SKETTER LOWRY, et al.,

Grievants,

v. **Docket No. 96-DOE-130**

WEST VIRGINIA DEPARTMENT OF EDUCATION, CEDAR LAKES CONFERENCE CENTER,

Respondent.

D E C I S I O N

Sketter Lowry, Carolyn Mahood, Joyce Braden, and Doris Blankenship (Grievants) initiated identical grievances pursuant to W. Va. Code §§ 18-29-1, et seq., on August 22, 1995, complaining that their employer, the West Virginia Department of Education (Respondent), employed them in excess of 1,020 hours in a calendar year without providing insurance and other benefits extended to regular hourly employees. After the grievance was denied at Level I, Grievants appealed to Level II, and a hearing was conducted on January 22, 1996. Following an adverse Level II decision by the Superinten dent's designee, Carolyn R. Arrington, on March 20, 1996, Grievants waived Level III in accordance with W. Va. Code § 18-29-4(c), and appealed to Level IV on March 27, 1996. A Level IV evidentiary hearing was held in this Board's office in Charleston, West Virginia,on August 14, 1996. This matter became mature for decision upon receipt of the parties' written post-hearing arguments by September 6, 1996.

BACKGROUND

Pursuant to W. Va. Code § 18-2-16, Respondent operates the Cedar Lakes Conference Center (CLCC) near Ripley, West Virginia, "for the purpose of developing competent leadership, developing character, training for useful citizenship, fostering patriotism, and of providing and encouraging the

development of organized regional activities for Future Farmers of America and Future Homemakers of America members, and other youth and adult groups." Respondent issued an "Employee Handbook and General Rules and Regulations" (Handbook) for CLCC in 1987. Adkins, L II, G Ex 1. (See footnote 1) Under the heading of "Personnel Classification," the Handbook describes four types of employees as follows:

> 1. **Annual Salary** - Any personnel employed on an annual basis and whose salary is fixed per year.
>
> 2. **Regular Hourly** - Those personnel employed by the camp for a fixed hourly wage not to exceed forty hours per week. Those personnel are employed to meet the requirements of the camp and may or may not work year around. Those personnel are entitled to medical and life insurance benefits and to be members in the West Virginia Teachers Retirement System.
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> 3. **Irregular Hourly** - Those personnel that are required as substitutes or on certain occasions to augment the regular staff such as extra dining hall, housekeeping, or security personnel. Those employees are paidon an hourly basis, and will not work more than 1,020 hours in any calendar year. Those employees are not eligible to participate in medical and life insurance or retirement plans.
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> 4. **Seasonal** - Those personnel employed during peak periods of occupancy and paid on an hourly basis. It is understood that the personnel will not exceed three months of work per year unless prior approval has been given by the Superintendent of Cedar Lakes.

Adkins, L II, G Ex 1 at 18.

Another pertinent provision in the Handbook states as follows:

> **MEDICAL AND LIFE INSURANCE**
>
> All permanent employees who work at least 1,040 hours per year are eligible to participate in the group medical insurance plan which includes a life insurance policy. Employees are eligible to participate in insurance programs as provided by statutory regulations, on the first day of the month following the date of employment without having to submit to a medical examination. Upon becoming eligible, the employee will pay (30) percent of the monthly premium for the first twelve (12) months on the Medical and Basic Life Plan. Thereafter, the insurance benefits are paid by the state.

> Single and family rates are determined by the Public Employees Insurance Board. Additional optional group life insurance is also available, paid for by the employee. Employees who enroll more than thirty-one days after their date of eligibility will be required to complete a Statement of Health. Coverage will be effective upon approval of the Statement of Health.

Adkins, L II, G Ex 1 at 24. (See footnote 2) It is clear from the extensive record in this matter that Grievants were originally employed by Respondent as "irregular hourly" personnel to perform various duties relating to housekeeping in facilities at CLCC. Moreover, most Grievants were typically requested to work in excess of 1,040 hours per calendar year. Based upon these essential facts and the language quoted from the Handbook, above, Grievants claim they are entitled "to be classified as regular hourly, to receive the difference in pay between irregular hourly and regular hourly classified employees, credit for all annual and sick leave days they would have accrued had they been classified as regular hourly during each calendar year they exceeded 1,020 hours of work since their initial date of employment, and to all other benefits enjoyed by regular hourly employees." (Grievants' brief at L IV.)

DISCUSSION

Respondent contends that the subject matter of at least one portion of this grievance, Grievant's claim for insurance benefits administered by the Public Employees Insurance Agency (PEIA), is outside the jurisdiction of this Grievance Board, citing W. Va. Code § 18-29-2(a), which excludes certain matters from the grievance procedure as follows:

> Any pension matter or other issue relating to the state teachers retirement system in accordance with article seven-a [§ 18-7A-1 et seq.] of this chapter or other retirement system administered outside the jurisdiction of the applicable governing board, any matter relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

As previously noted by this Grievance Board in Carpenter v. West Virginia Department of Education, Docket No. 93-DOE-372 (Dec. 30, 1993), it is necessary to readthe statute as a whole in order to ascertain the intent of this provision. In this regard, § 18- 29-1 states:

> The purpose of this article is to provide a procedure for employees of the governing boards of higher education, state board of education, county boards of education,

> regional education service agencies and multi-county vocational centers and their employer or agents of their employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. (Emphasis added).

Moreover, § 18-29-2(a) broadly defines "grievance" to include:

> ... any claim by one or more affected employees ... alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination .... (Emphasis added).

This grievance alleges a violation of the Handbook issued by Respondent to its employees at CLCC. According to the "Introduction & Purpose" section of the Handbook:

> This **Employee Handbook**, which is provided to each employee at Cedar Lakes Conference Center, outlines basic policies and procedures. This handbook also provides employees with a summary of their rights, responsibilities, benefits, and opportunities.

Adkins, L II, G Ex 1 at 1 (emphasis in original).

Consequently, the undersigned administrative law judge finds that this grievance involves an allegation relating to Grievants' compensation and employment status, as governed by a policy, rule or regulation under which they work, within the meaning of § 18- 29-2(a), rather than a claim regarding insurance benefits. Further, based upon the language in the Employer's Handbook, this grievance involves a matter in which authority to act is vested in the Grievants' employer, the Department of Education. Accordingly, thatportion of the grievance relating to whether Grievants should be entitled to PEIA insurance coverage on the same terms as regular hourly employees is not excluded from the grievance procedure under W. Va. Code § 18-29-2(a). See Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996); Carpenter, supra; Talerico v. Harrison County Bd. of Educ., Docket No. 17-88-021-3 (June 23, 1988).

Respondent further contends that, in regard to alleged violations of the Handbook in any calendar year prior to 1995, this grievance was not initiated within the following time limits set forth in W. Va. Code § 18-29-4(a)(1):

> 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.

A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). According to the record, Grievant Lowry exceeded the 1,040 hour limitation for irregular hourly employees in calendar years 1989 through 1994. Grievant Braden exceeded 1,040 hours in 1993, 1994, and 1995. Grievant Mahood exceeded 1,040 hours in 1992 through 1994. Grievant Blankenship has never exceeded the 1,040 hour limit in any calendar year. See Lowry, L II, G Ex 1. These grievances were filed at Level I on August 22, 1995. See Lowry, L II, R Ex 1.

Grievants argue that this grievance was not "discovered" until they became acquainted with the Handbook at a union meeting in late July 1995, and they then initiatedtheir grievance to challenge a continuing practice of their employer. In support of this position, Grievants cite to Spahr v. Preston County Board of Education, 391 S.E.2d 739 (W. Va. 1990), wherein the Supreme Court of Appeals of West Virginia interpreted this "discovery" provision. In Spahr, the Court found that the grievants did not learn of the "event" giving rise to the grievance, in that case disparate treatment of similarly situated teachers in regard to a pay supplement, until they met with their union representative. Accordingly, the grievance was timely since it was filed within fifteen days of that "discovery."

In the instant matter, Grievants were employed as irregular hourly workers and their status never changed, although they were employed beyond the 1,040 hour limitation set forth in the Handbook. (See footnote 3) What Grievants "discovered" when they met with their union representative in July 1995 was not an event, but language in the Handbook which led them to believe they were entitled to additional benefits from their employer. This Grievance Board has previously held that "the date a [g]rievant finds out an event or continuing practice was illegal is not the date for determining whether a grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989) (emphasis in original). Thus, mere 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 § 18-29-4 as interpreted in Spahr. See Floren v. Kanawha County Bd. of Educ., Docket No. 93-20- 327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44- 385 (Jan. 15, 1991). Therefore, as to those years prior to 1995 when Grievants may have worked in excess of 1,040 hours, this grievance was not timely filed. (See footnote 4) Adkins, supra. See Kent v. Jackson County Bd. of Educ., Docket No. 90-18-418 (Jan. 25, 1991).

As for calendar year 1995, only one Grievant, Joyce Braden, filed a timely grievance relating to a grievable "event" - exceeding the 1,040 hour limit for irregular hourly employees. (See footnote 5) As to the remaining Grievants, it is apparent that all four grievances were worded identically and submitted together. W. Va. Code § 18-29-2(a) permits a grievance to be filed on behalf of a "class" of employees, provided that each similarly situated employee indicates in writing his or her intent to join the class. Here, each employee obviously indicated such consent by submitting an identical grievance. Thus, the remaining Grievants are included in this timely "class" grievance. (See footnote 6)

Turning to the merits of this grievance, it is well-settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syllabus Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). In the instant matter, Respondent is bound by the terms of the Handbook it promulgated for CLCC. See Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). However, the language in the Handbook does not clearly state that an employee hired in "irregular hourly" status who subsequently works in excess of 1,040 hours in a calendar year becomes entitled to permanent "regular hourly" status, as Grievants contend. By accepting this argument, this Grievance Board would permit Respondent's supervisors at CLCC to promote irregular hourly employees permanently to positions reserved for regular hourly employees, without the benefit of a competitive posting, (See footnote 7) by simply assigning an employee more than 1,040 hours of work in a year. The undersigned does not agree that such a remedy is compelled by the terms in the Handbook relied upon by Grievants. See Jude v. Mingo County Bd. of Educ., Docket No. 29-87-184 (Jan. 29, 1988).

At best, Grievants may be entitled to the same compensation and benefits as regular hourly employees, once they cross the 1,040 hour threshold in a given calendar year. Grievants rely upon the language at page 24 of the Handbook:

> All permanent employees who work at least 1,040 hours per year are eligible to participate in the group medical insurance plan which includes a life insurance policy.

However, Grievants were hired as "irregular hourly" employees, and it is clear from the record that no action was ever taken by CLCC to change that status. Moreover, the Handbook specifically states "[t]hose employees [irregular hourly] are not eligible to participate in medical and life insurance or retirement plans." Adkins, L II, G Ex 1 at 18. This specific provision addressing the entitlement of irregular hourly employees controls over the more general provision relied upon by Grievants. See Syllabus Point 2, State ex rel. Myers v. Wood, 154 W. Va. 431, 175 S.E.2d 637 (1970). See also UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984). Accordingly, Grievants are not eligible for retirement or insurance benefits as a result of working over 1,040 hours in a calendar year.

Grievant Braden's request for "the difference in pay between irregular hourly and regular hourly classified employees" must be denied as no differences were established to warrant award of such damages. See Cruciotti v. Ohio County Bd. of Educ., Docket No. 90-35-427 (Sept. 16, 1991). In other words, irregular hourly and regular hourly employees appear to receive the same wage.

Finally, Grievant Braden claims "credit for all annual and sick leave days [she] would have accrued had [she] been classified as [a] regular hourly" employee after exceeding 1,040 hours. The Handbook provides that regular hourly employees accrue both annual and sick leave "each month at the rate of one-half (1/2) day for eighty hours or less and one (1) day for over eighty (80) hours." Adkins, L II, G Ex 1 at 21-22. However, the Handbook further states that "[a]nnual leave shall not be accorded irregular hourly,summer, or part-time emergency employees." Adkins, L II, G Ex 1 at 21. Accordingly, this specific provision precludes awarding Grievants annual leave for working in excess of 1,040 hours in a calendar year. See State ex rel. Myers, supra.

The Handbook similarly states that "[s]ick leave shall not be accorded irregular hourly, summer or emergency employees." Adkins, L II, G Ex 1 at 22. Thus, this specific language precludes awarding sick leave to Grievants when they work in excess of 1,040 hours in a calendar year. Id.

The rest of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievants are employed by the West Virginia Department of Education (DOE) as "irregular hourly" employees at Cedar Lakes Conference Center (CLCC) near Ripley, West Virginia.

2. DOE issued an "Employee Handbook and General Rules and Regulations" (Handbook) for CLCC sometime in 1987. Adkins, L II, G Ex 1.

3. The Handbook contains provisions stating that irregular hourly employees "will not work more than 1,020 hours in any calendar year" and "permanent employees who work at least 1,040 hours per year are eligible to participate in the group medical insurance plan." Adkins, L II, G Ex 1 at 18, 24.

4. The Handbook also provides that irregular hourly employees "are not eligible to participate in medical and life insurance or retirement plans." Adkins, L II, G Ex 1 at 18. Further, the Handbook states: "annual leave shall not be accorded irregular hourly, summer, or part-time emergency employees," (Adkins, L II, G Ex 1 at 21.) and "sick leaveshall not be accorded irregular hourly, summer or emergency employees." Adkins, L II, G Ex 1 at 22.

5. Grievant Lowry has been employed at CLCC since 1988 and worked in excess of 1,040 hours in 1989, 1990, 1991, 1992, 1993, and 1994. Lowry, L II, G Ex 1. Grievant Braden has been employed at CLCC since 1992 and worked in excess of 1,040 hours in 1994 and 1995. Lowry, L II, G Ex 1. Grievant Mahood has been employed at CLCC since 1990 and worked in excess of 1,040 hours in 1993 and 1994. Lowry, L II, G Ex 1. Grievant Blankenship has been employed at CLCC since 1994 and has never been employed in excess of 1,040 hours in a calendar year. Lowry, L II, G Ex 1.

6. Each Grievant was initially hired as an "irregular hourly" employee, and CLCC has never changed their status. Likewise, CLCC has never extended insurance benefits, annual and sick leave benefits or participation in the West Virginia Teachers Retirement System to Grievants or any other irregular hourly employees.

7. This grievance was initiated on August 22, 1995. Only Grievant Braden worked in excess of 1,040 hours during calendar year 1995. See Lowry, L II, G Ex 1.

CONCLUSIONS OF LAW

1. Grievants are required to prove the allegations of their complaints by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. This grievance, which alleges entitlement to regular hourly status and the leave, insurance and retirement benefits enjoyed by employees in such status in accordance with the CLCC Handbook, represents a claim alleging a misapplication or misinterpretation of the policies, rules, regulations or

written agreements under which these grievants work,relating to compensation and employment status as defined in W. Va. Code § 18-29-2(a). This grievance does not involve a "pension matter" or an issue "relating to public employees insurance" as described in the same statute. Accordingly, this matter properly falls within the education employee grievance procedure, W. Va. Code §§ 18-29-1, et seq. Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Carpenter v. W. Va. Dept. of Educ., Docket No. 93-DOE-372 (Dec. 30, 1993); Talerico v. Harrison County Bd. of Educ., Docket No. 17-88-021-3 (June 23, 1988).

3. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95- 29-315 (Jan. 25, 1996).

4. Under the "discovery provision" of W. Va. Code § 18-29-4(a)(1), "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739, 742 (W. Va. 1990); Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27- 481/482 (Aug. 19, 1992).

5. Under W. Va. Code § 18-29-4, "the date a [g]rievant finds out an event or continuing practice was illegal is not the date for determining whether a grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989) (emphasis in original).

6. Each Grievant was aware when she had worked in excess of 1,040 hours per year in calendar years 1989 through 1994 without receiving the same benefits accordedto regular hourly employees. Accordingly, as to events which occurred more than 15 days prior to August 22, 1995, this grievance is time-barred by the provisions of W. Va. Code § 18-29-4(a)(1). Adkins, supra. See Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991). See also Brown v. Public Employment Relations Bd., 345 N.W.2d 88 (Iowa 1984).

7. The Department of Education must abide by the rules and regulations it promul gates, notwithstanding that such rules bestow rights upon employees which are not provided by statute. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993).

8. It is a well-established rule of statutory construction that a specific provision in a statute, rule or regulation controls over a general provision in that same statute, rule, or regulation. See Syllabus Point 2, State ex rel. Myers v. Wood, 154 W. Va. 431, 175 S.E.2d 637 (1970). See also UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984).

9. Although Respondent's Handbook states that irregular hourly employees, such as Grievants, "will not work more than 1,020 [1,040] hours in any calendar year," the Handbook further provides irregular hourly employees "are not eligible to participate in medical and life insurance or retirement plans" (Adkins, L II, G Ex 1 at 18.), "annual leave shall not be accorded irregular hourly, summer, or part-time emergency employees" (Adkins, L II, G Ex 1 at 21.), and "sick leave shall not be accorded irregular hourly, summer or emergency employees." Adkins, L II, G Ex 1 at 22. Accordingly, Grievants have notdemonstrated that they are entitled to any relief as a result of working in excess of 1,040 hours in a calendar year. See State ex rel. Myers, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred or 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 26, 1996

Footnote: 1

At Level II, the parties admitted the Level II transcript from another grievance, Adkins, et al., v. W. Va. Dept. of Educ., as Joint Exhibit 1. At Level IV, the parties agreed to incorporate the entire Level IV record from that same grievance, Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996), as part of the record in this related grievance. Accordingly, exhibits will be referenced as "Adkins, L II, G Ex 1," or "Lowry, L IV, R Ex 2," to specify the record from which a particular exhibit is cited.

Footnote: 2

It is noted that the "irregular hourly" classification contains a 1,020 hour limitation while the insurance provision sets forth a 1,040 hour threshold. There was testimony at Level IV in Adkins that the former provision was a typographical error and that both provisions should read "1,040 hours." Because the written document contains a patent ambiguity, such testimony is admissible as an exception to the parol evidence rule to clarify the drafter's intent. See Dominguez v. Dept. of the Air Force, 803 F.2d 680, 682 (Fed. Cir. 1986); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Because a full-time employee would work 2,080 hours in a 52-week year, the undersigned concludes that the manual should contain a 1,040 hour limit for "irregular hourly" employees in both provisions.

Footnote: 3

In Spahr, the grievants were informed by their union representative that their employer was treating other employees differently. Here, Grievants and all other irregular hourly employees were consistently treated in the same manner.

Footnote: 4

Grievants' reliance upon the decision of the Supreme Court of Appeals of West Virginia in Naylor v. Human Rights Commission, 378 S.E.2d 843 (W. Va. 1989), is likewise misplaced. Respondent's failure to provide Grievants with copies of the Handbook does not represent the type of conduct which would warrant application of the doctrines of equitable estoppel or equitable tolling, in the circumstances presented here. The testimony in Adkins indicates that copies of the Handbook were readily available, and there is no claim that any employee ever made inquiry about the Handbook and was denied access. See Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

Footnote: 5

It need not be decided if Grievant Braden initiated her grievance within 15 days of the date when she first exceeded 1,040 hours, as the facts in this matter document a "continuing offense," where each day she works beyond 1,040 hours without receiving any additional benefits, or a change in employment status, gives rise to a grievable event, given Grievants' position on the merits of this grievance. See Blankenship v. Summers County Bd. of Educ., Docket Nos. 92-45-133/134/135 (Nov. 30, 1992).

Footnote: 6

As Grievants Blankenship, Lowry, and Mahood did not exceed 1,040 hours in 1995,they have not established any entitlement to individual relief, beyond whatever prospective relief Grievants may be awarded as a class.

Footnote: 7

The Handbook provides that "[p]osition vacancies shall be posted on the bulletin board in the main office." Adkins, L II, G Ex 1 at 3.