PAM STURGIS, et al. ,

Grievants,

v. **Docket No. 97-HHR-376**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

HUNTINGTON STATE HOSPITAL, and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Pam Sturgis, Todd Jenkins (See footnote 1) , Tina McComas, Judith Schoenlein, Chantel Bowman (See footnote 2) , Janet Dickess, and Patricia Olah, (See footnote 3) allege that the West Virginia Department of Health and Human Resources ("HHR") failed to award the pay equity award given to other nurses at Huntington State Hospital ("HSH") to the nursing staff at the Substance Abuse Unit ("SAU"). The relief sought is a ten percent salary equity adjustment. This case became mature for decision on October 14, 1998, the date of the last Level IV hearing. (See footnote 4) This grievance was filed on January 18, 1995, and has had a long and convoluted procedural history. (See footnote 5) After the grievance was filed, it was denied at Level I by the Grievants' supervisor, Mr. Robert Nida. At some point, Grievants appealed to Level III. A Level III hearing was scheduled and continued at the request of Grievants so they could seek representation. In the Level III Order of Continuance dated April 11, 1995, the Grievance Evaluator stated the continuance was granted, but the hearing would not be rescheduled at that time because the Hearing Examiner was leaving her position. That Order stated, "This hearing will be rescheduled as soon as possible in the near future."

HHR did not reschedule the hearing, and Grievants did not ask for a new hearing date. Apparently, when the new Hearing Examiner took over she was unaware the grievance was pending, and did not know it needed to be rescheduled. In the Fall of 1996, Grievants wrote the then Hearing Examiner, Ms. Barbara Wheeler, and stated they had received a copy of the Nida grievance

decision (See footnote 6) , which had been issued in April 1996, and since their grievance was the same as Mr. Nida's they wished to discuss settlement. Ms. Wheeler directed Grievants to discuss their settlement request with Mr. Allen Campbell, HHR's attorney, as she was not empowered to act on those requests. Grievants did not contact Mr. Campbell, but later requested a hearing date.

At the Level III hearing on June 11, 1997, Respondents argued the grievance was barred by laches as Grievants had not pursued their grievance after the last continuance at Level III. No testimony on the merits of the case was presented. Respondents' Motionto Dismiss was granted on August 8, 1997, and Grievants appealed to Level IV on August 14, 1997. A Level IV hearing was held on November 11, 1997. Respondent HHR presented a Motion to Dismiss based on Laches. This Motion was denied as HHR had informed Grievants that it would reschedule the hearing. Although, Grievants could have checked on the matter sooner, HHR had the responsibility to schedule the grievance since it committed itself to this task.

At that same hearing, Respondent Division of Personnel ("DOP"), through its representative Mr. Lowell Basford, made an Oral Motion to Dismiss based on untimely filing. Mr. Campbell joined this Motion. Since Grievants were unaware of this Motion until the hearing, Mr. Basford was directed to place the Motion in writing, and Grievants were given until the next hearing to answer and to present witnesses to respond to the Motion.

The next hearing was held on May 5, 1998, and no Grievants were present to rebut Respondents' Motion. Additionally, there was no testimony to support Respondents' assumption that the grievance was untimely. Grievants' representative, Kristen Eldridge, argued Grievants had filed in a timely manner, as soon as they learned HHR was going to grant the HSH nurses a pay equity award, and they would not be included in this increase. Grievants asked to be allowed time to respond to Respondents' Motion in writing.

On August 14, 1998, Respondents' motion was denied for lack of evidence. No testimony had ever been given by Grievants as to when they became aware of the pay equity awards or on the merits of the case.

A third Level IV hearing was held on October 14, 1998. The representative for the Grievants did not attend, and no notice was received by either Grievants or the Grievance Board that the representative would not be there. Grievants elected to proceed with thehearing and to represent themselves. Only two Grievants, Mr. Jenkins and Ms. Bowman attended the hearing. They stated

they were unaware where the rest of the Grievants were, with the exception of Ms. Schoenlein.

In the presentation of their case, Grievant Jenkins indicated he believed the HSH nurses had received the pay equity award as the result of winning a grievance. In actuality, the pay equity award was granted by HHR after extensive study of salaries in the surrounding area and in response to difficulties HSH was experiencing in retention and recruitment. Grievant Jenkins indicated they were encouraged by Mr. Nida to file their pay equity award grievance, either in the Fall of 1993 or the Winter of 1994. Grievants believed at that time that Mr. Nida was going to be their representative. Mr. Nida filed his grievance in March of 1994, and Grievants did not file until January of 1995.

After Grievants presented this testimony which contradicted the representations of their former representative, Ms. Eldridge, Mr. Campbell renewed his Motion to Dismiss for untimely filing. (See footnote 7)

Grievants then proceeded to present very limited evidence to support their case. Respondents then presented the unrebutted testimony of Mr. Basford that the SAU was not included in the pay equity award plan developed by HSH's Hospital Administrator, (See footnote 8) and the SAU, although on the grounds of HSH, was not a part of that facility and wassupervised by another HHR entity. Apparently, Grievants' administrator could have also devised a plan for pay equity awards, but he did not do so.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

Respondents contend this grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. 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. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991). The timeliness issue is governed by W. Va. Code § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Unfortunately for Grievants, it is clear from their own testimony that this grievance was untimely filed. Grievants were informed by Mr. Nida that they should or could file a grievance in the Fall of 1993 or the Winter of 1994, and that he was going to do so. Grievants did not filed this action until approximately nine months to one year after they knew of the event or occurrence that was the basis for their filing, and after they were informed they had a right to file. Grievants did not meet the timelines mandated by W. Va. Code § 29-6A-4(a).

Additionally, even if the grievance had been found to be timely, the evidence presented clearly indicated the SAU was not part of HSH and was never meant to be included in the pay equity award developed for HSH nurses.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievants were LPNs employed at the SAU located on the grounds of HSH. Their Unit Director was Mr. Jack Clohand, the Director of Alcoholism and Drug Abuse programs. The SAU was

part of HHR under the control of Mr. Robert Hess the Director of the Office of Behavior Health Services. This Unit is no longer under the control of HHR, and is now a private facility.

2. Grievants knew, at the very latest, by the Winter of 1993-1994 that the nurses at HSH were to be granted a pay equity award, and they would not be receiving this increase.

3. This increase was only for certain identified nurses at HSH.

4. Grievants did not file this grievance until January 18, 1995.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

2. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept.,Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996).

3. W. Va. Code § 29-6A-4 provides a grievance must be filed within ten days of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance.

4. Respondents proved Grievants did not file their grievance within the time frames mandated by W. Va. Code § 29-6A-4.

5. Grievants did not present a reason that would excuse their failure to file their grievance within the specified timelines.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such

appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 30, 1998

Footnote: 1

Mr. Jenkins was incorrectly identified in several documents as Mr. Perkins.

Footnote: 2

Ms. Bowman was incorrectly identified in several documents as Ms. Brown.

Footnote: 3

The whereabouts of the majority of Grievants is unknown. Most of them no longer work for HHR, and have not appeared at any of the Level IV hearings. Only Mr. Jenkins, Ms. Schoenlein, and Ms. Bowman are employed by HHR, currently at HSH.

Footnote: 4

Respondent HHR was represented by Assistant Attorney General B. Allen Campbell, DOP was represented by Mr. Lowell Basford, Assistant Director of Classification and Compensation, and Grievants, at the last hearing, were pro se.

Footnote: 5

Multiple continuances were granted at Level IV at the request of the parties.

Footnote: 6

Docket No. 95-HHR-365 (Apr. 30, 1996).

Footnote: 7

Mr. Campbell also renewed his Motion to Dismiss for Laches after the testimony that no one knew where the other Grievants were. He also moved to dismiss the Grievants who did not attend the hearing. Due to the ruling on the timeliness Motion, the other two Motions do not need to be considered.

Footnote: 8

The pay equity award request sent by then HSH Hospital Administrator Joe Mulloy to then HHR Secretary Ruth Ann Panepinto states the proposal was "only for HSH and does not set a precedent for other facilities." Resp. DOP Ex. 1.