MARK CHAPMAN,

Grievant,

v. **Docket No. 99-HHR-132**

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

Respondent.

D E C I S I O N

On February 16, 1999, Mark Chapman (Grievant), filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Department of Health and Human Resources (HHR) denied him a five per cent (5%) merit increase in June 1996. The grievance was waived to Level II, where, on March 5, 1999, Kieth Anne Dressler, Director of Human Resources at Huntington Hospital, denied the grievance as being untimely filed. Grievant appealed to Level III, and an evidentiary hearing was conducted on March 17, 1999, by Grievance Evaluator M. Paul Marteney. On March 19, 1999, the grievance was denied by Jonathon D. Boggs, Commissioner of the Bureau for Behavioral Health and Health Facilities. Grievant appealed to Level IV on March 25, 1999, and a Level IV hearing was duly scheduled. On April 19, 1999, HHR filed a Motion to Dismiss this grievance on multiple grounds, including claims that the grievance was not filed within the statutory time limits, and the same issue had been presented in an earlier grievance which Grievant had not pursued following an adverse ruling at Level III, thereby barring this claim from further consideration in accordance with the legal doctrine of res judicata. On April 21, 1999, the undersigned ordered Grievant to respond to HHR's motion, indicating his position on the facts alleged by his employer. On May 17, 1999, the Level IV hearing was continued, pending a ruling on Respondent's motion. Grievant's written response was received on May 19, 1999, and this matter became ready for

decision at that time. (See footnote 1)

BACKGROUND

The grievance which is presently at issue was filed by Grievant on February 16, 1999, and contained the following statement of grievance:

> On (sic) June of 1996 I was denied a 5% merrit (sic) encrease (sic) while staff at other state Ang. [agencies] recived (sic) the increase. I became aware of this 2-16-99.

Evidence presented at the Level III hearing indicates that on December 4, 1996, Grievant filed a similar grievance which stated the following:

> In June 1996, I was informed that monies were available at Hunt Hosp [Huntington Hospital] for merit raises and according to my past performance records, I was to receive one. To date I have not received a merit raise and when I inquired with human resources I was told I would not be receiving one because they were frozen on the secretary's desk. I want the promised raise in a timely manner and frozen is not an acceptable reply since the allottedmoney would more than cover 14 merit (sic) why freeze them at 8. Where will the balance of the money go since it was allotted to Hunt Hosp for merit raises.

R Ex 1 at L III.

The 1996 grievance was pursued to Level III where it was consolidated for hearing on January 3, 1997, with similar grievances filed by three other Huntington Hospital employees who contended their promised raises had been improperly “frozen.” On May 19, 1997, that grievance was denied in a Level III decision issued by John Bianconi, Acting Commissioner for HHR's Bureau for Community Support. R Ex 2 at L III. The other three employees appealed to Level IV on June 3, 1997, or later. Those grievances were subsequently dismissed as untimely appealed from Level III to Level IV in a decision issued by this Grievance Board on July 29, 1997, Short v. Department of Health & Human Resources, Docket No. 97-HHR-270. R Ex 3 at L III.

Grievant made no known effort to either inquire about the status of his Level III decision, or appeal the decision to Level IV, until the present grievance was filed in February of 1999. At the Level III hearing in this matter, it was established that Grievant had then become aware that one or more other employees who had pursued a separate grievance involving their merit raises had prevailed at Level III of the grievance procedure. In response to HHR's Motion to Dismiss, Grievant provided a written response, dated May 18, 1999, which attempted to explain why he had not sooner

learned of the grievance filed by other employees, but made no reference to his earlier grievance involving the same merit raise.

DISCUSSION

Although the West Virginia Rules of Civil Procedure do not apply to proceedings conducted before this Grievance Board, the same principals of law contained in Rule 12(b) of the Rules may be applied to a Motion to Dismiss which could be dispositive of a grievance filed under W. Va. Code §§ 18-29-1, et seq. See Salmons v. W. Va. Dep't of Transp., Docket No. 93-DOH-443 (Sept. 30, 1994). Therefore, for purposes of ruling on this motion, it will be assumed that the allegations contained in Grievants' grievance and any responsive pleadings are true. See John W. Lodge Distributing Co. v. Texaco, 161 W. Va. 603, 245 S.E.2d 157 (1978). See also Sticklin v. Kittle, 168 W. Va. 147, 287 S.E.2d 148 (1981).

Initially, HHR contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code § 29-6A-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer ordinarily has the burden of demonstrating such untimely filing by a preponderance of the evidence. Should the employer demonstrate that a grievance has not been timely filed, the employee may nonetheless demonstrate a proper basis to excuse his 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). As previously stated, because this matteris being decided on a motion without a Level IV hearing, any disagreements over the facts must be resolved in Grievant's favor.

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378

S.E.2d 843 (1989).

In this particular matter, Grievant became aware that he had not received a proposed merit raise in December 1996, when he was told that his merit raise was included in a group of raises that had been inexplicably “frozen.” Grievant filed a grievance over the matter at that time, and pursued the matter through the grievance procedure to Level III. After the Level III decision was issued in May 1997, there is no indication that Grievant pursued the matter further until February 1999, when he learned that other employees had successfully pursued a grievance concerning denial of their 1996 merit raises. In any event, these grievance documents unequivocally establish that Grievant was on notice that he was not receiving the promised merit raise. See Rose, supra.

Consistent with the ruling of the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), this Grievance Board has determined that an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. See, e.g., Butler v.W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998). However, mere discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance within the intent of § 18-29-4 as interpreted in Spahr. Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991).

According to the facts established by the record in this matter, Grievant has known since at least December of 1996, when he filed an earlier grievance over the same matter, that his employer had not followed through on providing a merit raise which he believed he had been “promised.” Grievant pursued that grievance to a Level III hearing, thereafter taking no further action to pursue the matter until learning in February of 1999 that one or more of his fellow employees at Huntington Hospital had obtained their merit raises through the grievance procedure. This “discovery” does not provide an exception to the ten-day time limit in W. Va. Code § 29-6A-4 for filing a grievance, as endorsed in Spahr. Instead, as explained more fully in Adkins, supra, and Floren, supra, learning that other employees have obtained relief in a grievance or court proceeding is not an “event upon which the grievance is based” as described in W. Va. Code § 29-6A-4(a). Thus, because Grievant delayed

such an extended period of time in pursuing this grievance, without anylegal excuse, this grievance must be dismissed as untimely filed. See Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997); Short, supra.

Inasmuch as this grievance is clearly barred from consideration due to being untimely filed, it is not necessary to address HHR's contentions that this grievance is also barred by the legal doctrines of res judicata and laches. (See footnote 2)

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Department of Health & Human Resources (HHR) at Huntington Hospital in Huntington, West Virginia.

2. Grievant presently works in the Laundry Department at Huntington Hospital in an unspecified classification. Prior to transferring to the Laundry Department sometime in 1997, Grievant was a Health Service Worker. See R Ex 5 at L III.

3. In 1996, Grievant was one of 14 Huntington Hospital employees selected to receive a merit raise for the third quarter of 1996. See R Ex 5 at L III. At Level III, HHR stipulated that Grievant has been and is an exceptionally good employee.

4. Through no fault of Grievant, HHR placed a “freeze” on merit raises before Grievant's raise was approved. As a result of a dispute between Huntington HospitalAdministrator Desmond Byrne and his superiors in HHR, no Huntington Hospital employees received merit raises during the third quarter of 1996.

5. Grievant filed a grievance on December 4, 1996, alleging that HHR had improperly failed to award him a promised merit raise. R Ex 1 at L III.

6. Grievant pursued his grievance to Level III, where it was consolidated with the grievances of three additional Huntington Hospital employees making similar claims. Following a Level III hearing on January 3, 1997, before Grievance Evaluator Barbara J. Wheeler, the grievance was denied in a decision issued by John Bianconi, Acting Commissioner of the Bureau for Community Support, on May 19, 1997. R Ex 2 at L III.

7. In February 1999, Grievant learned that two of his fellow employees had prevailed in a grievance seeking to receive their merit raises for June 1996.

8. On February 16, 1999, Grievant filed this grievance seeking to receive the merit raise he should have been awarded in June 1996.

9. Between May 19, 1997 and February 16, 1999, Grievant made no effort to pursue this grievance.

10. HHR raised the defense of timeliness at Level II of the grievance procedure.

CONCLUSIONS OF LAW

1. The time in which to invoke the grievance procedure begins to run when the grievant knows of the facts giving rise to the grievance. Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). 2. "A grievant will not be allowed to overcome a timeliness defense by basing his current claim on another employee's successful grievance decision, if the events giving rise to the grievance were known to the grievant, but he delayed filing until the other employee received a successful outcome." Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994).

3. Grievant was aware of all facts giving rise to this grievance more than ten days before the instant grievance was filed. See Floren, supra.

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 properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 3, 1999

Footnote: 1

At Level III, HHR was represented by Kieth Anne Dressler. Assistant Attorney General Dennise Smith represented HHR at Level IV. Grievant has been pro se throughout these proceedings.

Footnote: 2

Because Grievant did not pursue his grievance beyond the adverse decision rendered at Level III, it could be argued that his claim over this matter was effectively abandoned. See Floren, supra. However, HHR did not make that argument, and it will not be addressed as the timeliness issue presented is dispositive of this grievance.