CHERYL SNODGRASS,

Grievant,

v. Docket No. 97-20-007

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Cheryl Snodgrass, won her grievance at Level II, and now seeks, at Level IV, to receive "[l]egal fees, psychological costs and expenses associated with grievance #96021 (See footnote 1) **[,] $3,500.00." Initially, Grievant requested a Level IV hearing, but after written communication with the undersigned, agreed to submit the case on the record. The undersigned also sent the parties a copy of W. Va. Code § 18-29-8 which controls the issue of expenses at the lower levels of the grievance procedure. This case became mature for decision on March 11, 1997, the deadline for proposed findings of fact and conclusions of law. The issues to be resolved at Level IV are whether this case was timely filed at Level IV, and whether Grievant should be awarded the fees and costs she requests.** (See footnote 2)

The following Findings of Fact are appropriately derived form the record below.

Findings of Fact

1. Grievant has been employed by the Kanawha County Board of Education ("KCBOE") for approximately fourteen years as a Custodian I. During the 1994-1995 school year, she was employed at Chesapeake Elementary School in a half-time position.

2. At the end of the 1994-1995 school year, Grievant was placed on administrative transfer, due to a reduction of the school's custodial staff.

3. Prior to the beginning of the 1995-1996 school year, Mr. Stan Cobb, in the Personnel Office, contacted Grievant and asked if she would be interested in working as a half-time Cook I at Marmet Elementary School ("MES"). Grievant accepted and started in the position.

4. Because Grievant had not worked as a cook before, she was required to take and

pass the competency exam. 5. Grievant took the exam on December 21, 1995, but did not pass it, and another employee was placed in the cook position.

6. Grievant asked to take the test a second time, but this request was refused, and Grievant was then placed in a custodial position at MES. Grievant did not like this new position, believed the expected work load was too heavy, complained about conflict among the staff, and felt increased anxiety.

7. Grievant filed this grievance in December 1995.

8. Although it is unclear from the record exactly when events occurred, after the Level II hearing the parties engaged in settlement discussions.

9. On May 13, 1996, Mr. William Courtney, Director of Employer/Employee Relations, wrote Grievant's counsel, Mr. Nathan Hicks, noting their prior conversations about settlement. Since KCBOE had failed to give Grievant the competency test, and inservice training as required by W. Va. Code § 18A-4-8e before she was tested the first time, he offered the following steps to resolve the grievance: 1) Grievant would receive three hours of inservice training to prepare her to retake the test; 2) Grievant would then be given another opportunity to pass the competency test; 3) Three and one-half days of sick leave would be reinstated regardless of whether or not Grievant passed the test; and 4) If Grievant did not pass the test, she would be placed in a half-time Custodian I position. Mr. Courtney noted "no monetary damages or attorney fees will be paid by the school system." 10. On May 15, 1996, Mr. Hicks responded to Mr. Courtney's offer and agreed with suggestions 1) and 2), but requested ten days of sick leave and $2,500 in attorney's fees and $2,500 in damages for the emotional stress his client had suffered.

11. On May 17, 1996, Mr. Courtney responded to the counter- offer and stated Grievant had only taken three and one-half days of sick leave; thus he could not and would not recommend restoring any additional leave time. (See footnote 3) **He noted the offer of the sick leave had been only in the interest of settlement, and was not to be construed as any type of admission by KCBOE.**

12. On May 24, 1996, Mr. Courtney wrote the Grievance Evaluator assigned to the case and requested the grievance be granted because KCBOE had not given Grievant the inservice required by W. Va. Code § 18A-4-8e.

13. On May 28, 1996, Grievance Evaluator Nancy Douglas granted the grievance, and directed Grievant to report on May 31, 1996, for training. After this training, Grievant would be scheduled to take the Cook competency test again. The evidence in the lower level record indicates Mr. Hicks was sent a copy of this Level II Decision.

14. On June 3, 1996, Grievant passed the Cook competency test, and on June 4, 1996, she was placed in a half-time cook position. She finished the school year in this position. 15. On September 6, 1996, Mr. Hicks wrote Mr. Courtney stating the grievance had been settled except for the issues of Grievant's legal fees and costs. He noted Grievant now wished to file a grievance with respect to the legal fee issue.

16. Mr. Courtney responded to this letter on September 10, 1996, and stated Grievant's case had been resolved by the Level II Decision issued by Ms. Douglas. He noted the issue of attorney's fees had been repeatedly rejected. Mr. Courtney also wrote that the request to file a grievance on the issue should have been made within fifteen days of receiving the Decision.

17. Mr. Hicks did not respond to this letter until November 5, 1996. In that letter he recalled the Decision being communicated orally, but his file did not contain a formal written decision. He requested a copy of this decision so he could proceed with filing the grievance on legal fees.

18. On November 6, 1996, Mr. Courtney sent Mr. Hicks a copy of the Level II Decision and noted KBCOE's position that no attorney fees are owed, and Grievant did not timely contest the issue.

19. This grievance was filed with this Grievance Board on November 25, 1996.

Discussion

The two issues before this Grievance Board are whether this grievance is timely filed, and whether Grievant can recover the fees, expenses, and costs she seeks. W. Va. Code § 18-29-4 indicates this grievance is untimely filed whether it is viewedeither as a new grievance or as a continuation of the previous one. If the grievance is viewed as a new one, it is governed by the timelines set out in W. Va. Code § 18-29-4(a) which states a grievance must be filed:

> 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. . . .

Grievant and her attorney must have known, at least by May 31, 1996, what decision had been reached in this grievance because she reported for inservice training on that date, and then began her new job on June 4, 1996. Mr. Hicks indicated in his letter of September 6, 1996, that the issues of costs and legal fees were not resolved. If he was not aware that this issue had been resolved by a grievance decision on that date, he must surely have been aware when he received Mr. Courtney's letter of September 10, 1996, which clearly informed him of this fact. Mr. Hicks did not attempt to file this grievance with the Grievance Board until November 25, 1996. (See footnote 4) This date is outside the fifteen day filing limit imposed by statute.

If this grievance is seen as a continuation of the prior grievance, it is likewise untimely. W. Va. Code § 18-29-4(b) requires that: " [w]ithin five days of receiving the decision of the chief administrator, the grievant may appeal the decision tothe governing board of the institution or may proceed directly to level four." Again, if Mr. Hicks was not aware a decision had been rendered in May, he was informed of this Decision in September and still did not file with this Board until November.

As to the issue of whether attorney fees, expenses, and costs can be awarded at the lower levels, W. Va. Code § 18-29-8 states:

> Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expense except as to the costs of transcriptions as provided for in section six [§ 18- 29-5] of this article.
>
> In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.

The Code Section clearly does not allow the undersigned to award attorney's fees or expenses at Level II. Thus, even if Grievant's claim were timely filed, the requested relief could not be granted.

As for the "pain and suffering" damages Grievant seeks, an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make

grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 225, 227 n.11 (1995). The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. This grievance is not timely filed whether it is viewed as a continuation of the prior grievance or is viewed as a new grievance because it was not filed with this Grievance Board within the guidelines mandated by W. Va. Code § 18-29-4.

2. W. Va. Code § 18-29-8 states "any expenses" incurred during the first three levels of the grievance procedure are the responsibility of the party incurring them. Attorney's fees, expenses, and costs cannot be awarded at these levels.

Accordingly, this grievance is DENIED.

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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 30, 1997

Footnote: 1

This is the grievance number assigned by Kanawha County.

Footnote: 2

Attached to Grievant's brief is a letter from Grievant, dated July 5, 1996. This letter is addressed to "Whom It May Concern" and was written several months before Grievant filed with this Grievance Board. In the letter Grievant

not only repeats the previously requested relief, but also asks for eight days of sick leave and damages to "make up" for the "emotional and physical toll all this has taken on me." As this additional relief was not included in the grievance previously submitted to Level IV, it will not be considered.

Footnote: 3

A review of the record below appears to reveal that Grievant had taken five of her eight and one-half available days, and had three and one-half days remaining.

Footnote: 4

The grievance was received by the Grievance Board at that time, but was returned to the attorney with directions how to complete the filing.