WILLIAM W. HARMON,

Grievant,

v.

DOCKET NO. 98-10-111

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, William W. Harmon, filed this grievance on March 17, 1998:

> On March 4, 1998, I became aware that if any other attendance worker in Fayette County had received a salary supplement, I was also to receive it. Helen Osborne, retired Attendance Director, received a $600 annual salary supplement until she retired in June 1989. I was to receive this same salary supplement for the 1990-91 through 1995-96 school years; however, I did not receive it. According to WV Code 18-29-2, I have been a victim of discrimination and favoritism. Also, it is a violation of WV Code 18A-4-5a, which requires uniformity for additional salary compensation.
>
> Relief sought: $3,780 - back pay for 6 years ($630 x 6 for 210-day yearly employment), any additional salary due me, and interest on these amounts.

The grievance was denied at level one and a hearing was conducted at level two on April 3, 1998. A decision dismissing the grievance was issued by Grievance Evaluator Peggy Martin on April 6, 1998. Grievant by-passed level three of the grievance process and appealed to level four on April 8, 1998. Grievant filed a motion for default against the Board on May 8, 1998. Thereafter, this matter was heard at level four on May 13, 1998,and became mature for decision on May 29, 1998, the deadline for the submission of proposed findings of fact and conclusions of law. (See footnote 1)

SUMMARY OF EXHIBITS

LIV Joint Exhibits

Ex. 1 -

October 17, 1997 handwritten note from William Harmon to Larry Coleman, Superintendent, and response to William Harmon from Ron Wood.

Ex. 2 -

Boardlaw Summary of Harmon/Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-00 (Aug. 25, 1997).

Grievant's Exhibits

Ex. 1 -

Portion of annotations of W. Va. Code § 18-29-4.

Ex. 2 -

September 30, 1996 letter from Dr. William L. Capehart, Superintendent, to Dr. Henry R. Marockie, State Superintendent of Schools.

Ex. 3 -

July 26, 1988 Superintendent's Opinion from Dr. Henry Marockie.

Ex. 4 -

February 18,1986 Superintendent's Opinion from Dr. Henry Marockie.

Ex. 5 -

Continuing Contract of Employment of Helen Campbell, dated August 30, 1954.

Ex. 6 -

Continuing Contract of Employment of William Harmon, dated July 6, 1983.

Ex. 7 -

Job Opportunities Posting dated June 15, 1989.

Ex. 8 -

William Harmon's Work History with Fayette County Schools.

Ex. 9 -

Job Opportunities Posting dated December 16, 1997.

Ex. 10 -

January 16, 1998 handwritten note from Superintendent Coleman.

Ex. 11 -

March 5, 1998 letter from Henry Marockie, State Superintendent of Schools, to William W. Harmon.

Ex. 12 -

March 24, 1981 Board Minutes.

Ex. 13 -

Helen Campbell Osborne's Work History with Fayette County Schools.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of Ray Carson.

FINDINGS OF FACT

1. Grievant became employed as a school attendance worker on December 12, 1978 and became Attendance Director in the 1989-90 school year.

2. Grievant succeeded Helen Osborne as Attendance Director.

3. Grievant had 10 years of classroom teaching experience.

4. Grievant's salary is based on the teacher's salary scale utilizing his education and experience.

5. Grievant's contracted salary amount as the Attendance Director was set by the Board pursuant to the provisions of W. Va. Code § 18-8-3 with duties spelled out in W. Va. Code § 18-8-4. At no time did Helen Osborne and Grievant hold the same position while they were each in the employ of the Board.

6. On October 17, 1997, Grievant requested and learned, in writing, of certain pay supplements afforded to Helen Osborne for the years 1985-86, 1986-87, 1987-88, and 1988-89. Jt. Ex. 1.

7. Grievant filed this grievance on March 17, 1998, claiming he was entitled to be paid the same $600.00 supplement which had been afforded to Helen Osborne.

8. Grievant had previously filed a grievance involving the $600.00 supplement, styled Harmon and Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 27, 1997), aff'd Circuit Court of Fayette County, Civil Action No. 97-C-332H (Jan. 27, 1998), which held the grievants, Attendance Directors or Workers, were not entitled to the same $600.00 supplement afforded professional educators.

9. The Level II Grievance Evaluator dismissed the instant grievance on the basis of res judicata, stare decisis, and timeliness. 10.

Grievant appealed to level four on April 8, 1998.

PRELIMINARY ISSUES

Grievant asserts the Board defaulted at level two because “no written decision was issued by the Level II hearing evaluator to affirm, modify or reverse the Level I decision.” W. Va. Code § 18-29-3(a) states, “If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by fault.”

Grievant wrote a letter to Superintendent Larry Coleman claiming default at level two on April 21, 1998, stating no decision had been yet been rendered. The level two hearing was held on April 3, 1998. The record shows that a level two decision was issued on April 6, 1998. Grievant claims this “decision” did not comply with the statutory mandates because it dismissed his grievance on the basis of stare decisis and untimeliness, rather than affirming, modifying, or reversing the level one decision.

It is clear from the record that the level two decision in fact did affirm the level one decision in this matter. At level one, Grievant's immediate supervisor, Gary W. Ray, Director of Schools, replied:

> On Friday, March 13, 1998, at your request, we met for an informal grievance hearing regarding your request for back pay for experience increment granted to classroom teachers for years worked beyond twenty. I have looked into your request and find that you filed this same grievance on September 20, 1996. Level IV denied your grievance. Upon your appeal to Fayette County Circuit Court, your request was denied. As I understand from your conference on March 13, 1998, your current request is the same as filed on September 20, 1996,: “I am seeking all salaries due me since I attained 20 years of experience as stated in WV 18 18A-4-2.” Your current grievance is nearly identical to the grievance filed by you on September 20, 1996, and

> denied by Level IV and Circuit Court of Fayette County. Further,I am without authority to resolve your grievance at this level. Therefore, for all of the above, your grievance is denied.

The Level II Grievance Evaluator agreed with Mr. Ray, and found that Grievant had litigated this issue before in another grievance, and dismissed the grievance based on res judicata. While the Grievance Evaluator used the term “dismissed” as opposed to “denied”, the effect is the same, and Grievant was advised in that decision of his appeal rights under the grievance statute. Indeed, no one argues that Grievant had the right to appeal the Level II decision to Level III or Level IV. Thus, the Grievance Evaluator's choice of words is merely a matter of semantics, and Grievant has not shown that he did not receive a written decision from her at Level Two within the statutory prescribed timelines. Therefore, Grievant's motion for default is **DENIED**.

The Board argues this grievance is barred by the doctrines of res judicata and stare decisis. The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988). See also, Boyer v. Wood County Bd. of Educ., Docket No. 95-54-309 (Sept. 29, 1995); Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995). "The identicality of issues litigated is the key component to the application of administrative res judicata . . . . Res judicata focuses on whether the cause of action in the second suit is the same as in the first suit." Liller, at 646.

Grievant previously filed a grievance styled Harmon and Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997), which is nearly identical to the instantgrievance. In that grievance, the grievants also sought the $600.00 annual supplement for classroom teachers who have more than twenty years service, alleging of violation of W. Va. Code § 18A-4-2. That grievance was denied by Administrative Law Judge Reynolds, and appealed to the Circuit Court of Fayette County. That Court affirmed the decision of the Administrative Law Judge, which held that a county board is not required to pay attendance workers or attendance directors the $600.00 supplement which is paid to professional educators. See Harmon and Chiles v. Fayette County Bd. of Educ., Circuit Court of Fayette County, Civil Action No. 97-C-332-H (Jan. 27, 1998).

Grievant alleges that the instant grievance is not barred by Chiles and Harmon, supra, because

he did not allege discrimination in that grievance, and has now introduced evidence supporting a claim of discrimination in this grievance. The Decision acknowledges that “it appears Grievants raised a discrimination issue when they presented evidence that FCBOE pays the supplement to some professional educators who are not classroom teachers”, although discrimination itself was not “clearly pled”. The Administrative Law Judge then went on to analyze a claim of discrimination on that basis on page 10 of her decision, and found the grievants had failed to make a prima facie case of discrimination, as they were not similarly situated to professional educators. Chiles and Harmon, supra.

Grievant has brought forth evidence that his predecessor, Helen Osborne, received a $600.00 supplement in her capacity of Attendance Director, which he claims to have newly discovered subsequent to the issuance of the Chiles and Harmon decision. This is not evidence which was introduced in the prior grievance, and is not representative of the facts used by Administrative Law Judge Reynolds to determine the grievants in that casehad not made a prima facie case of discrimination. Thus, as the grievance process is intended to be a fair, expeditious, and simple procedure, and not a “procedural quagmire”, the undersigned finds that the matter of discrimination as it relates to Helen Osborne was not raised in the previous grievance and is not barred from being litigated here. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990); Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

The Board also contends, however, that even if this recent claim of discrimination is permitted to be raised here, the claim is untimely. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing 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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket NO. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd,

Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

The event or action Grievant now seeks to challenge was the Board's action of giving Helen Osborne a $600.00 supplement in her capacity as Attendance Director. Grievant requested information regarding the supplement given to Ms. Osborne in writing on October 17, 1997. Grievant received the information verifying that Ms. Osborne did indeed receive the supplement, also in writing, on October 17, 1997. Grievant did not file this grievance until March 17, 1998, well beyond the fifteen day limit. The Board has established by a preponderance of the evidence that this grievance was untimely filed pursuant to W. Va. Code § 18-29-4.

Grievant contends that he did not know of his legal right to grieve this matter until March 4, 1998, when he read a computer-generated synopsis of his own decision in Harmon and Chiles, supra. It is the event which gives rise to the filing of a grievance, not the discovery of a legal right. See Spahr, supra. Therefore, Grievant has presented no justification for delaying filing this grievance some five months after discovering Ms. Osborne received the supplement to which Grievant claims he is also entitled.

CONCLUSIONS OF LAW

1. The preclusion doctrine of res judicata may be applied to prevent the "relitigation of matters about which the parties have already had a full and fair opportunityto litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988).

2. Grievant established that the claim of discrimination raised in the instant grievance was not identical, nor addressed, in his previous grievance styled Harmon and Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997).

3. A timeliness defense is an affirmative defense which the employer 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. 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.

5. The Board has proven by a preponderance of the evidence that the grievance was untimely filed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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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MARY JO SWARTZ

Administrative Law Judge

Dated: July 9, 1998

Footnote: 1

Grievant appeared pro se, and the Board was represented by Erwin L. Conrad, Esq., Conrad Law Offices.