PAMELA SEE, et al.,

Grievants,

v. **Docket No. 03-DOE-047**

DEPARTMENT OF EDUCATION/
SCHOOLS FOR THE DEAF AND BLIND,

Respondent.

DECISION

Grievants (See footnote 1) initiated separate grievances on or about December 2, 2002, alleging they have inequitable work schedules compared to other employees of Respondent, in that"we are required to work more than a five day work week and our schedules require us to report to work with only eight hours off between shifts." They seek to have their schedules adjusted to provide for a "normal work week" and that they no longer be required to return to work with only eight hours between shifts. The grievances were denied at level one on December 12, 2002. Grievants' claims were consolidated for hearing at level two on February 6, 2003, and the grievance was denied on February 10, 2003. Level three consideration was waived, pursuant to W. Va. Code § 18-29-4(c). Grievants appealed to level four on February 19, 2003. A hearing was held in the Grievance Board's Westover, West Virginia, office on April 9, 2003. Grievants were represented by Harvey Bane of WVEA, and Respondent was represented by its counsel, Heather L. Deskins. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 12, 2003. The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed at the Schools for the Deaf and the Blind ("SDB") as child care workers (a/k/a "houseparents"). Their duties are to provide supervision and care for the students at SDB when they are not in classes. Because students at SDB (ages 3 to 18 years) are from all over

the state and live in a dormitory setting at the school, they require 24-hour supervision. Grievants' duties include assisting students with homework, supervision of recreational activities, administration of medication, and general “home” care in the dormitories, such as bathing, assistance with toilet use, and generally making sure the children are safe.

2. Due to the dormitory setting at SDB and the houseparents' responsibility for 24-hour care of the students, Grievants' workweek begins at 11:00 p.m. on Saturday and ends the following Saturday at 11:00 p.m. Grievants work one of two shifts, either 3:00 to 11:00 or 11:00 to 7:00 a.m. (See footnote 2)

3. Each Grievant always receives two days off within the Saturday to Saturday workweek, but they are not always consecutive. Also, their days off vary from week to week.

4. Grievants do not work on holidays when the students go home, and they receive holiday pay for those days. 5. Grievants' employment term is 200 days.

6. Grievants received their schedules for their entire 2002-2003 school year on August 16, 2002.

7. Grievants sometimes are required to work more than five consecutive days, but those days usually overlap two work weeks, and they always receive their two days off during each work week.

8. On infrequent occasions, some Grievants have been required to work night shift one day, then work afternoon shift the following day, leaving only eight hours off between their work shifts.

9. Bus drivers are the only other employees of SDB who are required to work weekends. All other employees work Monday through Friday during daytime hours. Although food services are obviously necessary in the dorms on weekends, SDB employs substitute cooks to provide food on the weekends.

10. Grievants requested an informal conference regarding this grievance in late November of 2002.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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). See W. Va. Code § 18-29-6.

Respondent contends that this grievance was not filed within the statutory timeframe, so it should be denied on that basis alone. The burden of proof is on the respondentasserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievants may then attempt to demonstrate that they should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. West Virginia Code § 18-29-4(a) provides, in pertinent part:

> Before a grievance is filed and 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 or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
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> Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. 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). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke thegrievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

In the instant case, Grievants contend that, although they were provided with the year's schedule on August 16, 2002, Respondent's use of that schedule constitutes a continuing practice. SDB counters that, not only was the schedule for the current school year provided to Grievants at least three months prior to their initiation of the grievance process, but the policies they are grieving--i.e.

the Saturday to Saturday schedule for houseparents and the shifts applicable to them--have been in use since at least 1996. "This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996)." Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). However, “continuing damage arising from the alleged wrongful act which occurred in [the past] . . . cannot be converted into a continuing practice giving rise to a timely grievance[.]" Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995).

This grievance is clearly untimely. Grievants knew their schedule by August of 2002 at the very latest and, arguably, knew that the requirements of their schedules going back to 1996. Use of the schedule does not constitute a continuing practice. The adoption of the schedule is the action being grieved, which occurred far more than fifteen days prior to the filing of this grievance in November of 2002. Nevertheless, even if the grievance had been filed in a timely manner, Grievants have failed to prove their claims. They allege their schedules and workweek violate the provisions of W. Va. Code § 18A-4-8, which establishes the employment term for service personnel, along with other portions of that chapter setting forth the state minimum pay scale and class titles. However, Grievants' arguments regarding these statutes are not tenable, because the provisions are simply inapplicable to their positions as child care workers. West Virginia Code § 18A-1-1(a) defines “school personnel” as “all personnel employed by a *county board of education*” and further states that they are “comprised of two categories: Professional personnel and service personnel.” (Emphasis added.) Furthermore, W. Va. Code § 18A-4-8, which sets forth the class titles for all service personnel, does not include a definition for “child care worker.”

Grievants' positions are not service personnel positions and are encompassed by the provisions of W. Va. Code § 18-17-9, which authorizes the state board of education to employ “such auxiliary and service personnel as is deemed necessary for meeting the needs of the schools for the deaf and blind.” That statute only requires that these employees receive a written contract prior to their employment, setting forth their classification, terms of work, employment period and pay. Nevertheless, even if Grievants were considered service personnel, they have not established any

portion of the above- cited statutes which have been violated. In fact, W. Va. Code § 18A-4-8 notes that employees may be employed on a ten-month or twelve-month basis, and notes that "[n]o service employee, without his or her agreement, may be required to report for work more than five days per week[.]" The evidence presented in this case shows that, within theseven-day workweek utilized for houseparents, each employee receives two days off every week, so this provision has not been violated.

Additionally, as noted by Respondent, the schedules used for houseparents comply with both the Fair Labor Standards Act ("FLSA") and West Virginia statute regarding work hours. West Virginia Code § 21-5C-1(g) provides that a "workweek" is comprised of "seven consecutive twenty-four hour periods," which "need not coincide with the calendar week, and may begin any day of the calendar week and any hour of the day." The FLSA's provision is similar, providing that a workweek is seven consecutive 24-hour periods and may begin on any day and at any hour of the day. 29 C..F.R. § 778.105. Respondent's use of the Saturday to Saturday workweek, with two days off for each employee within that week, does not violate these provisions.

Grievants are to be commended for taking on positions which require that they work undesirable hours, such as evenings and weekends, in order to care for the students at SDB. However, there is no requirement in law or policy that they be provided with two consecutive days off or a specific amount of time between shifts. Therefore, even if this grievance were timely filed, the undersigned would be unable to grant the relief requested.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 2. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. West Virginia Code § 18-29-4(a).

3. "[C]ontinuing damage arising from the alleged wrongful act which occurred in [the past] . . . cannot be converted into a continuing practice giving rise to a timely grievance[.]" Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR- 630 (Mar. 23, 1995).

4. Respondent's schedule and workweek for houseparents has been in use since at least 1996, and the schedule for the 2002-2003 school year was provided to Grievants on or about August 16, 2002. Accordingly, this grievance, initiated in November of 2002, is clearly untimely.

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

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hampshire County, and such appeal must be filed within thirty (30) daysof 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 § 29A-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.

Date: June 25, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants include Pamela See, Helen Turner, Connie Lewis, Vera Kesner, Bonnie Corbin, Bonnie Sipple and Patricia Woodall.

Footnote: 2

During the school week, the students are in class during the daytime hours prior to 3:00 p.m. It is unclear from the record how the schedule operates on weekends when students are at the Schools.