LAILA KHOURY, et al.,

Grievants,

v.

DOCKET NO. 99-20-031

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, professional employees at Cedar Grove Community School, employed by the Kanawha County Board of Education ("Board"), filed the following grievance on June 5, 1998:

> The employees at Cedar Grove Community School were treated differently from the employees at McKinley Jr. High. The Cedar Grove Community School employees were paid $100/day for attending Tools for Schools training while the McKinley Jr. High employees were paid their daily rate of pay.
>
> Relief requested: Grievants be paid the difference between the $100/day salary they received and their normal daily rate of pay plus interest on this additional money from the time that they should have received their normal rate of pay.

A level two hearing was conducted on December 9, 1998, and the grievance denied by George W. Beckett, Grievance Evaluator, on December 30, 1998. The grievance was waived at level three, and Grievants appealed to level four on January 20, 1999. (See footnote 1) A levelfour hearing was conducted on February 22, 1999. The deadline for the parties' proposed findings of fact and conclusions of law was March 19, 1999, at which time this grievance became mature for decision. Grievants were represented by Perry Bryant and Steve Angel, West Virginia Education Association, and the Board was represented by its counsel, James Withrow, Esq.

SUMMARY OF EVIDENCE

Level Two Evaluator's Exhibits

Ex. 1 -

Grievance forms.

Level Two Grievants' Exhibits

Ex. 1 -

Staff Development Resource Director 1995-2000.

Level Four Grievants' Exhibits

Ex. 1 -

Grievance Forms from David Gillispie - Staff, filed July 14,1997.

Testimony

Grievants presented the testimony of Harold Carvey, Kathy Brown, John Barton, Roy Petry, Jr., William Heatherly, Dave Gillespie, Suzanne Carte, Leo Stamm, Alvin A. Anderson, and David Ashley. The Board presented no additional testimony.

FINDINGS OF FACT

The facts are not in dispute, and are set forth as follows.

1. Grievants are all professional employees of the Board, assigned to Cedar Grove Community School.

2. From July 7 through 11, 1997, Grievants attended “Tools for Schools” training at Capital High School, sponsored by the Board. The training lasted for five days and Grievants were paid $100.00 per day. 3. From July 7 through 11, 1997, the professional staff of McKinley Junior High School also attended “Tools for Schools” training at Capital High School. They were also paid $100.00 per day.

4. Subsequent to the training, David Gillespie, Principal at McKinley Junior High, told Harold Carvey, Principal of Cedar Grove Community School, that he was going to file a grievance on behalf

of himself and his employees, requesting they be paid their daily rate of pay for attending the training.

5. Mr. Carvey asked Mr. Gillespie to include him and his staff on the grievance. Mr. Carvey then went out of town to attend another training session, and was gone for one week.

6. Mr. Gillespie filed the grievance, but was told by William Courtney, Director of Personnel, that he could not file a grievance for the Cedar Grove employees.

7. Mr. Gillespie then proceeded to file a grievance on July 14, 1997, on behalf of himself and the employees of McKinley Junior High, asserting they should have been paid their regular daily rate of pay rather than $100.00 per day. Only Mr. Gillespie was a signatory to the grievance form.

8. Mr. Carvey returned to town on July 21, 1997, at which time Mr. Gillespie informed him that he was unable to file a grievance on behalf of the Cedar Grove employees.

9. Mr. Carvey asked Mr. Courtney why Mr. Gillespie was not allowed to file a grievance on behalf of the Cedar Grove employees, and Mr. Courtney told him it was because Mr. Gillespie was not principal at Cedar Grove, and that he could not file on behalf of employees who were not signatories to the grievance form. 10. Mr. Courtney also told Mr. Carvey that it was too late for him to file a grievance on behalf of himself and his employees, because the time limit had expired under the grievance statute.

11. At level three of the grievance process, on May 18, 1998, the Board granted Mr. Gillespie's grievance and awarded the McKinley staff their regular daily rate of pay for attending the training.

12. Grievants filed this grievance within fifteen days of learning about the Board's level three decision, alleging discrimination, and requesting they be paid their daily rate of pay for attending the “Tools for Schools” training.

DISCUSSION

In a non-disciplinary matter, Grievants bear the burden of proving their case by a preponderance of the evidence. The Board raised the affirmative defense of timeliness at level two, and reasserted that defense at level four. Since a timeliness ruling could be dispositive of the grievance, that issue will be addressed first.

W. Va. Code § 18-29-4(a)(1) requires a grievance to be filed within fifteen days following the occurrence of the event upon which the grievance is abased. A grievant will not be allowed to overcome a timeliness defense by basing his current claim on another employee's successful

grievance decision, if the events giving rise to the grievance were known tothe grievant, but he delayed filing until the other employee received a successful outcome. Haynes v. Kanawha County Bd. of Educ., Docket No. 94-20-337 (Dec. 16, 1994).

There is no dispute that the Cedar Grove employees did not file their grievance until after the McKinley Junior High School employees were granted their grievance on May 18,1998. There is also no dispute that the event giving rise to this grievance was receiving $100.00 per day as opposed to their daily rate of pay for attending the “Tools for Schools” seminar in July 1998.

However, Grievants contend they were misled and prevented from filing a timely grievance when Mr. Courtney advised Mr. Gillespie that he could not file a grievance for the employees of Cedar Grove Community School. Principal Carvey had asked Principal Gillespie to include him and the employees of Cedar Grove in the original grievance filing. Had Principal Gillespie been permitted to file on behalf of those employees, their grievance would have been timely filed in accordance with the statute.

W. Va. Code § 18-29-2(a) states in part: “A grievance may be filed by one or more employees on behalf of a class of similarly situated employees: Provided, That any similarly situated employee shall indicate in writing of his or her intent to join the class of similarly situated employees.” When Mr. Courtney would not allow Principal Gillespie to file a grievance on behalf of the Cedar Grove employees without their signatures, he correctly applied this portion of the grievance statute. However, Mr. Courtney treated the employees of McKinley Junior High School differently when he allowed Principal Gillespie to file the grievance on their behalf, without their signatures. It was not Principal Gillespie's role as principal which permitted him to file on behalf of McKinley employees as opposed to Cedar Grove employees. The statute clearly provides that the grievance may be filed by “one or more employees” on behalf of a class of similarly situated employees. Those employees do not necessarily have to be assigned to the same school to be “similar”. Indeed, in this grievance, the similarity between the groups of employees is not whatschool they were assigned to, but that they attended the “Tools for Schools” training and were paid $100.00 per day.

The Board cannot have it both ways. It cannot claim that it is acceptable to have Principal Gillespie file a grievance on behalf of one group of employees without the employees' signatures, but not acceptable for him to file on behalf of another group without their signatures.

The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 180 W.

Va. 634, 378 S.E.2d 843 (1989), defined the type of representations made by employees which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." This standard was adopted in and incorporated in this Grievance Board's decision in Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). See also Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Altizer v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991).

The Board, through Mr. Courtney, led Prinicpal Gillespie and Principal Carvey to believe that Principal Gillespie could not file on behalf of the Cedar Grove employees, and then claimed the grievance filed by the Cedar Grove employees was untimely. Because Mr. Courtney "unmistakably" understood that preventing Principal Gillespie from filing a grievance on behalf of the Cedar Grove employees would cause a delay in the filing of that grievance, since Principal Carvey was out of town, and because he allowed PrincipalGillespie to file on behalf of McKinley employees without their signatures, the Board is estopped from asserting that the Cedar Grove filing was untimely.

Grievants claim they have been discriminated against because the Board agreed to pay the McKinley Junior High employees their daily rate of pay for attending the "Tools for Schools" training. W. Va. Code § 18-29-2(m) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(a)

that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of Grievants and/or the other employee(s) and were not agreed to by Grievants in writing.

Richardson v. Putnam County Bd. of Educ., Docket No. 98-40-133 (July 30, 1998); Browning v. Mingo County Bd. of Educ., Docket No. 98-29-297 (May 28, 1998); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1991) . Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision.

Grievants are all similarly situated to the McKinley Junior High School employees, as professional employees of the Board who attended the five-day "Tools for Schools"training from July 7 through 11, 1997. Grievants were paid $100.00 per day for attending the training; the McKinley employees were paid their daily rate of pay, or more than $100.00 per day for attending the training. Clearly, this difference in pay is a detriment to Grievants. Thus, they have established a prima facie case of discrimination. The Board has offered no legitimate, non-discriminatory reason for the difference in treatment, other than its affirmative defense of timeliness, which has been denied. Thus, Grievants have proven they were discriminated against by the Board when the Board agreed to pay the McKinley employees their daily rate of pay, but not Grievants.

CONCLUSIONS OF LAW

1. W. Va. Code § 18-29-4(a)(1) requires a grievance to be filed within fifteen days following the occurrence of the event upon which the grievance is based. A grievant will not be allowed to overcome a timeliness defense by basing his current claim on another employee's successful grievance decision, if the events giving rise to the grievance were known to the grievant, but he delayed filing until the other employee received a successful outcome. Haynes v. Kanawha County Bd. of Educ., Docket No. 94-20-337 (Dec. 16, 1994).

2. W. Va. Code § 18-29-2(a) states in part: "A grievance may be filed by one or more employees on behalf of a class of similarly situated employees: Provided, That any similarly situated employee shall indicate in writing of his or her intent to join the class of similarly situated employees."

3. A claim of estoppel against an employer's claim of untimeliness is available to an employee

only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Naylor v. W. Va. Human Rights Comm'n,180 W. Va. 634, 378 S.E.2d 843 (1989). See also Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Altizer, et al. v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987).

4. Because the Board unmistakably knew that its actions in disallowing Principal Gillespie to file the grievance on behalf of the Cedar Grove employees would result in an untimely filing, but allowed him to file a grievance on behalf of the McKinley employees without their signatures, the Board is estopped from asserting the Cedar Grove employees' filing was untimely.

5. W. Va. Code § 18-29-2(m) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(a)

that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of Grievants and/or the other employee(s) and were not agreed to by Grievants in writing.

Richardson v. Putnam County Bd. of Educ., Docket No. 98-40-133 (July 30, 1998); Browning, et al. v. Mingo County Bd. of Educ., Docket No. 98-29-297 (May 28, 1998); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1991). 6. Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-

discriminatory reason for the employment decision.

7. Grievants have proven the Board has discriminated against them by granting the McKinley employees their daily rate of pay for attending the "Tools for Schools" training, but denying the same pay to Grievants.

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to compensate Grievants for the difference between $100.00 per day and their daily rate of pay for attending the five-day "Tools for Schools" training from July 7 through 11, 1997, plus interest.

Any party 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 § 18-29-7. 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. However, the appealing party is required by W. Va. Code § 29-A-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 record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 31, 1999

Footnote: 1

The employees of four schools, Cedar Grove, Hayes Junior High, DuPont Junior High, and St. Albans High School, all filed similar grievances after the Board awarded the McKinley employees their daily rate of pay. Those grievances were consolidated at level two for hearing purposes only.