RANDY LONG and DAVID CRAMER,

Grievants,

v. Docket No. 05-HE-044

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Randy Long and David Cramer ("Grievants"), employed by West Virginia University ("WVU") as Trades Worker Leads, filed a level one grievance on December 17, 2004, asserting the "back pay issue". For relief, they requested back pay from 2001-2003, as was given to a co-worker. Grievants' immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at level two, and three. Appeal was made to level four on February 10, 2005. A level four hearing for the consolidated grievances was conducted on April 19, 2005. Grievants were represented by James A. Wilson, a co-worker, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision upon receipt of WVU's proposed findings of fact and conclusions of law on May 20, 2005. Grievants elected not to file post-hearing proposals.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level three and level four.

Findings of Fact

1. Grievants have been employed by WVU at the Physical Plant at all times pertinent to this grievance, and presently hold the classification of Trades Worker Leads.

2. In January 2001, Grievants scheduled an informal conference to begin thegrievance procedure with Paul Cole, Operations Manager of the Physical Plant. At Mr. Cole's request, Grievants signed a form dated January 31, 1001, which stated that an informal grievance conference had been held on January 26, 2001. The form, produced by WVU further stated: "I would like to request that my grievance be held in abeyance until I receive further direction from my representative". At the bottom of the form, "WVU Physical Plant does agree to hold

the grievance in abeyance as requested. However, we would like to revisit the issue by March 5, 2001 in order to discusses [sic] resolution or continuation of the process".

3. In early 2001, approximately two hundred employees from the WVU Physical Plant began grievance proceedings seeking back pay as the result of a ruling by the Circuit Court of Kanawha County in the matter of Board of Trustees/West Virginia University v. Jessen, Civil Action No. 95-AA-290 (Mar. 8, 2000), which resulted in a revised data line and increased compensation for non-grieving Plasterer/Masons and Material Handlers, effective January 2001.

4. Later that year, the grievances at levels three and four were placed in abeyance, pending a review of the Physical Plant job families by the Job Evaluation Committee ("JEC"). The results of this review were ultimately implemented July 1, 2004. A number of positions were given new classification titles and/or placed in different pay grades, as a result of the review.

5. The Grievance Board issued a decision, Lambert et al., v. Higher Education Interim Governing Board/Marshall University, Docket No. 01-HE-132 (Oct. 6, 2003), holding that employees in all classifications who filed grievances in 2001, and were upgraded in 2004, were entitled to back pay from the date the grievances had been filed. 6. On October 16, 2004, WVU offered monetary settlements to those employees who had pending grievances at level three and level four.

7. WVU did not revisit Grievants' grievance in March 2001, or anytime thereafter.

8. Grievants filed this grievance on December 16 and 17, 2004.

9. WVU raised the timeliness issue at the level two hearing.

Discussion

Initially, WVU contends that Grievants' claim was not timely filed. 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). If the respondent meets this burden, the grievant may then attempt to demonstrate that she 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 ten days following the occurrence of the event upon

which the grievance is based.

W. Va. Code § 29-6A-4(a) provides in 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 ten days 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 time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., DocketNo. 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). One exception to the statutory time lines is the "discovery rule" which will toll the time limitations for filing grievances, allowing an employee to file a grievance within ten days after discovering the facts which give rise to his or her grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). The same analysis applies to grievances filed under W. Va. Code 29-6A-1, et seq. WVU argues that the settlement offers were extended on October 16, 2004, and that the time period for filing a grievance began at that point. Grievants respond that while they heard rumors of settlement offers they were not immediately confirmed. Since Grievants were not notified they were exempt from the settlement offers, they reasonably would not have known whether they would be offered a settlement, or if all the eligible employees received the offer on October 16. Neither party provided an accurate date when Grievants did know they would not be receiving a settlement. Under this set of facts, WVU has failed to prove that the grievance was not timely filed.

WVU also argues that Grievants are not entitled to the requested relief not only because they did not have a pending grievance at level three or level four, but they had never filed at level one, therefore, even if a grievance was initiated, there is no record of what it involved. Grievants testified that the informal conference was to begin their grievance seeking back pay as a result of the prior Mercer decisions, and WVU never contacted them regarding their grievance, which was held in abeyance for four years.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations arerequired. Factors applied when assessing the credibility of the witnesses include demeanor, the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

Given the timing of the informal conference, and the fact that Grievants are similarly situated to employees who were filing grievances involving classification/compensation, it is logical that this matter involved the back pay issue. WVU did not call Mr. Cole at either level two or level four to dispute Grievants' assertion, and their testimony on this issue is determined to be credible.

WVU argues that the grievance should be denied on the merits because they did not pursue their claim, citing Garcia, et al. v. West Virginia University, Docket No. 04-HE- 229 (Oct. 28, 2004), in which a number of employees did not pursue their grievances because they believed an employee organization was acting in their behalf. Unlike the Garcia grievants, Grievants Long and Cramer did not rely on the representations of co- workers or union officials in delaying their grievance. The abeyance was suggested by Grievants' immediate supervisor, who had them sign a document created by WVU. Notwithstanding the language referencing a desire to confer with their representative, the delay in these proceedings was due to WVU's actions. Because the nearly two hundred post-Mercer grievances were being placed in abeyance pending the JEC review, it isunderstandable that Mr. Cole apparently believed this to be the proper course of action. However, Grievants reasonably relied upon Mr. Cole's representation to their detriment, as WVU declines to award them any relief which they would have been entitled had they proceeded to level three.

W. Va. Code § 29-6A-6(b) authorizes the undersigned to “provide relief found fair and equitable . . . for the effective resolution of grievances not inconsistent with any rules of the

board or the provisions of this article". In consideration of the unique facts of this case, it is fair and equitable to award Grievants any back pay to which they would have been entitled had their grievance been placed in abeyance at level three or level four. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. W. Va. Code § 29-6A-4(a) requires the grievance process be started within ten days following the occurrence of the event upon which the grievance is based. One exception to these time lines allows the employee to file within ten days after discovering the facts which give rise to his or her grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). 3. WVU failed to prove Grievants did not file the grievance within ten days of learning that coworkers were offered a monetary settlement, and they would not receive the same offer.

4. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, factors to be applied include demeanor, the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

5. Grievants' testimony that their 2001 grievances were initiated seeking back pay consistent with that awarded other employees, is determined to be credible.

6. W. Va. Code § 29-6A-6(b) authorizes the undersigned to "provide relief found fair and equitable . . . for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article".

7. It is fair and equitable in this case to award Grievants any back pay to which they would have been entitled had their grievance been placed in abeyance at level three or level four. Accordingly, the grievance is GRANTED, and WVU is Ordered to compensate Grievants consistent with those employees awarded monetary settlements. 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: JUNE 22, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE