CORA CHILDERS,

Grievant,

v. Docket No. 98-HHR-477

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Cora Childers, employed by the Department of Health and Human Resources/Office of Social Services, filed a level one grievance on December 24, 1997, in which she stated, “I recently became aware that the HHR Specialists Sr., in the administrative unit filed a grievance and were awarded retroactive pay to April when the OSS reorganized. Other OSS staff in this classification were given the pay increase in Aug. 1997.” For relief, Grievant requested “fair and equitable treatment for all OSS employees in this classification.”

Grievant's immediate supervisor lacked authority to rule at level one. Lucy Eates, Director of the Division of Quality Assurance, Office of Social Services (OSS), advised Grievant that she did not have the authority to grant the relief at level two, and directed her to proceed to level three by forwarding her complaint to Mary Jo Thomas, Director of the Office of Social Services. Unfortunately, Ms. Thomas is not Respondent's designated level three hearing evaluator. Ms. Thomas did not advise Grievant of the error and did not forward the grievance. When Grievant learned from an employee publication in August 1998, that her grievance had not been sent to the proper level three grievance evaluator, she refiled her complaint along with a request for default judgment. The default was denied at level three, and Grievant appealed that decision to level four.

Because the grievance had been initiated prior to the effective date of the statutorydefault provision, Grievant's request for a default judgment was denied at level four, and the grievance remanded to level three. An evidentiary hearing was conducted on October 28, 1998, and a level three decision denying the grievance was issued on November 6, 1998. Appeal to level four was made on November 18, 1998, at which time the parties agreed to submit the matter for decision based on the lower-level record, supplemented with proposed findings of fact and conclusions of law. Grievant did not elect to submit proposed findings, and the grievance became mature for decision

with the receipt of Respondent's proposals on February 9, 1999. (See footnote 1)

Discussion

Agency Exhibit I, Division of Personnel Form WV-11(Personnel Action form) establishes that Grievant was reallocated from Health and Human Resource (HHR) Specialist, to HHR Specialist, Senior, effective August 1, 1997. Grievant asserts that she was unsure when she was reallocated because she had not received written notice of the action, but concedes that there was a salary increase beginning with her August 15 paycheck. Grievant bases her claim that she is entitled to backpay from April 1, 1996, through July 31, 1997, on similar awards made by Respondent to other employees. Specifically, Grievant submitted a level three issued by Respondent on April 29, 1998, in the matter of Allen K. Pyles. Mr. Pyles is similarly situated to Grievant, and Respondent granted his claim for backpay covering the same period of time.

Respondent argues that the grievance should be denied based upon timeliness. Noting that learning of another employee's grievance does not constitute discovery of an event giving rise to a grievance, Respondent asserts that the grievable event, i.e., her reallocation, became known to Grievant upon receipt of her August 15, 1997, paycheck. Respondent distinguishes the present matter from Pyles which was determined to have been timely filed, whereas the present grievance was not filed until December 24, 1997, more than four months after the grievable event, and well past the ten days within which Grievant was required to act and protect her interests.

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 filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public 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. Dept. of Trans., Docket No. 97-DOH-060 (July 16, 1997).

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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

In the present matter, the reorganization of OSS was effective April 1, 1996. Grievant's Exhibits A and B, an Agenda and minutes of the Division of Quality Assurance organizational meeting held on March 22, 1996, establish that she was aware of this fact. The record establishes that Grievant began to function as an HHR Specialist, Senior on April 1, 1996. Grievant did not file a complaint that she was working outside her job classification from April 1, 1996, until she was in fact reclassified, effective August 1, 1997. Even after her reclassification, which Grievant either knew, or should have known occurred as evidenced by her salary increase, Grievant failed to file a grievance for more than four months. If the matter is viewed as presented in the Pyles grievance, and the timelines begin running when Grievant became aware that she would not receive backpay, that fact was known to Grievant in August. In either situation, the grievance was not timely filed. Grievant indicates that she filed the grievance after learning that other employees had prevailed in grievances, and were awarded backpay. The Grievance Board has held that the timeliness statute is not triggered by a grievant's discovery of a legal theory to support the claim, or the success of another employee's grievance, but by the event or practice which is the basis of the grievance. Pryor, et al. v. W. Va. Dept. of Trans./Div. of Highways, Docket No. 97-DOH-341 (Oct 29, 1997). In the present matter, the event, working out of classification, was known to Grievant, but the legal theory to support her claim to backpay was not evident until other employees had prevailed in grievances, and been awarded the

pay. Further, there is no evidence that Grievant was discouraged from filing a grievance between April 1996 and December 1998. Grievant recalled that the employees were advised there was no money available in 1996 for their reclassification; however, this statement alone cannot be interpreted as a deliberate action taken by Respondent to discourage the employees from filing a grievance. See Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

In addition to the foregoing narration, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant is employed by the West Virginia Department of Health and Human Resources/Bureau for Children and Families, Office of Social Services, as a Health and Human Resource Specialist, Senior.

2. The Office of Social Services realized a reorganization effective April 1, 1996. Changes in personnel classifications necessitated by the reorganization were noteffectuated until August 1, 1997.

3. Grievant did not receive a written statement advising her that she had been reclassified, but was put on notice of the change through a salary increase received on her August 15, 1997, check.

4. Grievant did not file a level one grievance complaint until more than four months following the change in her salary.

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 filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public 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 §29-6A-4(a) requires that:

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 tendays 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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

3. Respondent has proven by a preponderance of the evidence that Grievant failed to file a level one grievance within the timelines set forth in W. Va. Code §29-6A-4.

4. The timeliness statute is not triggered by a grievant's discovery of a legal theory to support the claim, or the success of another employee's grievance, but by the event or practice which is the basis of the grievance. Pryor, et al. v. W. Va. Dept. of Trans./Div. of Highways, Docket No. 97-DOH-341 (Oct 29, 1997); Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

5. Untimely filing will defeat a grievance, in which case the merits of the complaint need not be addressed. Lynch v. W. Va. Dept. of Trans., Docket No. 97-DOH- 060 (July 16, 1997).

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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, andshould 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.

Date: February 24, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant did not indicate that she was represented at level four, but had been previously assisted by Scott Cundiff, and Respondent was represented by Tiffany M. Bost, Assistant Attorney General.