REXELL FREEMAN, et al.,

Grievants,

v. **Docket No. 05-01-444**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) are employed as bus operators by Respondent Barbour County Board of Education ("Board"). They initiated a grievance at level one on September 22, 2005, alleging entitlement to compensation for time spent taking their annual physicals, in violation of the Fair Labor Standards Act ("FLSA"). After denials at the lower levels, this grievance was appealed to level four on December 9, 2005. A hearing was conducted in the Grievance Board's office in Elkins, West Virginia, on March 10, 2006. Grievants were represented by counsel, John E. Roush of the School Service Personnel Association, and the Board was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 11, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievants are employed by the Board as bus operators. 2. All bus operators employed by county boards of education are required to maintain certification pursuant to regulations promulgated by the Department of Education. One of these requirements is that each bus operator successfully complete an annual physical examination.

3. The Board has always required bus operators to obtain their physicals during the summer, when most of them are not working. Respondent gives the drivers a date by which the physicals must be completed, along with specifying a clinic where the physicals can be scheduled. (See footnote 2)

4. Respondent has always paid for the cost of the physicals, but bus operators have never

been compensated for their time spent obtaining these exams, even though they are normally conducted during the summer months.

5. Most of the grievants obtained their 2005 physicals during the last week of June and the first two weeks of July. The Board required physicals to be completed by the beginning of August.

6. On July 25, 2005, Respondent adopted Policies G-19.2 and G-19.3, addressing the FLSA with regard to overtime and "on duty vs. off duty" issues. These policies explain definitions and provisions of the FLSA with regard to these issues, and state that the purpose of the policies is to ensure that Respondent complies with these provisions. 7. Policies G-19.2 and G-19.3 do not contain any specific discussions of physical exams required for certification or whether employees are to be compensated during such times.

8. On August 23, 2005, a staff development session was conducted by Karen Boone, Coordinator of Transportation, which all bus operators attended. At this meeting, various policies and procedures were discussed, including the new FLSA policies adopted by the Board in July.

9. During the discussion of the new FLSA policies, some drivers, including Grievants, questioned Ms. Boone as to whether or not their time spent obtaining physicals was considered compensable work time. Ms. Boone advised them that she had no authority to pay them for their 2005 physicals, but that, during future school years, the exams would be scheduled for a regular work day, so that the drivers would be paid for their time.

10. Grievant Freeman discussed the proposed FLSA policies with Superintendent Matthew Kittle during the summer of 2005, prior to their adoption.

11. Grievants met with Superintendent Kittle in early September and voiced their concerns regarding not receiving payment for their 2005 physicals. Mr. Kittle advised the drivers that he would seek a legal opinion on the matter, which apparently never occurred. 12. Grievants requested and received an informal conference on their grievance on September 22, 2005 **.**

Discussion

As a preliminary issue, Respondent contends that this grievance was not filed within the statutory time frame, and should be denied on that basis. 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 he 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). If proven, an untimely filing 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).

As to when a grievance must be filed, W. Va. Code § 18-29-4(a) provides, in pertinent part:

Before a grievance is filed and 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, 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.

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Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

In the instant case, Grievants contend that the discussion of the FLSA policies at the August 23 meeting, followed by their request from the Superintendent for payment, prompted this grievance. However, it is obvious, from a review of the underlying issues in this grievance, that what prompted Grievants' filing was the discovery of the applicability of the FLSA to physicals, which had not previously been called to their attention. It is well- settled that the discovery of 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) .

Respondent's adoption of a policy explaining the provisions of the FLSA was not a grievable event, because the provisions of the federal law have applied to school employees for many years. *See Smith v. Randolph County Bd. of Educ.*, Docket No. 05- 42-216 (Aug. 31, 2005). Moreover, Grievants' own understanding of this issue is evidenced by the following testimony given by Grievant Freeman at the level two hearing in this matter:

> Well, I maintain that the board is subject to federal law just like everyone else and for whatever time period that the law states that they are liable for thesewages. **It's irrelevant when they adopted this policy because the law was in effect before they adopted the policy.**

L. II Tr. at 8 (emphasis added). Clearly, the filing of this grievance was prompted by Grievants' discovery of a legal theory, i.e. the new Board policy, to support their claim of entitlement to payment for their exams. The grievable event occurred when Grievants obtained their physicals in June and July of 2005, knowing at that time that they would not receive payment for their time. Accordingly, their filing of this claim on September 22, 2005, was untimely.

Grievants have also claimed that they delayed filing this grievance based upon their belief that the Superintendent was awaiting advice from counsel, prior to determining whether or not Grievants could be paid for their 2005 physicals. Again, the grievable event was the Board's non-payment for the physicals, which occurred in June and July. Grievants only inquired regarding payment after the FLSA, a preexisting legal basis for their claim, was brought to their attention at the August meeting. This is not a case where Grievants made their request in a timely fashion, then put off filing their grievance while the issue was negotiated with Board officials. The West Virginia Supreme Court of Appeals, in *Naylor v. W.Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989), held that estoppel was available to the employee to excuse an untimely filing only when it "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Grievants' inquiries occurred well after their physicals occurred, for which they knew they would not be paid, so estoppel is not a valid claim under these circumstances.

The following conclusions of law support this Decision

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).

2. A grievance must be initiated 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. W. Va. Code § 18-29-4(a).

3. The discovery of 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) .

4. Respondent has proven by a preponderance of the evidence that this grievance was not initiated within fifteen days of the grievable event, i.e. Grievant's physical exams, so it is untimely.

Accordingly, this grievance is **DISMISSED** as untimely.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour County. Any 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.

Date: May 3, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants include Rexell Freeman, Kenneth Carder, Sr., Gary Marsh, John Mayle, Carl Bolton, John Edge, Kenneth

Carder, Larry Moore, Robert Golden, Willis Freeman, Steve Kaufman, Dave Robinson, Ron McLean, Larry Phillips, Kenneth Phillips, Thomas Kittle, Jimmy Runion, David Shelton, Kenny Jones, Chad Sinsel, Larry Simpson, Rodger Anglin, Eugene Carey, Joe Freeman, Gregory Louk, Peggy Moss, Steve Price, James Hart, Lisa Knight, Ira Mayle, Terrie Tusing, Marjorie George, Ronald Jones, Robert Stafford, Donna Edgell, and Larry Leach, Sr.

Footnote: 2

Employees are not required to see the physician specified by the Board. However, if an employee's private physician charges a greater fee than the Board's physician, the Board covers only the pre-approved cost of the exam.