KEVIN CONNER, et al.,

Grievants,

v. Docket No. 03-HHR-142

DEPARTMENT OF HEALTH & HUMAN RESOURCES/
BUREAU OF CHILD SUPPORT ENFORCEMENT and
BUREAU OF CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Kevin Connor, Starla Davis, Steven Jolliffe, Winifred Kallmyer, Arden Loomis, Brenda Martin, John Merritt, Cindy Price, and Amy Wiant ("Grievants"), are employed by the Department of Health & Human Resources/Bureau of Child Support Enforcement ("DHHR/BCSE") assigned to the Clarksburg, Harrison County, office. Grievants filed individual level one complaints on April 17, 2003, stating:
We firmly disagree with the requirement to take annual and/or holiday leave for Tuesday, February 18, 2003. Recent grievances (see attached) were granted relief sought and DHHR/BSCE was ordered to restore the 8 hours of annual leave that the grievants were required to use on 2/18/03. Both of these grievants [sic] consists of the same region as Harr/Dodd counties. However, we feel that it is discriminatory for the same relief not to be restored to the Harr Co. BSCE workers.

For relief, Grievants request reinstatement of eight hours annual leave taken on February 18, 2003. The parties agreed to waive levels one and two, and the grievance was denied following an evidentiary hearing at level three. The matter was appealed to level four on May 21, 2003, and a hearing to supplement the record was conducted on October 20, 2003. (See footnote 1) **Grievants did not appear, but were represented telephonically by Terry Reed of AFSCME, and BSCE was represented by Robert Miller, Assistant AttorneyGeneral. The matter became mature for decision upon receipt of Respondent's proposed findings of fact and conclusions of law on November 21, 2003. Grievants elected not to file any post-hearing**

proposals.

The following facts are derived from the record developed at levels three and four.

Findings of Fact

1. Grievants are employed by BCSE and are assigned to the Clarksburg, Harrison County, office.

2. On or about February 14, 2003, West Virginia experienced a severe winter storm which resulted in 20 to 24 inches of snow accumulation in the north central section of the state. On Saturday, February 15, 2003, Governor Bob Wise issued a Proclamation declaring a state of emergency existed statewide. Monday, February 17, 2003, was a state holiday.

3. Tuesday, February 18, 2003, most DHHR offices in Region III, including those in Preston, Taylor, and Barbour counties, were closed due to weather conditions. The four Regional Directors of the DHHR Bureau for Children and Families determined whether the offices in their regions would be closed. **(See footnote 2)**

4. Louis Palma determined that the DHHR offices in Region I would be open on February 18, 2003. Region I consists of sixteen counties in northwest West Virginia, including Harrison, Monongalia, and Marion counties. 5. Many employees in Region I were unable to report to work on February 18, 2003, due to road conditions. Those individuals were permitted to use annual or holiday leave, consistent with the Division of Personnel Policy on Inclement Weather.

6. DHHR/BCSE employees assigned to Marion and Monongalia counties filed grievances on February 20 and 21, 2003, alleging that they should not have been required to use annual leave on February 18, 2003. These grievances were granted by level three decisions dated April 2, 2003, and the grievants' eight hours of leave was restored.

7. On or about April 9, 2003, Grievants were advised that their leave would not be restored as a result of the Monongalia and Marion County decisions. The present grievance was filed on April 17, 2003.

8. Respondent raised the issue of timeliness at the level three hearing, and the grievance was denied on that basis.

Discussion

Initially, Respondent asserts that the grievance was not filed within the statutory time lines.

Specifically, Grievants were required to use annual or holiday leave on February 18, 2003, and did not file a grievance for approximately two months. 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 Pub. 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).

Pursuant to W. Va. Code § 29-6A-3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." However, as determined in Greathouse v. West Virginia Department of Transportation, 99-DOH-413 (Aug. 21, 2000), since a conference is required at level two instead of a hearing (*See* W. Va. Code § 29-6A-4(b)), the timeliness issue may properly be asserted by the employer at level three.

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). *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). This grievance was not filed within the ten day time frame.

Grievants argue that the grievance was timely filed because they were first led to believe the time would be restored upon the release of level three grievance decisions in Monongalia and Marion counties which found the failure to close the offices was arbitrary and capricious. They were not advised until April 9, 2003, that they would not benefit from the holdings in those decisions, and filed their grievance on April 17, 2003. This argument is in the nature of a discovery rule exception as discussed in Spahr v. Preston County Board of Education, 182 W.

Va. 726, 391 S.E.2d 739 (1990). Spahr determined anemployee 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, Grievants knew they were required to report to work or use leave time on February 18, 2003. The 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. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); 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). The same analysis applies to grievances filed under W. Va. Code §§ 29- 6A-1, *et seq.*

Had Grievants filed their grievance in a timely manner, it would likely have been granted, consistent with the two related matters. However, they simply did not pursue their claim in a timely manner.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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 Pub. 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).

2. Pursuant to W. Va. Code § 29-6A-3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." However, since a conference is required at level two instead of a hearing (*See* W. Va. Code § 29-6A-4(b)), the timeliness issue may properly be asserted by the employer at level three. Greathouse v. W. Va. Dep't of Transp., 99-DOH-413 (Aug. 21, 2000),

3. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997).

4. Because Grievants were aware of the facts giving rise to the grievance on February 18, 2003, the discovery rule exception to the statutory time lines does not applyin this instance. The 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. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996).

5. The grievance was not timely filed.

Accordingly, the grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and 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.

DATE: DECEMBER 12, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***This delay was primarily due to staffing changes by AFSCME.***

Footnote: 2

[2]The Bureau of Children and Families was joined as a party at level three. Although none of the Grievants are assigned to that Bureau, Respondent's Motion to Sever at level four was denied due to the fact that the Regional Directors made the decision to close the BCSE offices.