THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALVIN MESSINGER,
Grievant,

v. **Docket No. 2008-1569-CONS**

WEST VIRGINIA DEPARTMENT/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Alvin Messinger filed three separate grievances against his employer, Division of Highways ("DOH"). In the first grievance, Grievant alleged an unsafe work environment. The second grievance alleged "Regular work hours not credited on holidays." The third grievance alleged Grievant did not receive proper training. The three grievances were consolidated. Grievant then voluntarily retired from his position on November 30, 2009. Prior to the level three hearing, Respondent made a motion to dismiss the grievances as being moot. Grievant withdrew the grievances alleging unsafe working environment and training. However, he objected to the dismissal of the grievance alleging his regular work hours were not credited on holidays, as the requested relief was "to be made whole, including back pay, retirement, etc."

On January 19, 2010, a level three hearing was held on the remaining grievance at the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by Robert Miller, Esq. This case became mature on March 15, 2010 upon Grievant's filing of proposed findings of fact and conclusions of law and Respondent's filing of Explanation of Documents Provided.

Synopsis

The single issue Grievant asserts is that his regular work hours were not credited on holidays. Grievant worked 4 days a week, 10 hours each day. During the weeks where there was a holiday, Grievant was only paid for 8 hours, not the 10 he would normally work. He then had 2 hours that he must make up during that week to complete his 40 hours. Grievant asserts if he worked a standard 5 day, 8 hour schedule his base pay for each pay period would be constant. However, Grievant's base pay fluctuates, and Grievant asserts that, as a result, he is not being paid his full salary.

Respondent first asserts this grievance is untimely, as there were no holidays within the 15 days preceding the May 6, 2008, filing of this grievance. Respondent also argues Grievant is being paid correctly and is not being shorted any money.

In response to the timeliness argument, Grievant asserts this is a continuing practice.

Grievant's filing is untimely and must be dismissed.

Findings of Fact

1. Grievant was employed as a Bridge Safety Inspector 4 until his retirement on November 30, 2009.

2. Grievant was a salaried employee who worked a 4 day, 10 hour work schedule.

3. On the weeks when there was a state holiday, Grievant was paid for 8 hours. Therefore, for the remainder of the week, Grievant had to work his regular 10 hour shift, plus an additional 2 hours from the holiday. There are a number of different ways the

schedule could accommodate Grievant, so long as he had prior approval from his supervisor.

4. Grievant is paid twice a month, either the 15th or the 16th of the month and the 30th or the 31st of the month.

5. If Grievant actually works over 40 hours in a work week, he is paid overtime pay.

6. Grievant's base pay fluctuates from pay period to pay period.

7. There were no holidays within 15 days preceding the filing of this grievance.

Discussion

Motion to Dismiss

Respondent asserts this case should be dismissed due to timeliness. When an 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. *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 Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *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).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

As an initial matter, Respondent has proven that this portion of the grievance was not filed within fifteen days of a holiday or of Grievant being unequivocally notified of the decision on pay. Grievant testified himself that this is an issue he brought to DOH's attention back in 1987-1988.

As an excuse for his untimely filing, Grievant asserts DOH has engaged in continuing practice. The "'Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996); *Fleece v. Morgan*

County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

Whether the dispute here constitutes a continuing practice is difficult to discern. Certainly, Grievant has known how the holiday pay policy is applied for some time, but it is also easy to see this as a continuing practice, recurring each time Grievant is paid for a holiday. This issue was addressed in *Blon, et al. v. West Virginia University*, 07-HE-152 (June 16, 2008). In that case, Grievants took issue with the University's holiday pay policy. The administrative law judge ruled that it was a continuing practicing that only recurred every holiday.

The same analysis applies in this case. While Respondent's holiday pay policy is a continuing practice, it is only recurring every holiday, and since there were no holidays in the 15 days preceding the filing of this grievance, it must be dismissed as untimely. However, given the confusion on this issue, the undersigned feels a discussion of the merits is warranted.

Merits

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved

is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's written assertion is that his regular work hours are not being credited during holidays. In looking over Grievant's time sheets marked and entered into evidence as Respondent's Exhibit 5, the undersigned can see no place where Grievant is not paid correctly. Granted, there are a few times when Grievant has had to take 2 hours of annual leave to make up for the 2 hours he did not receive holiday pay. However, those are reflected.

Receiving 8 hours of pay for each holiday is set out as policy in the West Virginia Department of Transportation Administrative Procedures Vol. III, Chapter 10, III.5.b. Grievant has presented no evidence that this policy is illegal or unjust.

As to Grievant's concern about the fluctuations in base pay, there is a nominal difference in pay which coincides with a difference in hours. This difference in base pay occurs when the 8 hour holiday is at the end of the pay period, but not the end of the week. When that happens, the pay period with the holiday reflects 8 hours for the work, whereas the following pay period reflects either the additional 2 hours as worked or as annual leave.

Grievant has not proven that DOH has failed to pay him appropriately. Therefore, this grievance must be denied on the merits.

Conclusions of Law

1. Respondent asserts this case should be dismissed due to timeliness. When an 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. *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 Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *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).

2. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

3. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va.*

Bureau of Empl. Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

4. The "'Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996); *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999). *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

5. Allegations concerning a holiday pay policy is a continuing practice which is only recurring every holiday. *Blon, et al. v. West Virginia University*, 07-HE-152 (June 16, 2008).

6. This grievance is untimely, as there was not a holiday within the 15 days preceding the filing of this grievance.

7. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved

is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

8. Grievant did not meet his burden of proof in showing he was paid inappropriately.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: July 16, 2010

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Wendy A. Elswick
Administrative Law Judge