DARRELL NUTTER, .

Grievant, .

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v. .Docket Number: 94-HHR-630

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WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES at COLIN ANDERSON .

CENTER / WEST VIRGINIA DIVISION OF .

PERSONNEL, .

Respondents. .

D E C I S I O N

Darrell Nutter (hereinafter Grievant) filed this complaint against his employer, the West Virginia Department of Health and Human Resources (hereinafter Health), on March 25, 1994. He contends that the establishment of his salary after promotion and a reallocation of his position on March 16, 1994, was the result of discrimination. This grievance was denied at the lower three levels of the grievance procedure and appealed to level four on October 27, 1994. After continuances granted for cause, an evidentiary hearing was held at this Grievance Board's Charleston, West Virginia office on March 1, 1995. The case became mature fordecision on March 17, 1995, the date established for the submission of post-hearing briefs.

The material facts of the case are not in dispute and shall be set forth below as appropriately made findings of fact.

Findings of Fact

1. Grievant was hired in 1985 as a Maintenance Worker to work at Health's Colin Anderson Center. By 1990, he had obtained the position of Building Maintenance Supervisor at a salary of $1411.00 per month.

2. Grievant was laid off on November 16, 1990. He did not contest that action by filing a grievance.

3. On October 16, 1992, Grievant was recalled to the position of Building Maintenance Mechanic at a salary of $1057.00 per month.

4. On July 19, 1993, as Health was again laying off employees at Colin Anderson Center, Grievant bumped another employee and was assigned the position of Food Service Worker. Grievant did not lose any salary as a result of this move.

5. Grievant was promoted to the position of Electrician at a salary of $1248.00 per month on March 16, 1994. At this time, Health recommended that Grievant's salary on promotion be $1411.00 per month; however, the Division of Personnel (hereinafter Personnel) disapproved this recommended amount because it represented too large of a percentage increase from his base salary under its administrative regulations in effect at the time.

6. Grievant filed this complaint on March 25, 1994.

Discussion

Grievant contends that he was discriminated against in 1992 when he was recalled to the position of Building Maintenance Mechanic at a monthly salary lower than that which he held at the time of his lay off. He asserts that other employees who had also been laid off during this time frame were recalled to positions which were lesser positions or similar positions to that which they previously held, but that these employees did not experience a decrease in pay. He contends that but for these discriminatory acts, the base salary upon which his increase in salary on promotion was based would have been higher; therefore, he would have received a higher salary on March 16, 1994. Grievant does not challenge Personnel's application or interpretation of its administrative regulations dealing with the establishment of salaries upon promotion which were in effect at that time.

Health contends that the alleged grievable event occurred on October 16, 1992; therefore, this

grievance is untimely. With regard to the merits, both Health and Personnel contend that all applicable administrative regulations were complied with during the lay offs and recalls in 1992, and in regard to the setting of Grievant's salary on promotion in 1994. Health denies that Grievant has been the victim of discrimination.

W. Va. Code §29-6A-4(a) states, 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.

Generally, this statutory provision establishes that grievances must be filed within ten days of the occurrence of the event giving rise to the substantive claim which must allege a violation, misinterpretation or misapplication of a statute, policy rule, regulation or written agreement under which the grievant works. See, Code §29-6A-2(i) for the definition of "grievance." "Days" is defined in Code §29-6A-2(c) as "working days exclusive of Saturday, Sunday or official holidays."

In this case, Grievant's substantive claim relates to his recall to the position of Building Maintenance Mechanic in 1992. He contends that his employer engaged in discrimination at that time. Clearly, his grievance is untimely as he waited almost two years to challenge his employer's actions. (See footnote 1) Further, the 1994 salary determination which Grievant now wishes to have increased can only be classified as a continuing damage arising from the alleged wrongful act which occurred in 1992. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, Spahr v. Preston Co. Bd. of Educ., 391 S.E.2d 739 (1990). Therefore, this grievance was untimely filed.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusion of law.

Conclusion of Law

Grievant's complaint was untimely filed pursuant to the provisions of W. Va. Code §29-6A-4(a).

Therefore, this grievance is hereby **DISMISSED** as untimely. The Grievance Board may not exercise jurisdiction over the subject matter of said 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

March 23, 1995

Footnote: 1Grievant is not relying upon an argument that he has recently learned or discovered of the alleged violation.