

FILE COPY

DO NOT REMOVE
FROM FILE

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 18-0776

(Kanawha County Circuit Court Docket No.: 18-AA-188)

DEC - 6 2018

MELISSA WILFONG,
Petitioner-Appellant,

v.

RANDOLPH COUNTY BOARD OF EDUCATION.
Respondent-Appellee

APPELLANTS BRIEF

Andrew J. Katz, Esquire
The Katz Working Families' Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301
(304) 342-5579
ajk792000@yahoo.com
Counsel for Appellant

I. TABLE OF CONTENTS

SECTION	PAGE
II. Table of Authorities	3
III. Assignments of Error	4
IV. Statement of the Case	4
V. Summary of Argument	5
VI. Statement Regarding Oral Argument and Decision	5
VII. Argument	6
A. STANDARD OF REVIEW	6
B. STATEMENT OF LAW	7
C. DISCUSSION	8
MS. WILFONG'S GRIEVANCE WAS TIMELY FILED BECAUSE SHE DID NOT HAVE THE GROUNDS TO DO SO UNTIL SHE RECEIVED HER NEW ASSIGNMENT	
VIII. Conclusion	9
Certificate of Service	

III. TABLE OF AUTHORITIES

CASES	PAGE
<u>Bolyard v. Kanawha County Bd. of Educ.</u> , 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995)	7
<u>In Re Queen</u> , Syl. Pt. 1, 196 W. Va. 442, 473 S. E. 2d 483 (1996)	6
<u>Martin v. Randolph County Bd. of Educ.</u> , 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)	7
<u>Morgan v. Pizzino</u> , 163 W. Va. 454, 256 S.E.2d 592 (1979)	8
<u>Quinn v. West Virginia N. Comty. Coll.</u> , 197 W. Va. 313, 475 S.E.2d 405 (1996)	7
<u>Ooten v. Mingo County Board of Education</u> , Docket No.: 96-29-122 (7/31/96)	9
STATUTES	
West Virginia Code Section 6C-2-2©	8
West Virginia Code Section 6C-2-4(a)(1)	8
West Virginia Code Section 29-6A-7	6

III. ASSIGNMENT OF ERROR

1. Whether the lower court erred in ruling that Petitioner did not timely file her grievance because she did not file it within 15 days of learning that she would be transferred even though she filed it the day that she learned of her new assignment and the crux of her grievance was not that she was transferred but that she was not transferred to an administrative position.

IV. STATEMENT OF THE CASE

Petitioner has been, for all times relevant hereto, a professional employee for Respondent since 2009. For approximately six years, Petitioner served as a half-time principal and half-time teacher at Valley Head School. See JA at p. 2¹. Valley Head was designated for closure at the conclusion of the 2016-2017 school year. Id. Because of such closure, Ms. Wilfong was recommended for transfer, a fact she was notified of by letter dated March 17, 2017. Id. Importantly, Respondent's Superintendent recommended that Petitioner be permitted to "bump" the least senior assistant principal. While Respondent followed the Superintendent's recommendation to transfer Petitioner, Respondent refused to make a determination regarding to where Petitioner would be transferred. JA at p. 3. Respondent notified Petitioner of its decision by letter dated April 20, 2017. Id. Eventually, on August 1, 2017, Petitioner was placed in the position of Remedial Specialist at Tygarts Valley Middle/High School for the 2017-18 school year. JA at p. 9. Ms. Wilfong filed a grievance to uphold her rights under the West Virginia Code regarding professional transfers on that same day. JA p. 9.

¹ Citations to the Joint Appendix will be in the form of JA at p. __.

V. SUMMARY OF ARGUMENT

This matter is an appeal of a denial of Ms. Wilfong's grievance filed before the West Virginia Public Employees Grievance Board (Grievance Board). The substance of Ms. Wilfong's grievance is that when she was transferred, she should have been placed in an administrative position. The Grievance Board ruled against Petitioner on several grounds, one of which was that she did not timely file her grievance. On appeal, the lower court upheld the ruling on the basis that Petitioner did not file her grievance in a timely manner. It did not reach the merits of Petitioner's grievance.

Noting that there is a statutory requirement to file a grievance within fifteen days of the event being appealed, the lower court ruled that Ms. Wilfong should have filed her grievance within that time period from the date that she learned that she was going to be transferred without knowing to where she would be assigned. Petitioner contends that such ruling is erroneous. Ms. Wilfong did not contest the fact that she was transferred. Moreover, if Ms. Wilfong had been transferred to an administrative position as was appropriate, there would have been no basis for filing a grievance. Thus, a grievance really was not "ripe" until she learned to where she would be assigned. Ms. Wilfong received her assignment on August 1, 2017 and filed her grievance on that day. Thus, her filing was timely.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Of course, this Honorable Court best knows if oral argument will assist clarifying any points raised by the parties. Appellant believes that the legal issues involved are not complex and that a hearing would not assist this Court in reaching a decision.

VII. ARGUMENT

Ms. Wilfong filed her grievance within 15 day of when she received her new job assignment, which was the culmination of her transfer. The lower court erred in ruling that her matter was not timely filed because she did not do so within 15 days of being notified that she was being transferred. Ms. Wilfong would have had no need to file a grievance if she had been assigned to an administrative position. Ms. Wilfong's "harm" occurred when she found out that she was not being transferred to an administrative position and her grievance is timely filed because this occurred on the very day that she was given her new assignment.

A. STANDARD OF REVIEW

The appeal provisions of W. Va.. Code § 29-6A-7 provide that an appeal may be taken to a circuit court where the final grievance decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board . . .and based upon findings of fact, should not be reversed unless clearly wrong²." Quinn v. West Virginia v. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996).

² "Clearly wrong" is when a decision constitutes a misapplication of the law, entirely fails to consider an aspect of the problem or offers an explanation that runs counter to the evidence offered or offers an implausible explanation. In Re Queen, 196 W. Va. 442, 473 S. E. 2d 483 (W. Va. 1996).

Further, an appellate court accords deference to the findings below. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). The reviewing court must defer to the ALJ's factual findings that are supported by substantial evidence, and give substantial deference to inferences drawn from these facts. Id. Conversely, there is a *de novo* review of the conclusions of law and application of law to the facts. Id. Quinn, 475 S.E.2d at 408, *citing* Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995). Ultimately, an appellate court uses both a deferential and plenary standard of review, giving some deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts.

B. STATEMENT OF LAW

The lower tribunal ruled that Appellant did not timely file her grievance below. A grievance must be filed “[w]ithin 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.”³

³ The laws and regulations pertaining to the procedures of the West Virginia Public Employees Grievance Board should be liberally construed. Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

West Virginia Code § 6C-2-4(a)(1)⁴. Here, Appellant's grievance was timely filed for the reasons set forth below.

C. DISCUSSION

MS. WILFONG'S GRIEVANCE WAS TIMELY FILED BECAUSE IT WAS FILED THE DAY SHE LEARNED HER NEW JOB ASSIGNMENT AND SHE DID NOT HAVE GROUNDS TO FILE A GRIEVANCE BEFORE HER ASSIGNMENT WAS GIVEN

The West Virginia Code requires an employee to file a grievance within 15 "business" days of the event upon which it is based. See W. Va. Code Section 6C-2-4(a)(1). Here, Petitioner's grievance was timely filed because it was filed the very day, August 1, 2017, in which her transfer was consummated.

The Grievance Board ruled that since Petitioner was grieving her "transfer," the 15 day period commenced on April 18, 2017, when Respondent made its decision to transfer her "somewhere." However, the Grievance Board misrepresents Ms. Wilfong's position. Petitioner does not contest that she had to be transferred. Indeed, she could not do so as the school at which she worked was closing. Therefore, Respondent's act of transferring her to some location made on April 20, 2017 was not cause for a grievance. Rather, Ms. Wilfong contests the process that was used, a process that culminated in her being placed as a resource specialist and not a building administrator. Indeed, had she been properly placed in an administrative position, no grievance

⁴“Days’ means working days exclusive of Saturday, Sunday, official holidays and any 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.” West Virginia Code § 6C-2-2(c).

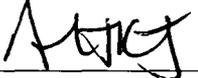
would have been warranted. However, Petitioner did not know where she would be placed until August 1st and she filed a grievance that very day.

The proper way to consider this issue was demonstrated in another grievance case: Ooten v. Mingo County Board of Education, Docket No.: 96-29-122 (7/31/96). In that case, the employer argued that a grievance over a transfer was not properly filed because it was not within 15 days of the decision to transfer. Id. at pp. 4-5. However, in ruling against the employer, the Grievance Board noted that, as here, the grievant had no quarrel with the decision to reassign him. Indeed, the grievant in that case only contested the decision of the employer to treat him as a classroom teacher and not transfer him as a principal. Only after his transfer hearing, when he found out he was transferring to a classroom teacher position, was his transfer grievable. Thus, the Grievance Board properly ruled in that case that the grievance was timely when it occurred within 15 days of the grievant learning to what position he was being transferred. Id. at p. 5. The Grievance Board here, which did not discuss the Ooten case, should have followed its proper legal precedent.

VIII. CONCLUSION

Ms. Wilfong should prevail for the reasons contained herein.

MELISSA WILFONG
By Counsel



Andrew J. Katz (6615)
The Katz Working Families Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301