

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

TIMOTHY R. LONG,
Grievant,

v.

Docket No. 2015-0754-WetED

WETZEL COUNTY BOARD OF EDUCATION,
Respondent, and

THOMAS PEGG,
Intervenor.

DISMISSAL ORDER

Grievant filed a level one grievance against his employer, Wetzel County Board of Education, on or about January 12, 2015, which states:

I have been notified that according to West Virginia Code 18A-4-8b Section (A) that the senior drivers in the county are supposed to be given priority in accepting extra duty assignments such as (MOVTI). There has never any vote by 2/3 rds of the drivers and the board that I have seen to contradict the law.

For relief, Grievant seeks:

I would like as the senior driver of the Shortline area to be awarded MOVTI shuttles on a daily basis instead of it being put into rotation.

By mutual consent of the parties, Acting Superintendent Jay Yeager conducted a conference on April 20, 2015. Mr. Yeager denied the grievance by decision dated May 26, 2015. Thomas Pegg sought leave to intervene in the grievance on or about June 2, 2015. Intervenor status was granted to Thomas Pegg on June 12, 2015. Grievant perfected his appeal to level two on June 3, 2015. A level two mediation session was conducted on October 2, 2015. Grievant perfected his appeal to level three on October 19, 2015. A level

three evidentiary hearing was conducted before the undersigned on January 29, 2016. Grievant appeared in person and by his counsel, John E. Roush, West Virginia School Service Personnel Association. Intervenor appeared in person and by his representative, Jonathan Bennett, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 7, 2016.

Synopsis

The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed as untimely.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant is employed by Respondent as a full-time regular bus operator. Grievant drives a special needs bus and is responsible for making midday bus runs whenever a special needs child requires transportation.
2. Midday runs for special needs bus operators can change from day to day. In addition, these midday runs can be outside of the bus operator's normal work time frame.
3. Along with several other nearby counties, Respondent participates in the operation of a vocational school located in St. Marys, West Virginia, known as the Mid-Ohio Valley Technical Institute or MOVTI.

4. In order to transport MOVTI students from their various high schools in Wetzel County to the MOVTI, bus drivers travel to and from a central point where these students board a single bus that then travels to MOVTI.

5. The MOVTI shuttle runs are considered an extracurricular assignments. Normally extracurricular assignments are posted and filled on the basis of seniority; however, an alternative procedure for filling these assignments can be used if certain conditions are met. In Wetzel County for the past few decades, these shuttle runs have been assigned in rotating seniority order in various zones within the county.¹

6. The MOVTI shuttle bus runs are posted every year to allow interested bus operators to bid on the positions. Most recently, the Short Line Zone shuttle run was posted on July 22, 2015, for the 2015-2016 school year. Grievant bid on this posted position along with other interested bus operators. Grievant was placed on the list of Short Line Zone bus operators who would drive the Short Line MOVTI shuttle run on a rotating basis.

7. The system used by Respondent, as explained by Grievant, provided that each driver is given five consecutive daily shifts at \$60 per run; after the 5-day period is over, the shuttle run passes to the next bus operator from that zone in seniority order; bus operators whose regular morning and evening bus runs would interfere with the completion of the shuttle run are not permitted to take any shuttle runs.

8. Respondent's administration indicated that the statutory process for altering the way the shuttle runs are assigned was completed many years ago. However, because

¹Grievant works in the Short Line Zone.

the documentation from that process could not be located, the statutory process for establishing an alternate procedure for awarding these extracurricular MOVTI shuttle runs was completed again in January of 2015.

9. After this alternative process was approved in January of 2015, the manner in which these shuttle runs were awarded did not change. The vote of the bus operators and the approval of Respondent confirmed the same process that had been in operation for at least 20 years. Grievant has been participating in the Short Line shuttle run process for the past 20 years.

10. Grievant indicated that he became aware that extracurricular assignments must be posted and filled on the basis of seniority unless the board of education and the affected employees approve of a different system in December of 2014.

11. Grievant began performing another shuttle run on January 15, 2016, which would conflict with the extracurricular assignment at issue in this case.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "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). In other words, “[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The first issue to be addressed is whether or not the grievance was filed at level one in a timely fashion. Respondent has maintained throughout the process that this grievance be dismissed as untimely filed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep’t of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). “The generally accepted meaning of preponderance of the evidence is ‘more likely than not.’” *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

Within fifteen days² 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. . . .

The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). 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).

Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

²Pursuant to W. VA. CODE § 6C-2-2(c) “[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee’s workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.”

It is not disputed that Grievant has known how the shuttle runs were assigned in the Short Run Zone for decades. Grievant's only argument that he was entitled to the Short Run assignment at least until a vote was taken on an alternative process for filling the position is unpersuasive. The record supports a finding that the vote of the bus operators and the approval of Respondent confirmed the same process that had been in operation for at least 20 years. While documentation of the exact time of the previous vote approving an alternative system of assignment could not be found, the record did support a conclusion that the bus operators had previously established a process to allow more drivers to participate in these shuttle runs.

Finally, Respondent is correct in pointing out that the discovery of a legal theory to support a grievance does not constitute discovery of an event giving rise to a grievance. It is well-settled that the discovery of a legal theory to support a grievance, such as Grievant's reliance on WEST VIRGINIA CODE § 18A-4-16(5), does not constitute discovery of the event giving rise to a grievance. *Spahr v. Preston County Bd. of Educ.*, 182 W.Va. 726, 391 S.E.2d 739 (1990); *Freeman, et al. v. Barbour County Bd. of Educ.*, Docket No. 05-01-444 (May 3, 2006). The grievance form was filed in this case on January 15, 2015, some nineteen years after Grievant first participated in the rotation of drivers who performed the MOVTI shuttle run. The Respondent proved by a preponderance of the evidence that this grievance is untimely and Grievant is without reasonable excuse for the untimely filing.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

2. A grievance must be initiated 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. WEST VIRGINIA CODE § 6C-2-4(a)(1).

3. Respondent has proven by a preponderance of the evidence that this grievance was not initiated within fifteen days of the grievable event, i.e., a practice that had been in place for some twenty years, so it is untimely.

Accordingly, this grievance is **DISMISSED** as untimely.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: April 8, 2016

**Ronald L. Reece
Administrative Law Judge**