WILLIE JEFFERSON, et al.,

Grievants,

v. Docket No. 05-HE-081

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Willie Jefferson, William Solomon, Donald Himes, and Steve Adams ("Grievants") employed by West Virginia University ("WVU") as Operations Managers at the Physical Plant, filed a level one grievance on December 21, 2004, seeking the same settlement offer awarded to a co-worker. Specifically, Grievants request back pay from 2001 until the date of their reclassification. The grievance was denied at all lower levels. Appeal to level four was made on March 4, 2005, and an evidentiary hearing was conducted on June 30, 2005. Grievants represented themselves, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The grievance became mature for hearing upon submission of proposed findings of fact and conclusions of law by WVU on July 29, 2005. Grievants elected not to file any post-hearing proposals.

The following facts have been derived from a preponderance of the evidence made part of the record at levels three and four.

Findings of Fact

1. Grievants are employed by WVU as Operation Managers at the Physical Plant.

2. In 2001 many employees at the Physical Plant filed grievances challengingtheir classification, including Grievant Solomon, who did not pursue his claim beyond level one.

3. Grievants were classified as Building Trades Supervisors II, pay grade 16, in 2001. As a result of the review conducted by the Job Evaluation Committee ("JEC") of the Physical Plant job families, Grievants were reclassified in 2003 as Operation Managers, pay grade 18.

4. On or about October 16, 2004, Dusty Phillips received a monetary award pursuant to a settlement agreement of his level four classification grievance which had been pending since

2001.

5. Grievants were not offered a settlement since they had not filed a grievance challenging their classification in 2001, and/or had not pursued their claim to level four.

6. WVU raised the issue of whether the grievances were timely filed at the level two hearing.

Discussion

Grievants argue that they are entitled to the same back pay award received by a co- worker. WVU asserts that Grievants did not file a grievance challenging their classification in 2001 or 2003, and are not entitled to the same settlement awarded to an employee who had a claim pending at level four. WVU further argues that the grievance was not timely filed.

Because the timeliness assertion, if proven, would defeat the grievance without addressing its merits, it will be addressed first. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burdenof 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). W. Va. Code § 29-6A-4(a) provides in pertinent part:

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.

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 v. Dep't of Transp./Div. of Highways, 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). In this case, Grievants were aware of their classification and pay grade in 2001, and did not file a grievance. The present grievance, filed some four years later, is well beyond the ten day time frame. However, Grievants argue that they filed upon learning that a co-worker had been awarded a monetary settlement. This argument appears to be that the delay would fall under the "discovery rule exception" to the statutory time lines, as addressed by 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). Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance."

The discovery rule exception does not apply in this case. The Grievance Board has previously held that timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket No. 99- CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98- HHR-477(Feb. 24, 1999). Grievants did not pursue grievances challenging their classification in 2001, and are not entitled to a financial award based on a settlement agreement accepted by another employee who had preserved his rights.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following 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 filingby 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). 2. An employee filing a grievance under the provisions of W. Va. Code §§ 29- 6A-1, et seq., must do so 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. 3. An exception to the statutory time lines is the “discovery rule exception” set forth in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance."

4. Timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket No. 99- CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98- HHR-477(Feb. 24, 1999).

Accordingly, the 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 itsAdministrative 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: AUGUST 24, 2005

_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE