JEANNE STRADER, et al.

Grievants,

v. DOCKET NO. 05-30-114

MONONGALIA COUNTY BOARD OF EDUCATION, Respondent.

DECISION

Grievants Jeanne Strader, Vera Jones and Larry Rowan filed this grievance against their employer, the Monongalia County Board of Education (MCBOE), Respondent, on September 10, 2004, claiming they were not paid their proper wage for hours worked during the summer of 2003, and became aware of this on September 1, 2004. As relief, Grievants seek “to be paid a half days wages for any and all days worked during that time.”

After denials at the lower levels and a waiver of level three by MCBOE, a level four hearing was scheduled for June 15, 2005, in the Grievance Board's Westover office. At that time, the parties agreed to submit the case for decision based on the record already developed. Grievants are represented by John E. Roush, Esq. of the West Virginia School Service Personnel Association, and MCBOE is represented by Harry M. Rubenstein, Esq. and Jason S. Long, Esq. of Kay Casto and Chaney, PLLC. The matter became mature for decision on July 22, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law and replies.

Issues and Arguments

Grievants originally contended MCBOE violated W. Va. Code § 18A-4-8a by paying them at an hourly rate for certain jobs rather than paying them at a rate equal to half of their regular daily pay. They also contend that this grievance falls under the discovery rule exception to the grievance procedure timeliness requirement. MCBOE asserts that this grievance was untimely filed, and that the jobs Grievant seek to be paid for are irregular, extracurricular jobs for which an hourly rate is appropriate. Additionally, MCBOE asserts that Mr. Rowan did not properly file a grievance on the issue and abandoned any claim he may have had when he failed to participate in the grievance process after level one.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants are employed by MCBOE as regular Bus Operators.

2. Ms. Strader drove as a substitute on an extra-duty bus run for about two weeks in the summer of 2003, driving the activity bus for the Kaleidoscope Program at Mountainview School. She was paid on an hourly basis for about one and a half hours per day.

3. Ms. Jones and Mr. Rowan worked as bus operators on bus runs posted as extra duty runs in the summer of 2004, for the Kaleidoscope Program, and were paid on an hourly basis for approximately one hour per day.

4. Ms. Strader received her final paycheck for the job she drove on or about August 15, 2003. Ms. Jones and Mr. Rowan received theirs on or about August 15, 2004. 5. On or about September 1, 2004, Ms. Strader overheard a conversation between some other bus operators about West Virginia Code § 18A-4-8a, which she understood to be a statute that entitled her to receive a half day's pay for jobs that lasted less than three and one-half hours. She filed this grievance on September 10, 2004, and was joined by Ms. Jones and Mr. Rowan.

6. Ms. Jones was aware of the statute under which she claimed entitlement to more pay earlier in the summer, but erroneously believed it would be addressed in a separate grievance in which she had joined.

Discussion

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 1) If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. (See footnote 2)

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. (See footnote 3) The time period for filing a grievance ordinarilybegins to run when the employee is unequivocally notified of the decision being challenged. *(See footnote 4)*

Ms. Strader did not file a claim about her 2003 pay until almost a year later because, as she admitted, she did not know of the statute upon which she bases her claim. However, there is no

dispute that she unequivocally knew the facts or events giving rise to her claim, at the very latest, in mid-August 2003. She did not file this grievance until September, 2004. "[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive." (See footnote 5) The date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether her grievance is timely filed. Instead, if she knows of the event or practice, she must file within fifteen days of the event or occurrence of the practice. (See footnote 6) With respect to Ms. Strader's claims, this grievance is untimely.

Mr. Rowan made no appearances on the record and his representative presented no evidence about his situation, so there is no way of knowing why he waited until Ms. Strader filed her grievance to assert a claim. However, as with Ms. Jones, he knew when he accepted or started the job on July 15, 2004, how he would be paid, and at the very latest, on or about August 15, 2004, when he received his last paycheck, he knew how he actually was paid. Ms. Jones knew the terms of her employment when she started the job, which ran from July 15, 2004 to August 1, 2004, yet she asserts that joining this grievance, which was filed on September 10, 2004, was a timely claim. At the very latest, using thedate Ms. Jones likely received her last paycheck for the job, she filed nineteen days after- the-fact.

Ms. Jones, however, asserts that she did timely file a claim, because she raised the issue in a prior grievance. The record is entirely unclear on why she did not participate in the grievance, although she testified she never received notice of any hearings or other proceedings in that case. No evidence was admitted which substantiates her claim that she was a party to that case, nor was evidence admitted that establishes what was claimed in that case. This sketchy and insubstantial foundation does not rebut Respondent's assertion that this grievance was untimely with respect to Rowan and Jones, based on the dates of the events and simple mathematics.

Given that this grievance is untimely with respect to the claims of all the grievants, the merits of the claim must remain unaddressed.

The following conclusions of law support this discussion:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler*

v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

2. "[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive." *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). The date a Grievant finds out an event or continuing practice was illegal is not the date fordetermining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Lynch v. W. Va. Dep't of Transp., supra*; *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). *See Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).

3. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra.*

4. Respondent has met its burden of proving this grievance was untimely filed.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County. Any such appeal must be filed within thirty 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.

August 19, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

Footnote: 2

Id.

Footnote: 3

W. Va. Code § 18-29-4a. Seifert v. Hancock County Bd. of Educ., Docket No. 02- 15-079 (July 17, 2002).

Footnote: 4

Seifert, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).

Footnote: 5

Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991).

Footnote: 6

Lynch, supra.