PAUL COLE, et al.,

Grievants,

v. Docket No. 05-HE-277

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Paul Cole, Walter Hurd, and George Beckner ("Grievants"), employed by West Virginia University ("WVU") at the Physical Plant, filed individual level one grievances in late December 2004, in which they alleged that they were entitled to the same settlement awarded to a coworker. Specifically, for relief, Grievants Beckner and Hurd requested the difference between pay grade 12 and pay grade 13, and Grievant Cole requested the difference between pay grade 17 and pay grade 18, from January 1, 2001 to July 1, 2003, with interest, and any benefits. Administrators at level one and two lacked authority to grant the requested relief. The grievances were consolidated at level three and were denied following an evidentiary hearing. Appeal was made to level four on August 4, 2005. Grievants, represented by Mary Snelson, Region XI Consultant for the West Virginia Education Association, and WVU counsel, Assistant Attorney General Samuel R. Spatafore, agreed to submit the grievance for a decision based upon the level three record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before November 7, 2005.

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

Findings of Fact

1. In 2001, approximately 200 employees at WVU's physical plant filedgrievances challenging their classification/compensation. In response, a review of all physical plant job families was conducted by the Job Evaluation Committee ("JEC"), the body responsible for employee classification at institutions of higher education.

2. Grievants Cole and Hurd did not file a grievance in 2001. Grievant Beckner did file a

grievance at that time, but pursued it only through levels one and two.

3. As a result of the JEC review, Grievant Cole was upgraded to the classification of Operations Manager, pay grade 18, and Grievants Beckner and Hurd were upgraded to the classification of Trade Specialist, pay grade 13, effective July 1, 2003. Grievants did not pursue a grievance as a result of the classification changes.

4. In October 2004, WVU offered settlements to qualified employees who had filed classification grievances in 2001, and had maintained active grievances at level three or level four, during the JEC review. Dusty Phillips, an Operations Manager, and Kerry Dewitt, a Trade Specialist, received monetary awards pursuant to a settlement agreement of their level four classification grievances 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 a claim.

6. Grievants filed their level one grievances upon learning of the settlements received by their coworkers.

Discussion

Grievants testified at level two that they did not file grievances in 2001 either because they thought they would be covered by other claims, or that only lead workers were filing grievances. Nevertheless, they argue that they are entitled to the same back pay award received by their coworkers, otherwise they will receive less compensation for performing the same duties. WVU asserts that Grievants did not file, or pursue, a grievance challenging their classification in 2001 or 2003, and are not entitled to the same settlement awarded to employees who had a claims pending. WVU further argues that this 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, 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). In this case, Grievants were aware of their classification and pay grade in 2001, and did not file a grievance. Their mistaken belief that it was not necessary to file, or continue to pursue, a grievance at that time is unfortunate, but does not establish a basis for relief. See Garcia, et al. v. W. Va. Univ., Docket No. 04-HE-229 (Oct. 28, 2004). The present grievance, filed some four years later, is well beyond the ten day time frame.

Grievants argument they filed this grievance upon learning that coworkers had been awarded monetary settlements, appears to fall under the "discovery rule exception" to the statutory time lines. This exception, 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), provides that 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 Corr., 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 settlement agreements accepted by other employees who had preserved their rights. Jefferson, et al. v. W. Va. Univ., Docket No. 05-HE-081 (Aug. 24, 2005).

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 Corr., 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 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, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE