DONALD LESTER,

Grievant,

v. **Docket No. 98-HHR-355**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, HUNTINGTON STATE HOSPITAL,

and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

On January 28, 1998, Donald Lester (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that his employer, Respondent Department of Health and Human Resources, Huntington State Hospital (HHR), had failed to timely promote him from Health Service Worker Trainee to Health Service Worker. The record does not indicate what action, if any, was taken on the grievance at Level I. The grievance was advanced to Level II where it was denied by Kieth Anne Dressler on March 20, 1998. Grievant appealed to Level III, where an evidentiary hearing was conducted before Grievance Evaluator Paul Marteney on August 20 and 21, 1998. Jonathon D. Boggs, Commissioner of HHR's Bureau for Behavioral Health and Health Facilities, denied the grievance at Level III on August 28, 1998. Grievant appealed to Level IV on September8, 1998, and following a continuance which was granted at the request of Grievant's representative, a Level IV hearing was scheduled for January 19, 1999. (See footnote 1) The parties appeared for that hearing and agreed to submit this matter for decision on the record developed through Level III. (See footnote 2) A briefing schedule was established by agreement of the parties, and this matter became mature

for decision upon receipt of Respondent's written argument on March 1, 1999.

The facts and circumstances surrounding this grievance are substantially undisputed. Based upon a preponderance of the credible evidence contained in the record established at Level III, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is currently employed by Respondent HHR as a Health Service Worker at Huntington Hospital.

2. Grievant was previously employed by HHR's Office of Behavioral Health Services in its Huntington Substance Abuse Unit (SAU). He first began working as a temporary Health Service Worker Trainee on March 27, 1995. A Ex 3. (See footnote 3) 3. After Grievant passed the required civil service examination, the SAU hired Grievant from the West Virginia Division of Personnel register as a Health Service Worker Trainee on September 22, 1995. HT, 8/20/98 at 10.

4. Grievant was placed on a six-month probationary period with the SAU and was certified as a permanent employee on March 22, 1996. HT, 8/20/98 at 12.

5. The SAU's Health Service Worker Trainees were normally promoted to Health Service Worker after one year of satisfactory service. HT, 8/21/98 at 8. However, the SAU closed on December 31, 1996, and no action had been initiated to promote Grievant.

6. After Grievant was laid off from the SAU due to lack of need, he was placed on a Preference Register in accordance with West Virginia Division of Personnel's Administrative Rule, § 12.4. See 143 C.S.R. 1 § 12.4 (1995). HT, 8/20/98 at 15.

7. On March 25, 1997, Grievant was hired from the Preference Register as a Health Service Worker Trainee at Huntington Hospital. HT, 8/20/98 at 12, 15.

8. The SAU was located on the grounds of Huntington Hospital but constituted a separate unit within HHR. HT, 8/20/98 at 4.

9. Huntington Hospital promotes Health Service Worker Trainees to Health Service Worker after one year of satisfactory performance. Consistent with this policy, Huntington Hospital promoted Grievant to Health Service Worker on March 25, 1998. A Ex 1A. 10. As a result of his promotion to Health Service Worker, Grievant's annual salary was increased from $11,820 to $12,420. A Ex 1A.

11. This grievance was initiated on January 28, 1998.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

The essence of this grievance is that the SAU should have promoted Grievant from Health Service Worker Trainee to Health Service Worker on or about September 22, 1996, after he completed one year of satisfactory service. For no apparent reason, but through no fault of Grievant, this promotion did not take place before Grievant was laid off at the end of December 1996. However, Grievant did not file a grievance against SAU to challenge this failure.

Grievant was subsequently hired by Huntington Hospital from the West Virginia Division of Personnel's preference register where he was listed as a Health Service Worker Trainee. Huntington Hospital hired Grievant as a Health Service Worker Trainee and continued to pay him in that capacity until March 25, 1998. At that time, consistent with its policy (which mirrors the policy followed by the SAU), Huntington Hospital promoted Grievant to Health Service Worker based on one year's satisfactory service with Huntington Hospital. Grievant filed this grievance on January 22, 1998, after he “discovered” that Huntington Hospital was not paying him as a Health Service Worker, but still considered him to be a Health Service Worker Trainee. To the extent this grievance alleges Huntington Hospital was then in violation of some statute, policy, rule, regulation or written agreement, it is timely. However, Grievant has not pointed to any specific policy or practice applicable to Huntington Hospital which has been violated. Thus, there is no basis for holding that Huntington Hospital violated any of Grievant's rights through its actions in this matter.

As noted in the Level III decision, Grievant's complaint that the SAU failed to follow its practice of promoting employees from Health Service Worker Trainee to Health Service Worker, following one year of satisfactory service, was not timely filed in accordance with W. Va. Code § 29-6A-4(a). The last time Grievant was improperly compensated by the SAU was December 31, 1996, at which time he was laid off. Thus, this grievance was filed more than two years beyond the 10-day time limit for initiating a grievance over this issue. See Hawranick v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); 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, Cir. Ct. of Mason County, No. 96-C-02 (June 17, 1996). Therefore, the undersigned administrative law judge is without authority to consider the merits of this grievance.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Respondent Huntington Hospital did not violate any applicable statute, policy, rule, regulation or written agreement when it hired Grievant from the West Virginia Division of Personnel preference register as a Health Service Worker Trainee and did not promote him to Health Service Worker until he had completed one year of satisfactory service in that classification with Huntington Hospital.

3. To the extent Grievant complains that he was not promoted to Health Service Worker by Respondent HHR's SAU on or about September 22, 1996, this matter was not initiated within the time limits for grieving such issues under W. Va. Code § 29-6A-4. See Hawranick v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-010 (July 7, 1998).

Accordingly, this 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 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 record can be prepared and transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 29, 1999

Footnote: 1

Prior to the scheduled hearing date, this matter was reassigned to the undersigned administrative law judge for administrative reasons.

Footnote: 2

Grievant was represented at Level III by Grace Kahn. Marguarite Kyer, with the Service Employees International Union (SEIU), requested a continuance in the Level IV hearing in Grievant's behalf, but did not otherwise appear in this matter. HHR was represented at Level III by Kieth Anne Dressler, and the Level IV brief was filed by Assistant Attorney General B. Allen Campbell.

Footnote: 3

Exhibits admitted at Level III will be cited as A Ex for the Agency's (HHR) Exhibitsand G Ex for Grievant's exhibits. The Level III hearing transcript will be cited as HT, 8/20/98 at , or HT, 8/21/98 at .