensated for Election Day when PCBOE schools were closed. *See* R Ex 1.

9. At no time has PCBOE paid a bus operator additional benefits for driving a four or five day extracurricular "as needed" run during only one semester of the school year.

10. The second semester of the 2012-13 began on January 17, 2013, and shortly thereafter Grievant was notified that her services were not needed to drive SR 83 during that semester. *See* G Ex 2.

11. On January 30, 2013, Grievant initiated this grievance at Level One challenging PCBOE's failure to pay benefits commensurate with a "200 day" contract during the first semester of the 2012-13 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once an employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ*., Docket No. 2012-0188-RalED (Mar. 28, 2012). *See Lewis v. Kanawha County Bd. of Educ*., Docket No. 97-20-554 (May 27, 1998).

If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Rose, supra*. *See Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997). W. Va. Code § 6C-2-3(a)(1) requires an employee to

"file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

Under W. Va. Code § 6C-2-3(c)(1), "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." Respondent timely asserted this affirmative defense in its Level One decision issued on February 25, 2013. Accordingly, it must be determined whether this grievance was timely initiated before the merits of this grievance may be addressed.

In order to determine whether this grievance was timely filed, it must first be determined what this grievance is about. This grievance was not filed until after the beginning of the second semester of the 2012-13 school year, when PCBOE determined that there was no need for Grievant to operate her bus run during that semester. According to the PCBOE school calendar, the second semester commenced on January 17, 2013. *See* G Ex 2. This grievance was initiated within fifteen calendar days of that date, when it became apparent that PCBOE would not be requiring Grievant's services to drive SR 83 during the second semester. If Grievant was challenging PCBOE's decision not to use her services for the second semester, this grievance would be timely. However, that is not the basis for this grievance.

Grievant's post-hearing argument makes it clear that Grievant is asserting that she is entitled to additional benefits for driving SR 83 during the first semester of the 2012-13 school year because (1) she drove that same route both semesters of the 2011-12 school year, and/or (2) she had a "200-day contract" for the 2011-12 school year to drive SR83, thereby entitling her to continue receiving the additional benefits associated with such contract under the so-called "non-relegation clause" in W. Va. Code § 18A-4-8(m). In other words, the facts which support Grievant's claim were in existence and did not change from the beginning of the first semester of the 2012-13 school year, or what was sometimes referred to for simplicity as the "third semester." Given this basis for relief, the date when PCBOE made the "ultimate decision" not to pay Grievant was not January 17, 2013 when Grievant learned that her services were not required for the second semester of the 2012-13 school year (or a "fourth semester"). Instead, PCBOE made the decision not to pay bus operators who operate "as needed" extracurricular bus runs for four or five days per week for only one semester of the school year after the *Lanham* decision was affirmed by the Circuit Court of Kanawha County in 2012 and, according to the record, PCBOE has been consistently applying this interpretation of that decision to date.

According to Grievant's theory for obtaining relief, the event which actually gave rise to this grievance arose before the first semester of the 2012-13 school year began, when PCBOE adopted the practice of waiting to see if the services of bus operators holding "as needed" extracurricular contracts were required for the second semester of the school year for at least four or five days per week before awarding additional benefits for the first semester to **ONLY** those bus operators who continued a qualifying

extracurricular run during the second semester of the school year. Grievant knew or should have known of this interpretation of the *Lanham* decision by PCBOE. Otherwise, she would not have written "dispute" on her time sheet when she was on unequivocal notice that she was not eligible to be paid for Election Day, or other such days, when the schools were closed. Although Grievant might have retroactively been given additional benefits for the first semester of the 2012-13 school year, had she been needed to drive SR 83 during the second semester, she would have received such benefits solely because of PCBOE's application of the *Lanham* decision, which this grievance is directly challenging as a misapplication of applicable law.

Had Grievant's services been needed to drive SR 83 for the second semester of the 2012-13 school year, it is likely she would not have pursued this grievance because she would then have received the additional benefits for the first semester of the 2012-13 school year she is now seeking, and would have suffered no harm. However, PCBOE's determination that Grievant was not needed to drive SR 83 for the second semester was not the ultimate decision that gave Grievant standing to challenge PCBOE's application of the *Lanham* decision. That decision was made months earlier. Instead, this determination simply represents the absence of the condition which would have made her eligible for those benefits in accordance with PCBOE's decision.

Grievant argues that PCBOE would have claimed that this grievance was premature if she filed as soon as she recognized that she was not receiving additional benefits for driving bus route SR 83 during the first semester of the 2012-13 school year. However, anticipating an employer's interjection of a specious argument does not

represent a valid basis for failing to timely file a grievance. This is nothing more than a wishful rationalization to compensate for Grievant sleeping on her rights.

Accordingly, this grievance was not timely filed because it was not initiated within fifteen days of the event on which the grievance is based, PCBOE's restrictive application of the *Lanham* decision. Grievant has not challenged PCBOE's determination that her services were not needed to drive SR 83 for the second semester of the 2012-13 school year, the only event which arguably occurred within the fifteen days before she filed this grievance.

Notwithstanding that the undersigned Administrative Law Judge is satisfied that this grievance was not filed within the time limits required by W. Va. Code § 6C-2-4(a)(1), this decision will address the merits of this grievance to facilitate anticipated appellate review as a matter of judicial economy, in order to avoid the time and expense of a remand for further proceedings.[2] *See Redd v. McDowell County Bd. of Educ*., Docket No. 2012-0420-McDED (July 27, 2012); *Ratcliff v. W. Va. Dep't of Envtl. Prot*., Docket No. 2009-0671-DEP (Aug. 17, 2010).

Therefore, in the event it should be determined that Grievant's claim was timely filed, her claim for entitlement to additional benefits is based upon the provision in W. Va. Code § 18A-4-8(m) which states:

Without his or her written consent, a service person may not be:

(1) Reclassified by class title; or

[2] Grievant did not pursue her claim of prohibited discrimination under W. Va. Code § 6C-2-2(d) at the Level Three hearing or in her post-hearing argument. Therefore, this claim is deemed abandoned.

> (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

According to the clearly established facts, PCBOE grants certain additional compensation to bus operators who, in accordance with the *Lanham* decision, operate an extracurricular bus run for four or five days each week for both semesters of a given school year. Grievant received this additional compensation for the 2011-12 school year because she operated an extracurricular bus run four or five days per week for each semester of that school year. In addition, in *Clark, et al., v. Putnam County Bd. of Educ*., Docket No. 2012-0944-CONS (June 28, 2013), Grievant Shantie, one of the prevailing grievants in that matter, was held to be entitled to an extracurricular contract with benefits, but not a "regular contract" to perform an extracurricular assignment on an "as needed" basis. It is this "as needed" extracurricular contract to drive a supplemental bus route, SR 83, which Grievant continued to hold during the 2012-13 school year.

In any event, Grievant was not eligible to receive additional compensation for the 2012-13 school year because she was only needed to drive that bus route during the first semester of the school year. PCBOE did not terminate Grievant's employment contract nor did it issue a new contract with reduced compensation. The contract remains unchanged and continues to authorize the same additional compensation at issue, provided that the same services are rendered. It is abundantly clear that Grievant did not render such services because her services were not required, and the non-relegation clause is simply not applicable in these circumstances. *See Lucion v. McDowell County*

Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). Therefore, this grievance must be denied on its merits.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ*., Docket No. 93-29-481 (Apr. 4, 1993).

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once an employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ*., Docket No. 2012-0188-RalED (Mar. 28, 2012). *See Lewis v. Kanawha County Bd. of Educ*., Docket No. 97-20-554 (May 27, 1998).

3. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Rose, supra*. *See Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

4. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

5. Under W. Va. Code § 6C-2-3(c)(1), "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two." Respondent timely asserted this affirmative defense in its Level One decision.

6. Respondent proved by a preponderance of the evidence that Grievant did not file her grievance within the time limits established by statute. Grievant did not demonstrate a proper basis to excuse her failure to file in a timely manner.

7. The "non-relegation clause" in W. Va. Code § 18A-4-8(m), "states that a service employee may not be adversely affected economically either during a current fiscal year or in subsequent years, provided that the service employee remains 'in the same job position and classification.'" *Lucion v. McDowell County Bd. of Educ*., 191 W. Va. 399, 404, 446 S.E.2d 487, 492 (1994).

8. Respondent did not violate the non-relegation clause in W. Va. Code § 18A-4-8(m) by refusing to pay Grievant additional compensation conditioned upon operating an extracurricular "as needed" bus run for at least four or five days per week during the first and second semesters of the 2012-13 school year. Grievant received this additional compensation for the 2011-12 school year because she met Respondent's established requirement to operate an extracurricular "as needed" bus run for at least four or five days per week during both semesters of that school year.

Therefore, 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 (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. 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 Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 17, 2013

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LEWIS G. BREWER
Administrative Law Judge