RAY JAFARI, .

Grievant, .

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v. . Docket Number: 95-DEP-039

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WEST VIRGINIA DIVISION OF .

ENVIRONMENTAL PROTECTION / .

WEST VIRGINIA DIVISION OF PERSONNEL, .

Respondents. .

D E C I S I O N

Ray Jafari (hereinafter Grievant) filed a grievance in 1988 pursuant to the provisions of the Grievance Procedure for State Employees, West Virginia Code §§29-6A-1, et seq., alleging that he was misclassified, and therefore, entitled to back wages and interest for having performed duties associated with a higher Division of Personnel classification. Ultimately, he prevailed at level three of the process and the level three decision, dated July 10, 1992, contained the following conclusion of law: "In addition to his back pay award, Grievant is entitled to prejudgment interest on said back pay. Cart v. W.Va. Dept. of Veteran's Affairs, Docket No. 89-VA-070 (Aug. 3, 1989)."

After this decision, the parties entered into settlement negotiations. Grievant and Respondents have agreed on the damage amount corresponding to the back wage award but not the amount representing the interest. Grievant appealed to level four on January 27, 1995, requesting rulings on whether he is entitled to both pre- and postjudgment interest, and whether said damage amounts

should be calculated by using a simple or compounding method. As this case involves only issues of law, a telephone conference was held on February 21, 1995, with the parties and the Undersigned to clarify the issues; a briefing schedule was established and the case became mature for disposition on or about March 27, 1995. No hearing was held in this matter. The parties submitted the various documents evidencing their attempt to settle the case. All parties submitted the same memoranda.

Both Respondents have requested that this case be dismissed based upon numerous grounds, including but not limited to that: Grievant's appeal to level four was not timely; this Grievance Board lacks jurisdiction to consider the subject of Grievant's appeal; Grievant's statement of grievance fails to state a claim for which relief may be granted; Grievant has requested relief which was not requested at the lower levels and Grievant is not legally entitled to postjudgment interest. Grievant has not directly responded to any of these affirmative defenses. He contends that he has acted in good faith throughout this lengthy litigation and that he is entitled to both pre- and postjudgmentinterest, mathematically computed on a bimonthly, compounded method, based upon an interpretation of W.Va. Code §56-6-29.

The recognized purpose of the Grievance Procedure for State Employees is "to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system . . .." W.Va. Code §29-6A-1. As the Legislature stated in the sister provision for education employees, "[T]his [grievance] procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level . . ." W.Va. Code §18-29-1. Obviously, the case at hand has become everything but expeditious, even though the underlying substantive legal issue, at this point, is simple to answer.

In response to the Respondents' argument that Grievant's appeal to level four is untimely, W.Va. Code §29-6A-4(d)(1) states, in pertinent part,

> If the grievant is not satisfied with the action taken by the chief administrator or his designee, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§29-6A-5] of this article . . .

As noted, Grievant received the level three decision in this case sometime on or about July 10, 1992, but his appeal to level four was not perfected until January 27, 1995, two and one-half years later.

Even if Code §29-6A-4(d)(1) were to be interpreted to include a "discovery rule" which would allow a grievant to appealfrom level three to level four upon **learning** that he/she "is not satisfied with the action taken by the chief administrator or his designee," regardless of the stated five-day time limit, such an interpretation could not justify a holding that Grievant's appeal to level four was timely in this case.

While the Undersigned believes that most favoravble grievance decisions granting some form of monetary relief are not immediately implemented, an appeal two and one-half years after the receipt of a written decision cannot be found timely or the purpose and intent of the grievance procedure would be frustrated.

Upon a review of the documents submitted evidencing the negotiations in this case, Respondent's first offer of settlement to Grievant was made February 26, 1993; shortly thereafter, Grievant requested verification of the dollar amounts offered. The parties corresponded with each other regarding the damage amount in controversy and Grievant requested a meeting with the Division of Personnel to discuss the method used to compute the amounts offered; no meeting was ever held. By letter dated January 3, 1994, Grievant was again asked to agree to accept the dollar amount offered as settlement in February 1993. By letter of January 11, 1994, Grievant refused the offer and stated that he still disagreed with the method of interest calculation. It appears that any meaningful negotiations or discussion between the parties ended at that time.

Assuming that Grievant could have appealed to level four beyond the stated five-day period when, at some point, hediscovered he was not satisfied with the action taken at level three, it is determined that he should have known he was not satisfied with the action taken by at least as early as January 1994. Because Grievant's appeal to level four was not received until January 1995, it is held that his appeal was not timely perfected pursuant to any reasonable interpretation of Code §29-6A-4(d)(1).

In any event, given the length of time that this case has been in dispute, the Undersigned feels compelled to point out that this Grievance Board's precedent establishes that interest, both pre- and postjudgment, is to be calculated using the simple method of computation. See, Graf v. BOT, Docket No. 930-BOT-156 (Jun. 22, 1994). No pronouncement on the issue of Grievant's entitlement to postjudgment issue is warranted as Grievant only made this request for relief at level four. The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. W.Va. Code §29-6A-4(d)(1) states, in pertinent part,

> If the grievant is not satisfied with the action taken by the chief administrator or his designee, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§29-6A-5] of this article . . .

2. Grievant's appeal to level four was untimely perfected under the provisions of Code §29-6A-4(d)(1).

Therefore, this grievance is hereby **DISMISSED** as the Grievance Board lacks jurisdiction to decide the merits of the claim.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 17, 1995