

DEBORAH L. ADKINS, et al., .

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Grievants, .

.

v. . Docket No. 95-DOE-507

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WEST VIRGINIA DEPARTMENT OF .

EDUCATION, CEDAR LAKES .

CONFERENCE CENTER, .

.

Respondent. .

DECISION

Deborah Adkins, Deborah Collins, Joyce Burgess and Doris Spellman (Grievants) complain that the Cedar Lakes Conference Center, operated by 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. This grievance was initiated on July 26, 1995. After the grievance was denied at Level I, Grievants appealed to Level II and a hearing was conducted on August 29, 1995. Following an adverse Level II decision by the Superintendent's designee, David Stewart, on November 6, 1995, Grievants waived Level III in accordance with W. Va. Code § 18-29-4(c), and appealed to Level IV on November 17, 1995. A Level IV evidentiary hearing was held in this Board's office in Charleston, West Virginia, on January 24, 1996. This matter became mature for decision upon receipt of the parties' written post-hearing arguments on March 18, 1996.

DISCUSSION

Pursuant to W. Va. Code § 18-2-16, the Respondent operates the Cedar Lakes Camp and 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. G Ex 1 at L II. [\(See footnote 1\)](#) The Handbook describes four types of employees under the heading of "Personnel Classification" 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.

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 paid on 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.

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.

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.

G Ex 1 at 24. (See footnote 2)

It is clear from the record in this matter, as established through hearings at Level II and Level IV, that Grievants were originally employed by Respondent as "irregular hourly" personnel to perform various duties relating to food services in the dininghall at Cedar Lakes. It is likewise apparent that during most of their years of employment, Grievants were requested to work in excess of 1,020 hours per calendar year. For example, during calendar year 1994 Grievant Spellman worked 1,112.5 hours, Grievant Burgess worked 1,452.5 hours, Grievant Collins worked 1,551.5 hours and Grievant Adkins worked 1,372.5 hours. Based upon these essential facts and the language quoted from the Handbook, above, Grievants claim that they are entitled "to be classified as regular hourly, to receive 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 7.)

Respondent initially argues that the subject matter of this grievance 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 read the 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.

G Ex 1 at 1.

_____ 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). Moreover, this grievance involves a matter in which the authority to act is vested in the Grievants' employer, the Department of Education. Accordingly, the instant grievance is not excluded from the grievance procedure under W. Va. Code § 18-29- 2(a). See Carpenter, supra.

_____ Respondent further contends that this grievance was not initiated within the following time limits as 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.

Although each Grievant exceeded the 1,020 hour limitation for irregular hourly employees at various times during calendar year 1994, this grievance was not filed until July 26, 1995. At that point in 1995, none of the Grievants had yet worked in excess of 1,020 hours for that calendar year. However, Grievants contend that this grievance was not "discovered" until they became acquainted with the Handbook at a union meeting in mid-July 1995, and that they initiated their grievance within fifteen days "following the discovery that provisions of the handbook may have been violated or misinterpreted." (Grievants' brief at 4.)

In support of their 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 there 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 was never changed, although they were employed beyond the 1,020 hour limitation set forth in the Handbook. What Grievants discovered when they met with their union representative here 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, this grievance was not timely filed.

The remainder 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. 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." G Ex 1 at 18, 24.
4. Grievant Adkins has been employed at CLCC since 1993 and worked in excess of 1,040 hours in 1993 and 1994. Grievant Collins has been employed at CLCC since 1988 and worked in excess of 1,040 hours in 1990, 1991, 1992, 1993 and 1994. Grievant Burgess has been employed at CLCC since 1989, with a one-year break in service during 1990, and worked in excess of 1,040 hours in 1991, 1992, 1993 and 1994. Grievant Spellman has been employed at CLCC since 1994 and worked in excess of 1,040 hours in 1994.
5. 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.
6. Grievants were not provided an individual copy of the Handbook but a copy was maintained in plain view near the timeclock which Grievants used on the days they worked at CLCC. L II HT at 147-49.
7. This grievance was initiated on July 26, 1995. As of that date, none of the Grievants had worked in excess of 1,020 hours during calendar year 1995. See G Ex A.

CONCLUSIONS OF LAW

1. 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. See *Carpenter v. W. Va. Dept. of Educ.*, Docket No. 93-DOE-372 (Dec. 30, 1993).

2. 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). 3. 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).

4. Grievants here were aware, or should have been aware, of all the basic facts necessary to file their grievance, more than fifteen days before the instant grievance was filed. Accordingly, this grievance is time-barred by the provisions of W. Va. Code § 18-29-4(a)(1). 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).

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: April 26, 1996

[Footnote: 1](#)

The Handbook will hereinafter be cited as "G Ex 1 at ." Grievants' exhibits admitted at Level IV are identified by letters, e.g., "G Ex A."

[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 that the former provision was a typographical error and that both provisions should read "1,040 hours." Inasmuch as Grievants never exceeded the 1,020 hour limitation without also exceeding the 1,040 hour limitation, it is not necessary to determine if the former provision should be modified based upon parol evidence of 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).