SHARON A. STOVER .

and VICTORIA V. FARLEY, .

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Grievants, .

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.

v. . Docket No. 93-26-521

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MASON COUNTY BOARD OF EDUCATION, .

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Employer. .

D E C I S I O N

Grievants, Sharon Stover and Vicky Farley, bus operators for the Mason County Board of Education (hereinafter Board) filed the instant appeal alleging that the Board had been engaging in discrimination and favoritism by allowing certain other bus operators to park their buses in the evening at places other than the regularly assigned stations. Ms. Stover's grievance was filed on September 7, 1993 and denied at level one on September 9, 1993. Ms. Farley filed her grievance on September 17, 1993, alleging the same type of activity but with regard to another driver. This second grievance was denied at level one on September 24, 1993. A level two hearing was held on October 28, 1993 and both complaints were consolidated at that time. A level two response denying bothgrievances was issued on November 1, 1993. Level three was bypassed and an appeal to level four was received by this Grievance Board on December 16, 1993. (See footnote 1)

On January 12, 1994, the Board's counsel filed a Motion to Dismiss the appeal to level four on the basis that said appeal was not timely perfected pursuant to the mandates of W. Va. Code §18-29-4(d)(1), which states, in pertinent part,

> If the grievant is not satisfied with the action taken by the chief administrator, or, if appealed to level three, the action of the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 18-29-5] of this article, . . . (Emphasis added).

Grievants filed a written response to the Board's Motion to Dismiss on January 21, 1994, and a telephonic conference was held on February 14, 1994, to address the facts surrounding Grievants' alleged lack of due diligence. Grievants testified that after their claims were denied at level two, their immediate supervisor Dene Haer, requested that they prepare a written request to be presented to the Board on the substance of the complaints in hope that the controversy could be solved. Apparently, Grievants complied with Mr. Haer's suggestion and then waited approximately ten days for a response to their written request dated November 7,1993. Grievants assert that on or around November 29, 1993, they collectively decided that they needed to appeal to level four as they had not received a response from the Board. However, that appeal was not received until thirteen days later. Grievants argue that their appeal should be declared timely for two reasons: (1) Because the Board had failed to comply with time lines prior to the issuance of the level two decision; and (2) because they had complied with Mr. Haer's request to attempt to solve the matter without resorting to an appeal.

The undersigned cannot be concerned with the Board's alleged failure to have properly scheduled and conducted lower level hearings in this matter. This Grievance Board has previously rejected this argument in numerous cases. In no way should a party be excused from complying with the mandatory procedural requirements of the Grievance Procedure simply because the other side has been guilty of failing to comply with the same provisions; in dealing with the various doctrines of equity, one must have "clean hands" in order to benefit from the other party's failures. (See footnote 2)

Further, assuming arguendo, the doctrine of equitable estoppel could be applied in this case to support an assertion thatGrievants were persuaded by Mr. Haer, either specifically or upon his actions alone, not to pursue their claims at level four until after he could present a written response to the Board on their behalf, their actual appeal to level four was still received well beyond the statutory five-day time limitation. (See footnote 3) This Grievance Board has previously ruled that the time frames for the filing of grievances and appeals pursuant to W. Va. Code §18-29-4 are not jurisdictional in nature because various equitable doctrines may excuse a delay. Gaskins v. W. Va.

Dept. of Health, Docket No. 90-H-032 (Apr. 4, 1990). However, the time frames must become jurisdictional after the doctrines of waiver, tolling and estoppel are determined not to have been established by the evidence.

Here, Grievants' claim must be dismissed as untimely based upon the delay in which it took for their appeal to be received by this Grievance Board. Grievants waited well beyond the five-day period for which to appeal after the point when it became obvious to them that the Board was not going to act favorably upon their request to settle the case. Grievants stated that they were only willing to wait a week or ten days for a response to their request. Both Grievants and Mr. Haer are to be applauded for attempting to amicably compromise the case at hand. However, Grievants were still required to comply with the time frames established for appeal in order to assure that their rights would ultimately be protected if a settlement of the case could not be reached.

Finally, during the telephonic conference, Grievants alluded to various disciplinary actions which had been taken by the Board against them relating somehow to the parking of their own buses. A review of the record developed to date cannot support a finding that any adverse actions taken against Grievants have been addressed through the grievance procedure at any level. Further, Grievant's testimony indicates that certain actions have occurred after their complaints were filed. Therefore, the undersigned is not able, based upon the evidence presented, to decide whether Grievants have one or more causes of action against the Board separate and apart from the facts and argument raised below.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusion of law.

Conclusion of Law

Grievants have failed to file a timely appeal of the level two decision dated November 1, 1993, pursuant to the mandatory requirements of W. Va. Code §18-29-4.

Therefore, the Mason County Board of Education's Motion to Dismiss is **GRANTED** and this grievance is hereby **ORDERED DISMISSED** and **STRICKEN** from the docket of the undersigned and of the Grievance Board due to an established lack of jurisdiction.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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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ALBERT C. DUNN, JR.

Administrative Law Judge

March 17, 1994

Footnote: 1It is inferred from the pleadings submitted by Grievants that they decided to waive level three and appeal directly from level two to level four pursuant to W. Va. Code §18-29-4(c). This inference is made based upon the fact that a level three appeal form was included with the appeal form to level four which had only the following notation written across the middle of the form: "By Pass level III." It is inferred that one of the Grievants made this notation indicating their desire to waive level three.

Footnote: 2In hopes of being helpful, the undersigned has recognized that the Board's Level Two Grievance Decision form does not contain a specific time period indicating when an appeal of that decision must be perfected. It is recognized that the Grievance Procedure for Education Employees does not mandate such specificity, however, it would surely appear helpful. Further, the Board's level three Grievance Response Form states that appeals to level four are to be mailed to this Grievance Board's Elkins, West Virginia office. Appeals to level four for Mason County Board of Education employees should be submitted to the Charleston, West Virginia office.

Footnote: 3The doctrine of equitable estoppel was thoroughly discussed in the case of Watkins v. Logan Co. Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993).