DOLORES GARCIA, et al.,

Grievants,

v. Docket No. 04-HE-229

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Dolores Garcia, Marvin Maxon, Richard Garcia, Diane Lawson, Danny Goff, Rosalee Johnson, Frances Rhome, Marvin Marshall, Sally Park, Delores Richards, and Myrtle Dodson ("Grievants"), employed by West Virginia University ("WVU" or "Respondent") as Campus Service Workers ("CSWs"), filed a level one grievance on April 13, 2004, in which they alleged discrimination occurred when they were not awarded $1200 back pay given to union members. (See footnote 1) **For relief, Grievants request back pay with interest from December 1997. The grievance was denied at all lower levels, and appeal to level four was made on June 9, 2004. A level four hearing was conducted on September 7, 2004, at which time several Grievants appeared on their own behalf, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision on September 29, 2004, the due date for submission of proposed findings of fact and conclusions of law.**

The following facts of this grievance are undisputed.

Findings of Fact

1. Grievants are employed by WVU as Campus Service Workers (CSWs)assigned to the Physical Plant. They have not been represented by an employee organization at any time pertinent to this grievance.

2. Grievants, along with a number of other CSWs who are members of the Association of College Employees ("ACE"), filed a level one grievance on January 17, 2001, in which they requested an upgrade from pay grade 5 to pay grade 8, and back pay from December 19, 1998, when they were moved to pay grade 5.

3. The grievance, styled Moore, et al. v. WVU, was denied at levels one and two. A

number of the CSWs filed an appeal to level four. Grievants did not file an appeal to level four based upon their understanding from Frank Dadisman, an ACE representative, that an appeal had been filed on their behalf. In fact, the appeal was filed only for those CSWs who were members of ACE.

4. The level four grievance appeal was placed in abeyance pending a review of all Physical Plant job families by the Job Evaluation Committee ("JEC").

5. As a result of the JEC review, all CSWs were advanced to pay grade 7, effective July 1, 2003. Based upon subsequent level four grievance decisions ruling that employees who were advanced as a result of the JEC review were entitled to back pay, WVU offered those CSWs who had filed a level four appeal a cash settlement of $1200.

6. The settlement offer was not extended to Grievants because they had not pursued their grievance to level four.

Discussion

Grievants argue that they were part of the Moore grievance, and did not file an appeal to level four through no fault of their own. WVU argues that Grievants are notentitled to the settlement offer because they did not pursue their grievance to level four. WVU further asserts that the current grievance was not timely filed.

When 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Res., Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-501 (Sept. 30, 1997).

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); 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 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 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).

Grievant Dolores Garcia was notified by WVU counsel on or about March 17, 2004, that a settlement offer forwarded to her was rescinded because she had failed to prosecute her appeal. Grievants did not file a level one grievance until April 13, 2004, clearly past the statutory time lines. Grievants did not state a reason for the delay in filing this grievance.

Even if Grievants had timely filed the present grievance, they could not prevail on the underlying claim for two reasons. First, they did not timely file an appeal to level four. W. Va. Code § 18-29-4(d) requires that an appeal of the decision issued by the chief administrator or the governing board be filed within five days of the written decision. Grievants acknowledge their failure to file an appeal, but explain that they relied upon the representation of a co-worker that the union would pursue the matter on their behalf. This was a most unfortunate assumption, as Grievants later learned. However, Grievants knew they were not members of an employee organization, and could not reasonably have expected representation.

The second reason Grievants could not prevail in the pending grievance, is their failure to prove that WVU engaged in discrimination by offering settlements only to union members. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." (See footnote 2) **In order toestablish a claim of discrimination, employees must establish a prima facie case of discrimination by a preponderance of the evidence.** (See footnote 3) **In order to meet this burden, a grievant must show:**

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their employer in a manner that the other

employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievants establish a prima facie case of discrimination, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievants must show that the offered reasons are pretextual. Prince v. Wayne County Bd. of Educ., Docket No. 90-50- 281 (Jan. 28, 1990).

Grievants have established a prima facie case of discrimination by showing that some Physical Plant employees who contested their classification were offered a settlement, but they were not. However, WVU has provided a legitimate, nondiscriminatory reason for their action, the offer was made only to those employees who had pursued theirgrievances to level four. (See footnote 4) **Grievants did not offer any evidence that the reason was pretextual, and they are not entitled to the relief requested.**

Conclusions of Law

1. When 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Res., Docket No. 98-HHR-010 (July 7, 1998). Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997). Thereafter, Grievants must show that the offered reason(s) are pretextual. Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

2. 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). 3. WVU established that Grievants failed to file this grievance within the statutory time lines, and Grievants did not offer an explanation for their delay in filing.

Accordingly, this 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." 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.

DATE OCTOBER 28, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.The level two transcript indicates that Frances Rhome had withdrawn from the 2001 grievance. Grievants Park and Richards did not appear at the hearing, and are dismissed from this grievance.

Footnote: 2

[2]At the time the classification grievances were filed at level one, employees at institutions of higher learning were covered by the education employees statute. These employees were transferred to the state employees procedure effective July 1, 2001.

Footnote: 3

[3]Prima facie is a Latin term meaning, literally, "at first sight." A prima facie claim is one that will prevail until contradicted or overcome by other evidence. Black's Law Dictionary, 5th Ed., 1979

Footnote: 4 ***It is important to note Grievants did not allege that any WVU representative had made a statement causing them to delay filing an appeal.***