THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

RON BUCHANAN and GILBERT WARREN

Grievants,

v. **Docket No. 07-30-073**

Sue Keller

Senior Administrative Law Judge

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Ron Buchanan and Gilbert Warren ("Grievants"), employed by the Monongalia County Board of Education ("MCBE") as bus operators, filed a level one grievance on October 6, 2006, stating "daily work of bus driving and training being different". For relief, Grievants requested they be "paid for the difference of daily work - training 4 hrs". Grievants' immediate supervisor lacked authority to grant the relief at level one, and the grievance was denied following an evidentiary hearing conducted at level two. Grievants elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c), and filed a level four appeal on March 5, 2007.

At level four the statement of the grievance was amended to allege violations of the Fair Labor Standards Act, local county policy and practice, and *W. Va. Code* §§ 18A-4-8, 18A-4-8a, and 18A-4-8b, when MCBE failed to pay them for attending a four-hour first aid certification class on August 31, 2006. (See footnote 1) Their amended relief sought was compensation for the four hours at their regular rate of pay, or in the alternative, compensation at their extra duty rate. Grievants contend "that, at the very least, they are entitled tocompensation for all time worked on August 31, 2006, over and above six hours." Grievants also request interest on all sums to which they are entitled. A level four hearing scheduled for May 18, 2007, was cancelled that morning after the parties advised the Grievance Board that the grievance would be submitted for decision based on the lower level record, supplemented with three MCBE policies and proposed findings of fact and conclusions of law filed by

the parties on or before June 6, 2007.

Synopsis

Grievants allege numerous statutory and policy violations when they were not compensated for time attending a class to renew their first aid certification. MCBE denies that it is required to compensate Grievants for training to maintain their state certification. Following the precedent set in *Zirkle, et al.v. Hancock County Board of Education*, Docket No. 94-15-441 (Feb. 24, 1995), Grievants failed to prove their claim.

The following facts have been derived from a preponderance of the evidence admitted to the lower-level record, including the level two transcript and exhibits.

Findings of Fact

1. Grievants have been employed by MCBE as bus operators at all times pertinent to this grievance.

2. On August 31, 2006, Grievant Buchanan worked three hours and forty-one minutes, and Grievant Warren worked two hours and forty-five minutes, completing their regular morning and afternoon runs.

3. As a convenience for its employees, MCBE provided a first aid training session on August 31, 2006, from 9:00 a.m. until 1:00 p.m. at the Transportation Center.

4. In addition to performing their regular duties on August 31, 2006, Grievants,along with many other employees of MCBE, completed the first aid class which lasted approximately four hours.

5. West Virginia State Board Policy 4336, Section 126-92-1, requires that school bus operators hold first aid certification from a program approved by the State Director.

6. Grievants needed to renew their first aid certification on or before August 31, 2006.

7. Grievants were not compensated for the four hours they participated in the first aid class.

8. For the week beginning August 28, 2006, Grievant Buchanan worked 20.1 hours, and Grievant Warren worked a total of 15.09 hours completing their regular duties. Both were compensated for a standard 30 hour work week.

9. Employees are not required to attend the first aid certification training offered by MCBE, and may complete approved training at a number of sites on several other dates and times.

10. Grievants filed a level one grievance on October 6, 2006.

11. During the level two hearing, MCBE raised the issue of whether the grievance was timely

filed.

Discussion

Timeliness

As a preliminary issue, MCBE contends that the grievance was untimely 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 MCBE meets thisburden, the grievants may then attempt to demonstrate that they 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).

The statutory time lines for filing a grievance are provided in *W. Va. Code* § 18-29-4(a), which provides in 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.

* * * * * *

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). In *Spahr v. Preston County Bd. of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the Court 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 present matter, Grievants were placed on notice that they were

not paid for the first aid training when they received their first paycheck in mid-September. The record does not reveal the specific pay date, but as a bimonthly event, it was likely on September 15. The grievance was filed on October 6, within the statutorily mandated fifteen working days.

Merits

___Grievants argue that MCBE must pay them for time in attendance at an inservice session required as a condition of continued employment. Further, Grievants assert that they are compensated for all work performed over and above their regular assignment, including mid-day and extra duty assignments, and there is no reason the first aid training should be treated any differently. In the alternative, Grievants argue that they clearly worked in excess of their regular six-hour work day, and should be paid for the time beyond their regular work day, relying on the *W. Va. Code* § 18A-4-8(d) provision that "no part of any working day may be accumulated by the employer for future work assignments, unless the employee agrees thereto."

MCBE argues that it did not require Grievants to attend the first aid training as a condition of employment. Although the State Department of Education requires that bus operators hold first aid certification, MCBE asserts that it is not required to bear the cost of qualifying minimal training, or continuing education of any employee.

This issue has long been resolved by the Grievance Board in the case of *Zirkle, et al.v. Hancock County Board of Education*, Docket No. 94-15-441 (Feb. 24, 1995), which included facts and issues nearly identical to those in the present matter. In *Zirkle*, the Hancock County Board of Education offered its employees certain training required for busoperators to remain certified by the State Department of Education. Due to schedule conflicts, the training was held after regular work hours. The grievants argued that they were entitled to compensation for the time required to complete the training at their extra duty rate of pay. The grievance was denied based upon findings that the grievants' attendance at the free evening training session was not mandatory, and that bus operators have an obligation to keep their driving certifications current on their own time and at their own expense. The characterization of the training session as an extra duty assignment was determined to be unpersuasive given the description of such assignments in *Code* 18A-4-8b.

Employees are commonly required not only to finance any qualifying or continuing education relative to their jobs, but also to obtain said training on their own time. In this case, Grievants could have completed the training elsewhere, but elected to accept MCBE's option, at no cost to them.

Grievants have failed to identify any law, policy or regulation which requires MCBE compensate them for the time required to obtain the certification required for them to maintain their eligibility to drive a school bus. (See footnote 2)

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. The grievance process must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of thedate 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. *W. Va. Code* § 18-29-4(a).

3. 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).

4. The grievance was filed within fifteen days of notice being provided to Grievants in their mid-monthly paycheck that they were not paid for the hours in attendance at the first aid certification training session.

5. Grievants have failed to prove any violation of statute or policy, or that they are otherwise entitled to the compensation requested.

Accordingly, the grievance is **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 (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: JUNE 14, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *MCBE did not object to the amended complaint.*

Footnote: 2 *Grievants did not address the alleged statutory or policy violations asserted, and none are applicable.*