

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TERRY SPROUSE, et al.,
Grievants,**

v.

DOCKET NO. 2015-0207-CONS

**LEWIS COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

This grievance was filed by Terry Sprouse and twenty-five other employees¹ against their employer, the Lewis County Board of Education, on August 21, 2014. The statement of grievance at level three reads, "Grievants contend that the Respondent did not compensate them for time worked in excess of the daily work day of six hours. Grievants allege a violation of county policy." As relief Grievants sought, "compensation for all hours worked over and above the six hour daily work day with interest."

A conference was held at level one on September 15, 2014, and a level one decision was issued on October 6, 2014. That decision granted part of the grievance, which at that time included several other issues which were either resolved by that decision or at a later date. The decision denied the grievance with regard to the issue of compensation for time worked in excess of six hours a day. Grievants appealed to level

¹ The other Grievants are Garry Alderman, Charles Dennis Bailey, Dwayne Brown, James Coffield, Doug Davisson, Chuck Everitts, Steve Finster, Robert Francis, Steven Freda, Tommy Gettings, Robert Grose, Jason Hawkins, Charles D. Krafft, Brad Lewis, Sonny Metz, Gerry Paugh, Robert Stewart, Jr., Jim Stutler, Joseph W. Taylor, Ronald Taylor, Sam West, Anna Wimer, Doris Workman, John Shaffer, and James R. Stutler.

two on October 15, 2014, and a mediation session was held on March 16, 2015. Grievants appealed to level three on June 23, 2015. A level three hearing was held before the undersigned Administrative Law Judge on February 3, 2016, at the Grievance Board's office in Westover, West Virginia. Grievants appeared by their representatives, Jeremy Radabaugh, West Virginia Education Association, and John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on March 14, 2016, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants claim that, because Respondent has a policy in place which states that the "normal workweek" for a Bus Operator is 30 hours, Grievants are entitled to additional compensation for time worked over 30 hours in a week. Respondent's policy does not in any way provide for such additional compensation, nor have Grievants demonstrated that they are by law entitled to such additional compensation. Respondent did not prove its assertion that the grievance was untimely filed, based on the fact that the policy at issue has been in place for many years. The grievance was timely filed as it was not a challenge to the policy, but rather, a claim for additional pay, which was timely filed under both the continuing practice exception and the fact that Grievants had only recently realized they were not being compensated for any hours they worked over 30 hours in a week.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievants are employed by Respondent, the Lewis County Board of Education (“LBOE”), as full-time Bus Operators.

2. Respondent has a policy in place entitled Policy 3.47 Service Personnel Wage and Hour Policy, which was last amended effective July 1, 2007. This Policy states that “[t]he purpose of this policy is to ensure that the LCBOE complies with the overtime provisions of the Fair Labor Standards Act (FLSA), regulations of the U.S. Department of Labor, Employment Standards Administration Wage and Hour Division, and all applicable state statutes and regulations related to the compensation of full-time and part-time employees.” This Policy further states that “[a]ll full-time employees of the Board are expected to work a 40 hour workweek each week. Board employees may regularly and routinely be scheduled to work less than a 40 hour workweek; however, the Board retains the right to request an employee to perform his/her duties up to 40 hours during a workweek without additional compensation.” This Policy states that *the normal workweek for a Bus Operator is 30.0 hours*, “[u]nless the workload for the week requires an individual to work additional hours.” (Emphasis added.)

3. Grievants all have different work schedules, which are primarily dependent on the length of their regular runs. An individual Bus Operator may also be required to put in additional time to deal with a student disciplinary issue or random drug testing. Grievants are paid for working six hours a day, five days a week, whether they work five hours or seven hours. About half the Bus Operators in Lewis County work more than 30 hours a week, every week, performing their regular bus assignments and related duties,

and some Bus Operators in Lewis County work less than 30 hours a week. Bus Operators in Lewis County receive additional pay for extra-duty and extra-curricular runs.

4. Lewis County bus operators, including all Grievants, are paid for overtime hours worked in excess of 40 hours per week on a blended rate basis, which calculates the pay of each employee for their various different assignments, including the employee's regular full-time assignment, extracurricular assignments, and extra duty assignments.

5. In addition to driving buses, Bus Operators in Lewis County must also attend various meetings, watch videos from their buses, report for physicals, report for random drug-testing, wash the buses, and attend student disciplinary conferences related to student misconduct while on the driver's bus.

6. Those Grievants who testified regarding when they became aware of the fact that they were not being compensated for the hours worked between 30 and 40 hours per week, were not aware of this fact until shortly before the grievance was filed.

Discussion

Respondent first asserts that the grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4, and therefore the grievance must be dismissed. 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). "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)." *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

West Virginia CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." West Virginia 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).

Respondent argues that the LBOE policy setting the work week for bus operators at 30 hours has been in effect for many years, and that Grievants have been aware of the 30 hour work week for bus operators for many years. Grievants, however, are not challenging the 30 hour work week. They are challenging Respondent's failure to pay

them for hours worked in excess of 30 hours per week. While Grievants were aware of the Policy for many years, those Grievants who testified regarding when they became aware of the fact that they were not being compensated for the hours worked between 30 and 40 hours per week, stated they were not aware of this fact until shortly before the grievance was filed. While this may seem incredible given that some of the Grievants have been employed by Respondent for many years, when asked how they could not have been aware of this, Grievants explained that they have extra-duty runs and extra-curricular runs for which they receive additional compensation, and their pay stubs do not state clearly what they are being paid for and are confusing, so they did not realize they weren't being paid for these hours worked. The grievance was timely filed.

One exception to timely filing is the continuing practice exception. Misclassification, for example, is a continuing practice; however, it is well-settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999). In addition, 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).⁷ *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). In *Blon/Exline v. West Virginia University*, Docket No. 07-HE-152 (June 16, 2008), the undersigned concluded that Respondent’s interpretation of its holiday pay policy was a continuing practice, which recurred each time the grievants were required to work a holiday. In *King, et al., v. Lewis County Board of Education*, Docket No. 2014-0456-CONS (August 26, 2015), the undersigned ruled that the application of Respondent’s Dress Code was a continuing practice, which recurred each time the Dress Code was applied to an employee. Even were the Grievants challenging the Policy itself, the grievance was timely filed within 15 days of the most recent application of the Policy which adversely affected Grievants.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep’t of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "The 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).

Grievants pointed to no law, rule, regulation, or policy which sets the number of hours an employee is to work, other than LBOE’s Policy 3.47. WEST VIRGINIA CODE § 18A-4-8 sets the minimum salary and class titles for school service personnel, based on the pay

grade to which the class title is assigned and years of service, for a 200-day minimum employment term. This CODE § states with regard to hours worked:

the minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the State Minimum Pay Scale Pay Grade and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the State Minimum Pay Scale Pay Grade set forth in the subdivision.

Other than the three and one-half hour threshold, it does not address the number of hours a school service employee is to work in order to be paid the minimum salary.

Grievants' argument that they must be paid for hours worked in excess of 30 during a week is based on the language of Policy 3.47 which states that a Bus Operator's "*normal workweek schedule*" is 30 hours, and suggest that any time worked in excess of 30 hours constitutes volunteer work, because the Policy states that Board may "request an employee" to work up to 40 hours, and that they must be paid for this volunteer work because "[t]he policy forbids an employee from volunteering to work without compensation," citing to Section 3.47.15. Grievants, however, have conveniently ignored the language of the Policy which states quite clearly that full-time employees "are expected to work a 40 hour workweek," full-time employees may routinely "work less than a 40 hour workweek," and the Board may ask an employee to work "up to 40 hours during a workweek *without additional compensation.*" Very clearly, this Policy does not in any way indicate that a Bus Operator is only supposed to work 30 hours a week, that he or she must be paid for hours worked over 30, or that if Respondent needs an employee to work more than 30 hours a week the employee retains the right to decline that request and if the employee agrees to the request, the employee is somehow volunteering his or her time to

the cause. The Policy states clearly that although Bus Operators normally work a 30 hour workweek, they may work up to 40 hours a week without additional compensation.

Grievants know that every Bus Operator in every county in the state has a different work schedule based on the run or runs the Bus Operator has *chosen* to bid on and accept, and that they are paid a set salary, regardless of the number of hours it takes to complete the run or runs. Grievants did not demonstrate that Respondent has violated any statute, regulation, rule, policy or practice, or that they are otherwise entitled to additional compensation when they work between 30 and 40 hours in a week.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. 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). "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).”
Carnes v. Raleigh County Bd. of Educ., Docket No. 01-41-351 (Nov. 13, 2001).

2. West Virginia CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." West Virginia 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).

3. One exception to timely filing is the continuing practice exception. Misclassification, for example, is a continuing practice; however, it is well-settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999). In addition, 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). In *Blon/Exline v. West Virginia University*, Docket No. 07-HE-152 (June 16, 2008), the undersigned concluded that Respondent’s interpretation of its holiday pay policy was a continuing practice, which recurred each time the grievants were required to work a holiday. In *King, et al., v. Lewis County Board of Education*, Docket No. 2014-0456-CONS (August 26, 2015), the undersigned ruled that the application of Respondent’s Dress Code was a continuing practice, which recurred each time the Dress Code was applied to an employee.

4. The grievance was timely filed.

5. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep’t of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "The 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).

6. WEST VIRGINIA CODE § 18A-4-8 sets the minimum salary and class titles for school service personnel, based on the pay grade to which the class title is assigned and years of service, for a 200-day minimum employment term. Other than setting a three and one-half hour per day threshold, it does not address the number of hours a school service employee is to work in order to be paid the minimum salary.

7. Grievants did not demonstrate that Respondent violated any statute, regulation, rule, policy or practice, or that they are otherwise entitled to additional compensation when they work between 30 and 40 hours in a week.

Accordingly, this grievance is **DENIED**.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: April 1, 2016

BRENDA L. GOULD
Administrative Law Judge