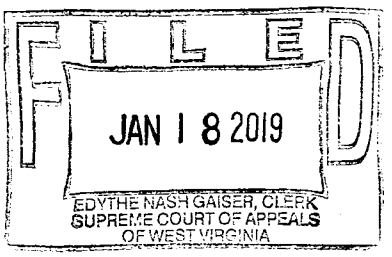
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MELISSA WILFONG,

Plaintiff below, Petitioner,

vs. No. 18-0776

RANDOLPH COUNTY BOARD OF EDUCATION,

Defendant below, Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 18-AA-188

RESPONDENT RANDOLPH COUNTY BOARD OF EDUCATION'S SUMMARY RESPONSE

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SUMMARY RESPONSE

Pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure, Respondent files this Summary Response to Petitioner's Brief.

Petitioner's sole assignment of error in this matter is that the Circuit Court erred in affirming the conclusion of the Public Employees Grievance Board (hereinafter "Grievance Board") that the underlying grievance was untimely filed. Although the Grievance Board also ruled in Respondent's favor regarding the merits of Petitioner's grievance, she has not appealed or challenged those aspects of the grievance decision. As the merits of this case were not appealed, the Grievance Board's decision in that regard is now final and cannot be disturbed by this Court.

Of particular importance to the instant case is this Court's standard of review. The Grievance Board's finding that the grievance was not filed in accordance with the grievance statute's requirements was necessarily based upon factual conclusions, specifically as to what the grievable event was and when it occurred. Pursuant to longstanding precedent, those findings are to be given great deference by a reviewing court.

> Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.

Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000). "A final order of the hearing examiner for the . . . Grievance Board . . . and

based upon findings of fact, should not be reversed unless clearly wrong." *Quinn v. West Virginia Northern Community College*, 197 W.Va. 313, 475 S.E.2d 405 (1996).

In the grievance decision in this case, the Administrative Law Judge ("ALJ") discussed how, although recommended to the Board of Education ("the Board") at the same meeting when Petitioner's transfer was approved in April of 2017, the Board declined to displace an assistant principal in order to provide Petitioner with a direct administrative transfer. Appendix at 8. While ruling that Petitioner was neither entitled to the creation of a new position nor a direct lateral transfer, the ALJ also addressed Petitioner's argument that she should have been directly transferred to a specific half administrative/half teacher position at a different school, which also should have occurred in the spring of 2017, if it had been possible and/or proper. Appendix at 11-12.[1] However, it was undisputed throughout this proceeding that, not only did such a displacement of another employee not occur during the required time period, but Petitioner was advised repeatedly by the personnel director and incoming superintendent that she, in fact, would NOT be directly transferred into any specific position and should apply for all positions for which she was qualified for the upcoming 2017-2018 school year. Appendix at 8, 12, 26, 40, 41, 55, 56. As the ALJ concluded,

> The record demonstrated by a preponderance of the evidence that Grievant knew at the time of this transfer approval and within the weeks following that she had not been directly placed into any particular position

[1] As with Petitioner's own transfer, and as she clearly argued at all levels of the grievance and initial appeal, any displacement of another employee in order to provide her with a specific position pursuant to the requirements of West Virginia Code § 18A-4-7a would have had to occur within the timelines set by the provisions of West Virginia Code § 18A-2-2, if resulting in a dismissal from employment, or of West Virginia Code § 18A-2-7, if necessitating a transfer. Deadlines under both statutes require notice and/or board action by April or May of the preceding school year.

> and would be required to bid upon available positions. Grievant offered no explanation or excuse for waiting until over three months after approval of her transfer to file a grievance. Grievant had been repeatedly advised by the personnel office to apply for posted positions, . . . This grievance was filed far beyond the 15-day time requirement of the grievance statute[.]

Appendix at 13-14.

In numerous cases, this Court has affirmed that an employee's failure to file a grievance within the time limits set forth in West Virginia Code § 6C-2-4(a) justifies dismissal of the untimely claim. *See Rose v. Raleigh County Bd. of Educ.*, 483 S.E.2d 566, 199 W.Va. 220 (W. Va., 1997); *Lewis Cnty. Bd. of Educ. v. Holden*, 234 W.Va. 666, 769 S.E.2d 282 (W. Va., 2015); *See also Spahr v. Preston Cnty. Bd. of Educ.*, 182 W.Va. 726, 391 S.E.2d 739 (1990). Specifically, an employee must initiate her grievance within fifteen days of the grievable event or within fifteen days of the employee's discovery of the occurrence of such event. West Virginia Code § 6C-2-4(a)(1).

The Grievance Board's factual conclusions regarding the untimely filing of the grievance are fully supported by the evidence of record and are not clearly wrong. Petitioner's own testimony confirmed her clear understanding that, although she believed her seniority entitled her to displace other administrative employees in the spring of 2017, the Board of Education declined to approve any such transfers or reductions. Appendix at 25 – 27. Also, both Petitioner and her superiors unanimously agreed that she was told on multiple occasions, beginning just after her transfer was approved in April of 2017, that she would have to bid on positions and would not be "automatically transferred" into any particular job or "bump" any other specific

administrator. *Id.* All of these events occurred months before her grievance filing in August of 2017.

As held by the Circuit Court,

> Here, the event upon which Petitioner claims to have predicated her August 1, 2017, grievance is her transfer to a non-administrative position. Petitioner does not dispute that Respondent made no assurance that [she] would be transferred to an administrative position and . . . admits that . . . she was never offered to be transferred into a position similar to her former position.

Appendix at 4. The Court went on to conclude that Petitioner was required to file her grievance "within fifteen days of April 20, 2017, the date on which she learned she was being transferred with no assurance of being transferred to an administrative position[.]" She failed to prove that her filing on August 1, 2017, "was within fifteen days of 'the occurrence of the event upon which the grievance is based' and thus did not satisfy her burden." Appendix at 5. The findings of both the Grievance Board and Circuit Court are supported by ample evidence and cannot be found to be clearly wrong in this case.

Petitioner contends that, if she had been placed in an administrative position, there would have been no need to file a grievance. Yet, as Petitioner has admitted and as Respondent proved with uncontroverted evidence, she was presented with many opportunities to secure specific positions which would likely have resulted in a promotion from her previous half-administrator/half-teacher job. Appendix at 70-79. For inexplicable reasons, and apparently as the result of advice from her organization representatives, she refused to apply for or even participate in the application/hiring process for these employment opportunities. Appendix at 8, 26, 27, 28, 40, 56. At one point during the three-month period between being placed on transfer and finally agreeing to accept a teaching position, Petitioner even refused to provide written

confirmation of her choices to the administration, albeit while also expressing concern as to the potential consequences of her ill-advised refusal to cooperate. Appendix at 68.

Petitioner's outright refusal to take action to ameliorate her situation, then crying foul as a result of her own decisions -- well beyond the required time limits for initiating a grievance -- surely constitutes "invited error." As so aptly stated by this Court in *Hopkins v. DC Chapman Ventures, Inc.*, 228 W.Va. 213, 719 S.E.2d 381 (W. Va., 2011), "'[a] judgment will not be reversed for any error . . . introduced by or invited by the party seeking reversal.' Syllabus Point 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966)." In *Hopkins*, the Court discussed the many cases where this principle has been recognized and upheld:

> Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences. *State v. Crabtree*, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996). *See also Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 599, 396 S.E.2d 766, 780 (1990) ('[T]he appellant cannot benefit from the consequences of error it invited.'); *In re Tiffany Marie S.*, 196 W.Va. 223, 233, 470 S.E.2d 177, 187 (1996) ('[W]e regularly turn a deaf ear to error that was invited by the complaining party.'); *Comer v. Ritter Lumber Co.*, 59 W.Va. 688, 689, 53 S.E. 906, 907 (1906) (the party inviting 'the error ... must accept its results'); Syllabus Point 1, *McElhinny v. Minor*, 91 W.Va. 755, 114 S.E. 147 (1922) ('appellant cannot complain of errors ... which he alone caused'); *Smith v. Bechtold*, 190 W.Va. 315, 438 S.E.2d 347 (1993) ('invited error' when appellant moved for the very delay that was the subject of the appeal); Syllabus Point 2, *Young v. Young*, 194 W.Va. 405, 460 S.E.2d 651 (1995) ('A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.'); Syllabus Point 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971) ('An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited....').

719 S.E.2d at 387. Petitioner failed to file a timely grievance as a result of her transfer in April of 2017, then knowingly refused consideration for numerous jobs which, if she

had been selected, would have resulted in no grievance being necessary. A very untimely grievance was ultimately filed, directly as the result of Petitioner's knowing actions, i.e. an invited error from which she cannot now benefit.

Finally, and perhaps most importantly for this Court's consideration, Respondent must emphasize that, since Petitioner has not challenged the lower Court's failure to address the merits of the Grievance Board's decision, those matters are not before this Court and remain final upon the parties. As this Court held in syllabus point three of *Sulzberger & Sons Co. v. Fairmont Packing Co.*, 86 W.Va. 361, 103 S.E. 121 (1920), "[t]his court will not review or reverse a decree or order of the circuit court, or any part thereof, not appealed from." *See also Hupp v. Sasser*, 490 S.E.2d 880, 200 W.Va. 791 (W. Va., 1997). As discussed in *Hupp*, when the petitioner makes the decision not to raise an issue as an assignment of error, that claim is deemed to have been waived, and this Court has no choice but to uphold the lower tribunal's ruling. 490 S.E.2d at 889. It is certainly not unusual for circuit courts to only address portions of a Grievance Board decision, leaving it incumbent upon the parties to raise any unaddressed issues on appeal, whether as assignments of error or as cross assignments of error, that they wish this Court to review. Having chosen not to raise any of the Grievance Board's rulings on the merits as assignments of error in this appeal, Petitioner has waived her option to challenge those aspects of the decision.

Due to the merits of the underlying grievance decision being unchallenged in the current appeal, any ruling by this Court on the issue of the timeliness of the grievance filing would be of absolutely no consequence at this juncture. Even if it were determined that the Grievance Board and Circuit Court erred in their rulings regarding

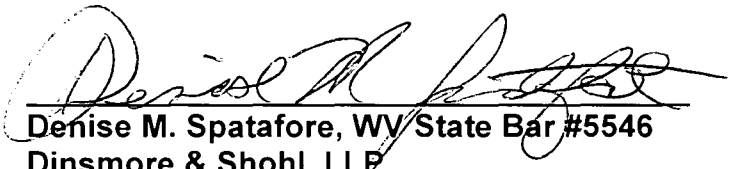
the timeliness of the grievance, this Court is without jurisdiction to address the underlying issue in the grievance, i.e. whether Petitioner was entitled to some other position of employment through the transfer process that took place in the spring of 2017. "'Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.' Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908)." Syl. Pt. 1, *State ex rel. McCabe v. Seifert*, 220 W.Va. 79, 640 S.E.2d 142 (2006). Because a reversal of the lower Court's ruling on timeliness will not change the outcome of the grievance on the merits, the matter is now moot, due to Petitioner's choice to raise no assignments of error with regard to the denial of her grievance by the Grievance Board.

Conclusion

Petitioner has to meet her burden of proving that the lower Court's ruling was clearly wrong, so the Order of the Circuit Court of Kanawha County must now be affirmed. Both the findings of the Grievance Board and the Circuit Court were well-reasoned and supported by ample evidence with regard to Petitioner's knowledge of the event giving rise to her grievance, her knowing failure to file her grievance within the statutory required time limits, and her actions which constituted invited error regarding her late filing. Moreover, regardless of this Court's conclusions regarding whether the lower tribunals were correct regarding the timeliness issue, with Petitioner having raised no challenges to any other issues decided in the underlying decision of the Grievance Board, this matter has now been rendered moot. Any ruling by this Court would have

no consequence to the parties or the merits of the case which remain unchallenged, requiring that this appeal be dismissed.

RANDOLPH COUNTY BOARD OF EDUCATION,
By counsel



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