

HOLLY GREATHOUSE, et al.,

Grievants,

v.

DOCKET NO. 99-DOH-413

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION/DIVISION OF HIGHWAYS,**

Respondent.

D E C I S I O N

Grievants are all employees of the West Virginia Department of Transportation/Division of Highways ("Highways") in its Calhoun County headquarters. ([See footnote 1](#)) They filed essentially identical grievances on June 2 and 3, 1999, alleging that, "[o]ur clerk Joan Satterfield was paid for calling in the weather during the snow and ice removal season. While doing this she was working out of her classification doing a job that should have been posted and bid on according to Grievance Level IV decision on docket number 99-DOH-084." Through the course of these proceedings, it became clear Grievants were alleging Ms. Satterfield was exclusively offered scheduled overtime work amounting to two hours per day to monitor and call in the weather report for the county. Grievants contend this work should have been offered to them pursuant to the Employer's ScheduledOvertime Policy. As relief they seek back pay with interest for the overtime hours they should have been offered.

The grievances were denied at level one on June 4, 1999, by Grievants' supervisor, Glenn Hanlin. The level two grievance evaluator, James E. Roten, Jr., District Administrator, did not schedule a level two conference, but instead rendered a decision summarily denying the grievances based on timeliness. Thereafter, level three hearings were conducted on June 24, 1999, and the third level grievance evaluator, Brenda Craig Ellis, recommended the grievances be denied by decisions dated

September 27, 1999. Her recommendations were accepted by Thomas Badgett, Assistant Commissioner on that same date. Grievants appealed to level four, where the grievances were consolidated. A level four hearing was conducted on May 3, 2000. This matter became mature for decision on July 3, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant Greathouse was represented by Kelly R. Rice; the remaining Grievants were represented by Marilyn Kendall, American Federation of State, County & Municipal Employees; Highways was represented by Timbera Wilcox, Esq.

FINDINGS OF FACT

The material facts of this grievance are not in dispute, and are set forth in the following findings.

1. Grievants are employed by Highways in the Calhoun County Maintenance facility. Grievants' classifications during the relevant period, and their dates of hire, are as follows:

Roger Stump, Transportation Worker II

Aug. 1, 1974 Robert Swisher, Transportation Worker II
Feb. 3, 1975

Jerry Riggs, Transportation Worker II

Nov. 29, 1976

Jerry Harris, Transportation Worker II

Dec. 22, 1976

Robert Bennett, Transportation Worker II

Oct. 5, 1988

Arnold Banfield, Transportation Worker II

Dec. 28, 1988

Holly Greathouse, Transportation Worker II

Jan. 13, 1989

Seldon Lynn Tanner, Transportation Worker I

May 25, 1989

James Metheny, Transportation Worker II

July 22, 1991

Elvin Hixon, Transportation Worker II

Feb. 28, 1996

Hollins Duffield, Transportation Worker II

June 16, 1997

2. Joan Satterfield is employed by Highways as an Office Assistant III in the Calhoun County facility, and was hired on June 3, 1974.

3. Janet Butler is employed by Highways as a Transportation Worker I in Calhoun County, and was hired on December 3, 1979.

4. Ms. Satterfield was assigned the duty of calling in the weather conditions each day during the period December 1, 1997, through March 31, 1998, also known as the Snow Removal and Ice Condition ("SRIC") season. She performed this duty from her home prior to normal work hours, and was compensated an additional two hours per day for this activity.

5. Every month a scheduled overtime roster was posted on the bulletin board in the lunch room. This roster contained the scheduled overtime of every employee in the facility, including Ms. Satterfield's SRIC assignment.

6. The SRIC function performed by Ms. Satterfield was not posted.

7. All employees in the Calhoun County facility were qualified to perform the weather call-in duties. In past years a variety of employees have performed this duty. 8. Highways' Scheduled Overtime Policy governs the assignment of overtime work which is scheduled in advance. This policy requires such work to be rotated among qualified employees beginning with the most senior and ending with the least senior employee.

9. In or about March, 1998, Janet Butler filed a grievance alleging Highways' Scheduled Overtime Policy had not been followed, and requesting compensation for the same time period in this grievance. Ms. Butler prevailed in her grievance and was compensated at the rate of one and one-half times her normal hourly rate for the same number of hours Ms. Satterfield worked calling in the weather during the 1997-1998 SRIC season. Butler v. W. Va. Div. of Highways, Docket No. 99-DOH-

084 (May 13, 1999).

10. Grievants learned of the work performed by Ms. Satterfield as a result of the Butler decision.

11. Grievants filed their grievances on June 2 and 3, 1999.

PRELIMINARY ISSUE

Highways contends the individual grievances were not timely filed at level one. Timeliness is an affirmative defense which the employer is required to prove by a preponderance of the evidence. Hale v. Mingo County Bd. of Educ., Docket No. 96-29-315 (Jan. 15, 1996). Grievants argue the timeliness issue was not properly raised by Highways at or before level two, and therefore, it is barred from raising the issue at levels three or four. Thus, the first issue to be resolved is whether Highways has properly raised the timeliness defense. W. Va. Code § 29-6A-3(a)(2) of the grievance procedure for state employees, states, in pertinent part:

Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing.

There is no dispute that Highways did not raise the timeliness defense at level one of the grievance procedure, when Grievants' supervisor denied the grievance due to lack of authority to grant the requested relief. With regard to level two, W. Va. Code § 29-6A- 4(b), states:

Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference. (Emphasis added).

Grievants timely appealed to level two on June 8, 1999. The appeal was received by James E. Roten, Jr., District Administrator, District 3 Division of Highways. Mr. Roten did not schedule or hold a level two conference. Instead, he issued a written response to the Grievants indicating the grievances were denied at level two because they were not filed in a timely manner. At the time, Grievants made no objection to Mr. Roten's failure to hold a conference.

Grievants appealed to level three, and level three hearings were conducted by Grievance

Evaluator Brenda Craig Ellis, on June 25, 1999. At level three, Highways raised the timeliness defense. Ms. Ellis held the defense was not properly raised at or before the level two conference in this matter, and rejected Highways' defense. Subsequently, at level four, Highways once again raised the timeliness defense.

Grievants contend Mr. Roten was without authority to simply decide the grievance on the basis of timeliness without holding a level two conference as prescribed by statute, that his decision was, in essence, null and void, and the level three grievance evaluator was correct in barring Highways from raising a timeliness defense at level three. Highways argues Mr. Roten, as the appropriate person to handle the level two appeal, raised the timeliness defense on behalf of Highways in his written level two decision, thus satisfying the statutory time limit for raising that defense. In the alternative, Highways points to the fact that it does not hold hearings at level two, only level three, and the statutes are not consistent in this regard.

The statutes are inconsistent, as noted by Highways. W. Va. Code § 29-6A-4(b) regarding level two of the grievance procedure for state employees, commands the employer's administrator or his designee to hold a conference at level two. But W. Va. Code § 29-6A-3(a)(2) states the employer must raise the timeliness defense at or before the level two hearing. Clearly, state employers are not required to hold a level two hearing by statute, and Highways does not hold level two hearings. Therefore, it is impossible for the employer to raise the timeliness defense "at or before the level two hearing", as there is no such step in the grievance procedure for state employees.

Despite this inconsistency, this matter nevertheless may be resolved through the application of basic principles of statutory construction. Generally, "statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syllabus Point 3, Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975)." Carvey v. W. Va. State Bd. of Educ., 527 S.E.2d 831, 1999 W. Va. LEXIS 201 (1999); Syl. pt. 3, Boley v. Miller, 187 W. Va. 242, 418 S.E.2d 352 (1992). See also Syl. pt. 2, Beckley v. Kirk, 193 W. Va. 258, 455 S.E.2d 817 (1995).

Moreover, "where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions. . . ." Carvey, supra; State v. Williams, 196 W. Va. 639, 474 S.E.2d 569 (1996)(quoting State ex rel. Pinson v. Varney, 142 W. Va. 105, 96

S.E.2d 72 (1956)(additional internal quotations and citations omitted). With respect to inconsistent statutes which, together, form a part of a comprehensive body of law, "the general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus Point 1, UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984). Syllabus point 1, Whitlow v. Board of Education of Kanawha County, 190 W. Va. 223, 438 S.E.2d 15 (1993)." Syl. pt. 6, Albright v. White, 202 W. Va. 292, 503 S.E.2d 860.

W. Va. Code § 29-6A-3(a)(2) was added to the grievance procedure statute in 1998. The language in this subsection is identical to a provision contained in the grievance procedure for education employees in W. Va. Code § 18-29-3(a). The grievance procedure for education employees includes a provision for level two hearings, and in contrast to the state statute, education employees (with the exception of higher education employees) regularly have level two hearings, and by-pass level three hearings. It appears the Legislature, in amending the state employees grievance procedure to provide for default and to limit an employer's ability to raise the timeliness defense, adopted the education employees statute wholesale, without changing the language to reflect that state employees are provided evidentiary hearings at level three, rather than level two.

Therefore, given the inconsistency in the statutes, the undersigned must give Highways the benefit of the doubt in this matter. The level three grievance evaluator's holding that Highways failed to raise the timeliness defense at or before level two, is reversed, and the undersigned finds Highways successfully raised the timeliness defense at level two through Mr. Roten's written decision.

This statutory inconsistency should be corrected or clarified by the Legislature so the procedures are as clear as possible for the benefit of all public employees and employers covered by this statutory procedure.

DISCUSSION

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. Once the employer has demonstrated 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. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr.30, 1996); Sayre v. Mason County Health Dep't, 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).

W. Va. Code § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The events which Grievants claim violated Highways' Scheduled Overtime Policy occurred between December 1, 1997, and March 31, 1998. Grievants filed their grievances on June 2 and 3, 1999, obviously well outside the ten-day time limit provided by statute. However, Grievants contend they first became aware Ms. Satterfield had been performing the overtime after the Janet Butler grievance had been decided. Grievants allege they first saw the Butler grievance on May 27, 1999.

Consistent with the ruling of the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), this Grievance Board has determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. See, e.g., Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998). However, 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 Section 18-29-4 as interpreted in Spahr. Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); 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).

Grievants were all aware the SRIC assignment was being performed by someone during the 1997-98 season. They also knew they, themselves, were not performing that function, but not one of them ever inquired as to who was doing that job. Every month a scheduled overtime roster was posted on the bulletin board in the lunch room. This roster contained the scheduled overtime of every employee in the facility, including Ms. Satterfield's SRIC assignment. Grievants all testified they rarely, if ever, looked at the scheduled overtime roster on the bulletin board, and none of them looked to see who was performing the SRIC function. Allegedly, it was not until Ms. Butler received her level four decision in May 1999, that Grievants became aware Ms. Satterfield was performing that function. However, as stated above, Grievants all knew the SRIC function was being performed by someone, as it was an essential function during the winter months.

The discovery that Ms. Satterfield was performing the SRIC function does not provide an exception to the ten-day time limit in W. Va. Code § 29-6A-4 for filing a grievance, as endorsed in Spahr, nor does the discovery that Ms. Butler was successful in obtaining relief through her grievance. Instead, as explained more fully in Adkins, supra, and Floren, supra, learning that other employees have obtained relief in a grievance or court proceeding is not an "event upon which the grievance is based" as described in W. Va. Code § 29-6A-4(a). Thus, because Grievants delayed such an extended period of time in pursuing this grievance, without any legal excuse, this grievance must be dismissed as untimely filed. See Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997); Short, supra.

CONCLUSIONS OF LAW

1. The failure of the level two grievance evaluator to hold a level two conference before issuing his decision does not preclude Highways from asserting the timeliness defense at level three, where no harm has been shown by Grievants.
2. The holding of the level two grievance evaluator in his written decision that the grievance was untimely filed serves to raise the timeliness defense on behalf of Highways in conformance with W. Va. Code § 29-6A-3(2).
3. 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. Once the employer has demonstrated 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. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

4. W. Va. Code § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

5. Consistent with the ruling of the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), this Grievance Board has determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. See, e.g., Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998).

6. 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 W. Va. Code § 18-29-4 as interpreted in Spahr. Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); 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).

7. Grievants' "discovery" that Ms. Satterfield was performing the SRIC function during the 1997-98 winter season does not give rise to the discovery exception set forth in Spahr, supra.

8. Grievants' filing on June 2 and 3, 1999, eighteen months following Ms. Satterfield's performance of the SRIC function, is well outside the limit provided in W. Va. Code § 29-6A- 4(a) for

filing a grievance at level one.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 21, 2000

[Footnote: 1](#)

Grievants are Holly Greathouse, Roger Stump, Robert Swisher, Jerry Riggs, Jerry Harris, Robert Bennett, Arnold Banfield, Seldon Lynn Tanner, James Metheny, Elvin Hixon, and Hollins Duffield.