EDWARD LILLY

v. Docket No. 94-41-195

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

The grievant, Edward Lilly, is employed by the Raleigh County Board of Education (Board) as an Electrician II. He initiated a grievance at Level I February 15, 1994 alleging, "Respondent has not compensated Grievant for performing asbestos related duties in violation of West Virginia Code §18A-4-8a." His supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held April 18, 1994. (See footnote 1) The Board, at Level III, declined to address the matter and appeal to Level IV was made May 16, 1994. A hearing was held July 14, 1994 (See footnote 2) and the parties submitted proposed findings of fact and conclusions of law by August 22, 1994.

The grievant has been employed by the Board as an electrician for over ten years. For the past five or six years he has also been assigned duties associated with the Board's Asbestos AbatementProgram, an attempt to either remove or contain asbestos at a number of its schools using "in-house" employees trained for such tasks. Those duties have included: on-site removal of asbestos, supervision of workers engaged in the removal of asbestos, planning asbestos removal projects, maintenance of records related to asbestos removal and/or containment and completion of the paperwork needed for various federal and state authorizations to begin and cease a particular asbestos removal project.

It appears that prior to 1992 the grievant received no additional compensation for performing asbestos-related duties. Subsequent to certain amendments to W.Va. Code §18A-4-8a in 1992 (See footnote 3) the grievant began receiving additional hourly compensation for any on-site duties performed including supervisory ones. He also began receiving the higher compensation for at least a portion of the hours spent completing and maintaining the various paper recordsrequired by the Board and federal and state agencies on each project.

In late 1992 the grievant reviewed the statute and concluded that the Board was improperly disallowing the higher wage for certain hours he was spending on those records. He took no action, however, until late August or early September 1993 when he approached his supervisor, Director of Maintenance Gilbert Pennington about the matter. During several conversations with the grievant, Mr. Pennington took the position that the grievant had either been compensated sufficiently for the duties in issue or they were not sufficiently asbestos-removal related to qualify for the supplement.

In late December 1993 or early January 1994, the grievant took his complaint to Mr. Pennington's superior, Assistant Superintendent Racine Thompson. Mr. Thompson also refused to acknowledge that the grievant was entitled to additional compensation. On or about February 13, 1994, the grievant had a discussion with either Mr. Pennington, Mr. Thompson or both and was again advised that he would not receive the higher pay for the hours in dispute. (See footnote 4) As previously noted, the grievance was filed on February 15, 1994.

The grievant performed the services for which he seeks the additional pay on a number of occasions in 1993, the last being anasbestos removal project completed December 27, 1993 at Sylvia Elementary School. (See footnote 5) At the time he filed the grievance, he had not since worked on any projects.

The Board maintains the complaint is untimely. (See footnote 6) The grievant concedes that he did not file "within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance" as required by W.Va. Code 18-29-4(a)(1) but, citing Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987), asserts the Board should be estopped from raising the issue. Specifically, he asserts that Mr. Pennington and Mr. Thompson made statements to the effect that the matter would be rectified and that the delay was the result of his reasonable reliance on those representations.

In Steele, it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officialsthat the matter will be rectified will not be barred from pursuing the grievance pursuant to W.Va. Code §18-29-1, et seq., upon denial thereof." This equitable principle has since been recognized and applied in a number of Grievance Board decisions. See, e.g., Altizer v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991).

The West Virginia Supreme Court of Appeals, in Naylor v. W.Va. Human Rights Comm'n, 378

S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "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." This standard was adopted and incorporated in the Steele analysis by the Grievance Board in Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993).

The grievant's evidence in support of an estoppel theory fails under either standard. There is no evidence whatsoever of any deliberate design on the grievant's superiors' parts to cause him to delay bringing his complaint. Indeed, the record reflects that some time in the fall of 1993, both the grievant and Mr. Pennington concluded that their dispute over the interpretation of the applicable statute should be resolved by "someone higher up" and that Mr. Pennington at one point advised the grievant to initiate formal proceedings over the matter.

The evidence will also not support that either superior took any action or made any statement which could be construed as an attempt to lull the grievant into thinking that he could obtain the relief he sought through informal means. There is some testimony of record which suggests that the grievant on at least one occasion obtained the additional pay by complaining to Mr. Pennington. The record as a whole, however, supports that while Mr. Pennington may have been willing to compromise when there was a close question as to whether certain hours worked by the grievant qualified for the higher rate of pay, he unequivocally advised the grievant on more than one occasion that he would not change his overall position on which hours were asbestos-related. (See footnote 7)

Essentially, the only evidence of any probative value offered by the grievant to show a promise on a superior's part and reliance thereon, was his own testimony that some time in late December or early January 1994, Mr. Thompson made the statement "I'll look into it" in response to one of his inquiries over the matter. According to the grievant, he was justified in concluding that this statementand perhaps other similar comments made by Mr. Pennington were tantamount to promises that he would receive the redress he sought. In Watkins, supra, it was held that such "wait and see" remarks on an employer's part were wholly insufficient for application of an equitable estoppel theory. That holding is fully applicable here.

Accordingly, the grievance is **DENIED** as untimely.

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

Raleigh County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: November 28, 1994

Footnote: 1 *The transcript of this proceeding and exhibits admitted are part of the record herein.*

Footnote: 2 *At this hearing the parties merely supplemented the record developed at Level II.*

Footnote: 3 *The amendments, effective July 1, 1992, in pertinent part, provide,*

> *The minimum pay for any service personnel employees engaged in the removal of asbestos material or related duties required for asbestos removal shall be their regular total daily rate of pay and no less than an additional three dollars per hour or no less than five dollars per hour for service personnel supervising asbestos related duties. Related duties required for asbestos removal shall include, but not be limited to, travel, preparation of the work site, removal of asbestos, decontamination of the work site, placing and removal of equipment and removal of structures from the site.*

The dispute centers on the interpretation of "related duties." Because the complaint is found untimely, it is not necessary to address the merits of the case.

Footnote: 4 *This finding is based on the testimony of the grievant and Mr. Pennington that they had a meeting "just days" before the grievance was filed.*

Footnote: 5 *The parties disagree that the grievant last worked on a project on December 27, 1993. The Board, in its post-hearing proposals, argues that the last project on which he performed the services for which he claims the extra wages was in October 1993. The evidence on this issue is also somewhat conflicting but it appears from Grievant's Exhibit 1 at the Level II hearing, an official history of the asbestos-related jobs the grievant was assigned to, that the project was finished at the end of December 1993. Further, the grievant's proposed findings of fact contain a list of the times for which he seeks the pay and they clearly note that December 27 was the "closure" date for the Sylvia Elementary project. In any event, whether the job ended in October or December is ultimately of little significance to the outcome in the case.*

Footnote: 6 *As required by W.Va. Code §18-29-3 (a), this assertion was made at the Level II hearing by Dr. Emily Meadows, the Board's representative. It was raised again at the Level IV hearing and in the Board's post-hearing*

proposals.

Footnote: 7There is also some evidence of record which suggests that after the grievance was filed, Mr. Pennington obtained a $280.00 payment for the grievant for a number of hours spent on paperwork on an unidentified project. The grievant's post-hearing proposals mention this payment and at least imply that it is supportive of his claim that his supervisor was responding to his ongoing efforts to resolve the matter informally and thereby encouraging him to delay. The better interpretation of this evidence is that Mr. Pennington and Mr. Thompson were making the grievant an offer in exchange for withdrawing the grievance. Indeed, the grievant's proposals refer to the payment as a "settlement" which did not resolve the matter. Accordingly, to the extent that this evidence is cited as supportive of an estoppel theory, it is found unpersuasive.