ANN LIVESAY, et al.,

Grievants,

v. Docket No. 04-49-187

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Ann Livesay, Sandra Garrison, Andrew Scott, David Chipps, and Michael Gillespie ("Grievants"), employed by the Upshur County Board of Education ("UCBE") as teachers, filed a level one grievance on March 9, 2004, after they were charged leave time on a day school was cancelled due to inclement weather. For relief, Grievant request restoration of their leave. The record does not include a level one decision; however, the grievance was denied at levels two and three. (See footnote 1) Appeal was made to level four on May 14, 2004. An evidentiary hearing was conducted in the Grievance Board's Elkins office on June 23, 2004. Grievant Livesay was represented by J. Burton Hunter, III, Esq.,Grievant Garrison appeared pro se, and UCBE was represented by Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love. The grievance became mature for decision upon receipt of Grievant's Livesay's response to UCBE's proposed findings of fact and conclusions of law on August 4, 2004.

The following facts are derived from the evidence submitted at the levels two and four hearings.

Findings of Fact

1. Grievants are employed by UCBE as teachers and were assigned to Buckhannon-Upshur High School or Buckhannon-Upshur Middle School on December 19, 2003.

2. Grievants all reported they were taking annual or sick leave, or leave without cause, prior to the beginning of the school day on December 19, 2003.

3. Due to inclement weather, Dr. Charles Chandler, Superintendent, called a two-hour delay for December 19, 2003.

4. Classroom teachers are required by UCBE to report to work at their regular time of 8:00 a.m., on days a two-hour delay is invoked. Substitute teachers were called to fill the

absences created by Grievants on December 19.

5. Shortly after 8:00 a.m., Dr. Chandler determined that school would be cancelled for the entire day.

6. Teachers are not required to report for work on days school is cancelled due to inclement weather.

7. As soon as Grievant Livesay heard that school was cancelled, she called Cheryl Gaunt, Coordinator of Services, to inquire whether she would be charged with sick leave for that day. Ms. Gaunt advised her that she would be charged with a half-day of leave. Grievant Livesay then called members of the board to express her disagreement.

8. Teachers who reported for work on December 19, 2003, were permitted to leave, and were paid for the day. Those teachers, including Grievants, who had requested leave for that day, were charged with a half day of leave. 9. During the first week of January 2004, Grievants were provided leave forms to complete for December 19, 2003. Grievant Livesay did not sign the form, but wrote "snow day" on the paper and returned it.

10. On January 15, 2004, Grievants received their pay checks with stubs which indicated the deduction of a half-day of leave from their accrued time.

11. The Faculty Senate Officers of BUHS, including Grievant Livesay, Vice President, contacted Dr. Chandler by letter of January 7, 2004, in which they expressed their concern and disagreement with his decision to deduct the half day from teachers who had requested leave on December 19. Dr. Chandler responded on January 16, 2004, that teachers were to be at work by 8 o'clock. Substitutes had been called by 8:17 a.m. when the decision was made to cancel school for the day. In fairness to the hundreds of people who had reported for work, those who had called in to take a sick or personnel day were charged leave time.

12. By letter dated February 2, 2004, Grace A. Harris, President of the Upshur County Professional Educators, advised Dr. Chandler that the decision to deduct the leave from employees was not consistent with past procedure, and expressed concern that there was no specific policy to govern this situation.

13. On February 12, 2004, Grievant Livesay informed her supervisor that she intended to file a grievance, and an informal conference was conducted on February 19. A level one grievance form was filed on March 9, 2004.

Discussion

Initially, MCBE contends that this grievance was not filed within the statutory time frame, and should be denied on that basis. The burden of proof is on the respondentasserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

As to when a grievance must be filed, West Virginia Code § 18-29-4(a) provides, 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.

*** * * * * ***

Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. 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). Spahr v. Preston CountyBoard of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

By her own testimony, Grievant Livesay establishes that she knew she would be charged a

half-day of sick leave for December 19, 2003, the morning of that day. She was again notified that she would be charged sick leave the first week in January. Grievant's designation of January 15, 2004, as the date the statutory time lines began to run, is incorrect. The grievable event occurred on December 19, and Grievant was aware of the event on December 19. The receipt of her paycheck was simply documentation that the leave had in fact been deducted from her account.

Grievant testified that the delay in beginning the grievance process was due to her attempts to informally resolve the issue, and researching the law to ensure that she could file a viable grievance. The Grievance Board has previously held that the time lines may be tolled when the parties are attempting, in good faith, to settle the matter. In this case, there were no such settlement talks. Grievants' attempts to get Superintendent Chandler to change his mind do not toll or extend the time period in which to file a grievance. Grievants would have protected their interests by filing a grievance, and then asking that it be held in abeyance while a settlement was pursued. Researching the law is commendable, but does not extend the time lines. Therefore, the grievance was not timely filed.

Even if the grievance should be found timely filed, Grievants could not prevail on the merits of the grievance. The evidence establishes that the weather conditions of December 19, 2003, were such that Dr. Chandler was forced to make a late decision tocancel school for the day. Grievants expend a great deal of effort to establish the exact time the decision was actually made, and the announcement was broadcast, and arguing that the decision should have been made earlier. Had schools been cancelled prior to 8:00 a.m., Grievants would not have been charged leave. However, the decision was made after the beginning of the school day when teachers should have already been at work. Grievants have failed to prove that the deduction of a half-day of leave from those teachers who had already requested leave, and had not reported for work, is in violation of any statute, rule, regulation, or policy.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this

burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4(a).

3. Grievant Livesay was aware on December 19, 2003, that she would be charged a half-day of leave for that day, therefore, the grievance was not filed within fifteen days of the grievable event. Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Upshur County. Any 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. 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: SEPTEMBER 15, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievants Chipps and Gillespie did not appear at the level two hearing, and were dismissed at that level. Grievant Scott did not appear at the level four hearing, and it is determined that he has abandoned his claim.