DAVID COOPER,

Grievant,

v v.

Docket No. 03-33-237

McDOWELL COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, David Cooper, filed this grievance on February 14, 2002, against his employer the McDowell County Board of Education ("MCBOE" or "Board"). His Statement of Grievance contends:

> State statute - 18A-4-10 - Personal leave for illness an[d] other causes when using personal leave days while you are on Workmen's [sic] Comp. We was not given equal time back when we gave the BOE our comp. check, we was only given ½ personal leave day.
>
> Relief Sought: To give this writer the amount of personal leave days that the BOE right by law should have given me accordingly to the state statute 18A- 4-10[.]

This grievance was denied at Level I and Level II. On August 1, 2003, Level III was waived. Grievant appealed to Level IV on August 7, 2003, and a Level IV hearing was scheduled for October 21, 2003. The parties decided to submit this case on the record, and the hearing was canceled. This case became mature for decision on October 14, 2003, after receipt of Respondent's proposed findings of fact and conclusions of law and the missing pages of the transcript. (See footnote 1)

Issues and Arguments

Grievant asserts he has been incorrectly compensated for the Temporary Total Disability Benefits checks he turned in to MCBOE from 1999 - 2002. Exactly what compensation Grievant was seeking, and how MCBOE violated W. Va. Code § 18A-4-10 was unclear. MCBOE maintains Grievant's filing is untimely, and he has not explained how the statute was violated or identified with any specificity

the amount of relief he should receive. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed by MCBOE as a Custodian.

2. Grievant has sustained several work-related injuries and has received Temporary Total Disability Benefits from time to time.

3. Before the State Department of Education took over MCBOE on November 8, 2001, when employees turned in their Workers' Compensation Temporary Total Disability Benefits checks, they did not receive a one to one ratio on personal leave days. (See footnote 3) A portion of an employee's personal leave time was deducted so the check from MCBOE would equal the amount of the regular compensation, as Temporary Total Disability Benefits checks are less than an employee's regular compensation.

4. Grievant was aware of this fact for many years before he filed this grievance.

5. Grievant did not file a grievance because a coworker stated he would be placed on a hit list and be terminated.

6. Grievant did not identify any worker who had filed a grievance and been terminated.

7. Grievant turned in his last Temporary Total Disability Benefits check to MCBOE on November 26, 2002.

8. Dr. Mark Manchin was placed as MCBOE's Superintendent by the State Department of Education in December of 2002, and since that time employees have received a one to one ratio on their Temporary Total Disability Benefits checks.

9. Grievant has come to Dr. Manchin's office several times to discuss various issues. The report Dr. Manchin received prior to coming to MCBOE did not indicate employees were fearful of filing a grievance because of retaliation.

10. Grievant filed this grievance on February 14, 2003, after he found out he would owe MCBOE personal leave days when he took a medical leave of absence due to a nonwork-related injury.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep'tof Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent asserted at the Level II hearing that this grievance was untimely filed. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26- 394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97- DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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 Serv., Docket No. 90-DHS-524 (May 14, 1991). An untimely filing, if proven, will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 18-29-4(a)(1) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrenceof 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.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). 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). However, the West Virginia Supreme Court of Appeals in Spahr, supra, stated, "W. Va. Code, 18-29-4(a)(1) (1985), contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." An examination of when Grievant knew "of the facts giving rise to his grievance" is in order.

Grievant knew in 1999 that he was not receiving a one for one return with his Temporary Total Disability Benefits checks for personal leave days, and he even talked with coworkers at that time about filing a grievance. A co-worker indicated he would get fired if he filed a grievance. Grievant did not discuss the issue with any supervisor, and he was not told by any supervisor not to file a grievance. Grievant chose not to file a grievance. He has not proven his assertion that he would be fired if he filed a grievance, and, indeed, could not point to even one employee to whom this had happened. Dr. Manchin, in his testimony, stated there were multiple concerns when the state took over the school system, but retaliation for filing a grievance was not identified as one of them.

Even if the undersigned Administrative Law Judge attempted to view this grievance as a continuing practice, the last time Grievant submitted a Temporary Total Disability Benefits check was in November of 2002, and this check was credited in early January 2003 on a one-for-one basis. Grievant still did not file until February 14, 2003, which is outside the 15-day filing window, and after Grievant found out he would need to repay a portion of the fifteen personal leave days he was credited with at the first of the school year, as he had already received them with his Workers' Compensation injury during the first semester. Grievant did not demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham, supra. Accordingly, this grievance is untimely filed and the merits of the grievance will not be discussed.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

2. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31,1997); Sayre v. Mason County Health Dep't, 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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. An untimely filing, if proven, will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97- DOH-060 (July 16, 1997).

4. W. Va. Code § 18-29-4(a)(1) mandates a grievance must be filed "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."

5. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). 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).

6. MCBOE has met its burden of proof and demonstrated Grievant did not file this grievance within the specified statutory filing period.

7. Grievant did not demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham, supra.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of McDowell County, and 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 § 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 29, 2003

Footnote: 1

Grievant was represented by Attorney Kendrick King, and the Board was represented by Attorney Kay Bayless. Mr. King elected not to file any proposed Findings of Fact and Conclusions of Law.

Footnote: 2

Grievant believed it might be as much as 100 days.

Footnote: 3

For example, if an employee had taken personal leave days, and then got Temporary Total Disability Benefits, he did not get all of his personal leave time back when he gave MCBOE his Temporary Total Disability Benefits check.