TIMOTHY CAIN, et al.,

Grievants,

v. Docket No. 05-DOH-402

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Timothy Cain, Linda Hypes, Ronald Markle, Dean Fordyce, and Jeff Clay ("Grievants"), employed by the Division of Highways ("DOH"), filed individual grievances in July and August 2005, seeking credit for years of service and annual leave while off work on Total Temporary Disability ("TTD"). The grievance was denied at levels one, two, and three. Grievants' claim of default at level three was denied, and a level four hearing scheduled for February 14, 2006. On January 24, 2006, the Division of Personnel ("DOP") filed a "Motion To Dismiss" the grievance. A conference call was conducted on January 30, 2006 to allow all parties an opportunity to address the Motion. Participating in the call were Karen O'Sullivan Thornton, Assistant Attorney General, for DOP, Barbara Baxter, Esq., for DOH, and Tammy Cain, representative for Grievants.

___The following facts essential to this case are undisputed.

Findings of Fact

1. Grievant Cain received TDD benefits from February 14, 1991 to February 21, 1991, and from January 22, 2001 to May 14, 2003. Grievant Cain did not accrue seniority or annual leave during these absences, and did not file a grievance until July 21, 2005. 2. Grievant Markle received TDD benefits from October 31, 2001 to May 3, 2004. He did not accrue seniority or annual leave during this time, and did not file a grievance until July 20, 2005.

3. Grievant Hypes received TDD benefits from May 10, 1990, to October 15, 1990, from April 28, 1992 to December 5, 1994, from August 2, 2004 to August 30, 2004, and from April

20, 2005 to April 28, 2005. She did not accrue annual leave or seniority during these periods, and did not file a grievance until August 4, 2005.

4. Grievant Clay received TDD benefits from January 21, 1998 to August 31, 1998, from October 14, 1998 to October 20, 1998, May 20, 1999 to June 7, 1999, March 7, 2002 to April 29, 2002, February 20, 2004 to November 2004, and January 10, 2005 to January 31, 2005. He did not file a grievance until August 24, 2005. **(See footnote 1)**

5. Grievant Fordyce received TDD benefits from October 24, 1996 to January 15, 1997, and August 18, 2001 to February 18, 2003. Grievant filed a grievance on September 15, 2005.

6. Prior to July 6, 2005, employees who were off work, and receiving TDD benefits did not accrue seniority, annual leave, sick leave, or holiday pay.

7. Pursuant to the decision in *Canfield, et al. v. West Virginia Division of Corrections and West Virginia Division of Personnel,* Slip Opinion No. 32287 (July 6, 2005), the West Virginia Supreme Court of Appeals determined that denial of credit for years of service and annual leave while on TDD was not related to a proper governmentpurpose, and violated the equal protection clause of Section 10, Article III, of the West Virginia Constitution.

8. Grievants filed their individual complaints upon learning of the *Canfield* decision, sometime between July 13 and 15, 2005.

Discussion

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). Pursuant to *W. Va. Code* § 29-6A- 3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." The level three decision states that the issue of timeliness was raised by DOH at level one, and Grievants

offer no evidence to the contrary. Further, in the instant case, DOP was not joined as a party until level three. It has been held by this Grievance Board that DOP is permitted to raise the timeliness defense at the first level where it had the opportunity to do so, which is often not until level three. *Delbart v. Dep't of Health and Human Res.*, 99-HHR- 458 (Apr. 21, 2000).*See Barnett v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-144 (July 20, 1999). Accordingly, the undersigned finds that the timeliness defense was properly raised.

As to whether the grievance was timely filed, *W. Va. Code* § 29-6A-4(a) provides:

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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

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).

Grievants readily concede they filed their grievances after learning that other employees had prevailed on the same issue in *Canfield, supra*. The West Virginia Supreme Court has recognized a “discovery rule” which will toll the time limitations for filing grievances in certain instances. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Spahr determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. *See*, *e.g* ., *Butler v. W. Va. Dep't of Transp.*, Docket No. 99-DOH-084 (May 13, 1999); *Little v. W. Va. Dep't of Health & Human Res.*, Docket No. 98-HHR-092 (July 27, 1998). However, the discoveryof a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event"

giving rise to a grievance within the intent of *W. Va. Code* § 18-29-4 as interpreted in *Spahr*. *Parkins v. W. Va. Dep't of Envtl. Protection*, Docket No. 03-DEP-156 (Sept. 17, 2003); *Adkins v. W. Va. Dep't of Educ.*, Docket No. 95- DOE-507 (Apr. 26, 1996). The same analysis applies to grievances filed under *W. Va. Code* §§ 29-6A-1, *et seq.* Grievants knew they did not accrue seniority or leave time while on TDD at various times from 1990 through 2005, but did not file a grievance at any of those times. The claims at issue in this matter arose from events which occurred as recently as three months prior to filing, to as long as fifteen years ago. None of the grievances were filed within the statutory time frame, and learning of the success of another employee does not toll the time lines under the "discovery exception." *See Fincham v. Div. of Corr. and Div. of Personnel,* Docket No. 05-CORR-400 (Dec. 22, 2005).

Even if the grievance had been timely filed, DOP revised its rule regarding employee benefits accrued while receiving TDD benefits effective the date of *Canfield, supra,* July 6, 2005, with the provision that the changes were to be applied prospectively. Substantial public issues arising from statutory or constitutional interpretations that represent a clear departure from prior precedent will ordinarily favor prospective application. *Bradley v. Appalachian Power Co.,* 163 W. Va. 332, 256 S.E.2d 879 (1979). Absent a specific retroactive application of the changes in *Canfield, supra,* the prospective application by DOP is upheld.

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); *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. A grievance must be initiated 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. *W. Va. Code* § 29-6A-4(a). 3. 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, 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). 4. Grievants knew that they would not accrue seniority or leave time while they were on TTD during the period 1990-2005, but did not file a grievance within ten days of any of those absences.

5. An employee may 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). However, the discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitutediscovery of an "event" giving rise to a grievance. *Parkins v. W. Va. Dep't of Environ. Protection*, Docket No. 03-DEP-156 (Sept. 17, 2003); *Adkins v. W. Va. Dep't of Educ.*, Docket No. 95- DOE-507 (Apr. 26, 1996).

6. The grievances were untimely filed, and Grievants offered no proper basis to excuse the late filing. Accordingly, the grievance is DENIED. Any party or the West Virginia Division of Personnel 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: FEBRUARY 6, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievant Clay began accruing credit for years of service and annual leave from the date of his most recent TTD, which began on August 12, 2005.***