PHILLIP H. CALE, et al.,

Grievants,

v. Docket No. 05-HE-115

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Phillip Cale, Michael Cupp, Lynda Nelson, Tim Suder, Sherman Riffle, Ray Kirk, and Robert Fields ("Grievants") are employed by West Virginia University ("WVU") assigned to the Physical Plant. Grievant Cale filed a level one grievance on January 31, 2005, Grievants Nelson and Cupp filed on February 3, 2005 (Docket No. 05-HE-109), and Grievants Suder, Riffle, Kirk, and Fields filed on January 24, 2005 (Docket No. 05-HE-090), seeking interest on an award of back pay granted to them in a prior grievance. The grievances were denied at the lower levels, and were advanced to level four on or about March 16, 2005. The grievances were consolidated for hearing at level four on May 10, 2005. Grievants represented themselves, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The grievance became mature for decision on June 14, 2005, upon receipt of WVU's proposed findings of fact and conclusions of law. Grievants elected not to file additional proposals.

The following facts of this matter are undisputed, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievants have been employed by WVU, assigned to the Physical Plant, at all times pertinent to this grievance. 2. In Nelson, et al. v. Higher Education Interim Governing Board/West Virginia University, Docket No. 01-HE-064 (Apr. 6, 2004), Grievants were granted back pay as the result of a change in their classifications and pay grades following a review by the Job Evaluation Committee ("JEC").

3. The Nelson decision specifically stated that no interest was awarded because Grievants had not requested interest at level four.

4. Grievants were aware of the fact that they were not awarded interest at the time the decision was issued in April 2004.

5. Grievants did not appeal the level four decision to circuit court to obtain interest on their awards.

6. Approximately nine months after receiving the Nelson decision, Grievants filed the present grievance seeking interest on the back pay awarded in April 2004, after learning of the success of a co-worker.

7. At level two, WVU properly raised the issue of whether the grievances were timely filed.

DIscussion

Grievants argue that they are entitled to interest on the back pay award, consistent with that received by a co-worker, and as required by W. Va. Code § 56-6-31. (See footnote 1) **WVU asserts that Grievants did not request interest, and are not entitled to it under the cited statutory provision. WVU further distinguishes Grievants' case from that of a co-worker, and argues that the grievance was not timely filed. Because the timeliness assertion, if proven, would defeat the grievance without addressing its merits, it will be addressed first. Where 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. 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. Kessler v. W. Va. Dep't of Transp., Docket No. 96- DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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). W. Va. Code § 29-6A-4(a) provides in pertinent part:**

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

tendays of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

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). In this case, Grievants were notified of their award of back pay, with no interest, by decision dated April 6, 2004. They did not file grievances seeking interest until late January and early February 2005, some nine months later, and well beyond the ten day time frame. However, Grievants argue that they filed promptly upon learning that a co-worker had been awarded interest in a similar matter reviewed by a circuit court. This argument appears to be that the delay would fall under the "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). 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." Because Grievants knew of the facts giving rise to this grievance in April 2004, the discovery rule exception does not apply in this case. The Grievance Board has previously held that timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket No. 99-CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98-HHR-477(Feb. 24, 1999).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Where 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. 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. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997).

2. An employee filing a grievance under the provisions of W. Va. Code §§ 29- 6A-1, et seq., must do so 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.

3. WVU has proven that Grievants failed to file their level one grievances within ten days of learning they would not receive interest on back pay awarded in an earlier grievance.

4. An exception to the statutory time lines is the "discovery rule exception" set forth in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739(1990). 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."

5. Timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket No. 99- CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98- HHR-477(Feb. 24, 1999).

6. Grievants' claim that they filed this grievance upon learning of the success of a co-worker, does not fall within the discovery rule exception.

Accordingly, the grievance is DENIED.

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 § 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. 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: JULY 11, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.W. Va. Code § 56-6-31, states in part,"[e]xcept where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not."