BONNIE P. BALL, .

Grievant, .

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v. . Docket Number: 94-20-384

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KANAWHA COUNTY BOARD OF EDUCATION, .

Respondents. .

D E C I S I O N

Bonnie Ball (hereinafter Grievant) filed this grievance pursuant to the provisions of West Virginia Code §§18-29-1, et seq., on June 29, 1994, against her employer, the Kanawha County Board of Education (hereinafter Board). (See footnote 1) She claims that the Board eliminated her position as part of a reduction in force, and subsequently transferred her to another position in violation of W. Va. Code §§18A-4-8b, 18A-2-6 and 18A-4-8. Grievant's claim was denied at level two on the basis that it was not timely filed. Grievant appealed to level four on August 4, 1994, and the parties subsequently agreed that this Decision could be rendered based uponthe record created at level two after numerous attempts at scheduling an evidentiary hearing failed. The case became mature for decision on February 24, 1995.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant was assigned to the position of Secretary III for the Homebound Program at the Board's Central Office for Exceptional Children beginning July 1, 1993, for the term of 261 days.

2. In March 1994, Superintendent Jorea Marple recommended to the Board that Grievant's position be eliminated during a reduction in force.

3. Grievant appeared before the Board to oppose this recommendation on March 11, 1994; however, the Board accepted Superintendent Marple's recommendation.

4. Grievant was notified by letter dated March 15, 1994, of the Board's action to eliminate her position at the end of the 1994-1995 school year.

5. Grievant filed the instant complaint on June 29, 1994, claiming that the Board had illegally eliminated her position based upon an improper comparison of its secretaries' seniority dates.

Discussion

The Board claims that this grievance was not timely filed. It asserts that Grievant did not file the instant complaint within the applicable statutory period after the Board took action toeliminate her position on March 11, 1994, and subsequently notified her of its decision on March 15, 1994. Grievant responds to the Board's affirmative defense by asserting that she was generally told by people with regard to the merits of her claim that she did not have "a legal leg to stand on," and therefore, she did not initiate a grievance until after she became aware of the holdings in the Supreme Court of Appeal's decision in Berry v. Kanawha County Board of Education, 446 S.E.2d 510 (W. Va. 1994) which was issued on June 16, 1994.

Grievant's argument is not persuasive. W. Va. Code §18-29-4(a)(1) states, 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.

This Code provision, in essence, establishes the statute of limitations for the filing of grievances by education employees against their employers. In the instant case, in order for Grievant to have timely initiated the grievance procedure, she was required by law to file (See footnote 2) her claim "within fifteen days following the occurrence of the event upon which the grievance is based." The event or

action Grievant now seeks to challenge was the Board'svote to eliminate her position on March 11, 1994. Therefore, she had fifteen days (See footnote 3) in which to file a claim with her immediate supervisor. Grievant's claim was not initiated until long after this fifteen-day period.

Grievant has also failed to establish an equitable defense to the Board's argument which would allow for a tolling of the statutory time frames that control. Grievant has not established sufficient facts upon which to support an application of the doctrine of equitable estoppel. See, Watkins v. Logan Co. Bd. of Educ., Docket No. 93-20-052 (Sep. 20, 1993). Further, an employee may not successfully defend against a timeliness defense by showing that he/she waited to file a grievance until after learning of the outcome in another employee's litigation of the same or similar issue when the grievant knew of the facts giving rise to the claim. Pack v. Kanawha Co. Bd. of Educ., Docket No. 93-20-483 (Jun. 30, 1994). Finally, Grievant has not establish substantial compliance with the filing requirements. See, Duruttya v. Board of Education of County of Mingo, 382 S.E.2d 40 (W. Va. 1989).

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant was required to have filed the instant complaint "within fifteen days following the occurrence of the event upon which the grievance is based." W. Va. Code §18-29-4(a)(1).

2. Grievant's complaint was not timely filed pursuant to the provisions of Code §18-29-4.

Therefore, this grievance is hereby **DISMISSED** as untimely. The Grievance Board cannot, therefore, exercise jurisdiction over the substance of Grievant's claim.

Any party may appeal this decision to the Circuit Court of Kanawha 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 13, 1995

Footnote: 1Grievant was one of three employees who participated in litigating this claim against the Board at the lower levels; the other two employees have since withdrawn their claims.

Footnote: 2The verb "file" is used to refer to the grievance procedure's requirement that a grievant "schedule a conference with the immediate supervisor to discuss the nature of the grievance. . ."

Footnote: 3"Days" is defined by W. Va. Code §18-29-2(b) as "days of the employees' employment term exclusive of Saturday, Sunday, official holidays or school closings . . ."