WANDA YOUNG,

Grievant,

v. **Docket No. 01-CORR-059**

DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievant, Wanda Young, against her employer, Respondent, Division of Corrections/Anthony Correctional Center ("Corrections"), on or about December 23, 2000. The statement of grievance reads:

> Have not been paid at proper rate since becoming a Corrections Officer I. Dept of person[ne]l memorandom [sic] - instructions for across the board increase dated March 31, 2000 from Joe E. Smith WV Division of Pers Section IV A) See attached forms.

As relief, Grievant sought "[t]o be paid properly under WV Division of Person[ne]l Memorandum Ref: above with back pay to start date as a Correctional Officer I."[1]

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[1] This grievance was denied at Level I on January 2, 2001, and Grievant appealed to Level II on January 9, 2001. The grievance was denied at Level II on January 16, 2001, and Grievant appealed to Level III on January 23, 2001. A Level III hearing was held on January 24, 2001, and a decision denying the grievance at Level III was issued on January 30, 2001. Grievant appealed to Level IV on February 16, 2001. The Division of Personnel ("Personnel") was joined as a party, and a Level IV hearing was held on May 2, 2001, before Administrative Law Judge Andrew Maier. Grievant was represented by Dennis Brackman, Corrections was represented by Leslie Kiser Tyree, Esquire, and Personnel was represented by Lowell Basford. This grievance was transferred to the undersigned on June 4, 2001. It became mature for decision on June 2, 2001, the deadline for submission of written argument. None of the parties submitted written argument.

The following Findings of Fact are made based upon the evidence presented at Level IV.[2]

Findings of Fact

1. Grievant was promoted by Corrections from Cook to Correctional Officer I on September 1, 2000. Her salary upon promotion was increased to $18,120.00. This was a special hiring rate above the minimum salary for the pay grade.

2. This grievance was filed on or about December 23, 2000.

3. Corrections raised a timeliness defense at Level I.

Discussion

Corrections argued that the grievance was not timely filed, and this issue will be addressed first. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

The first issue which needs to be addressed is whether this defense was timely raised by Corrections. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the

[2] Although Grievant made very few statements at the Level III hearing, she was not under oath, and neither her statements, nor the unsworn statements of her representative can be considered as evidence in this proceeding. In addition, although documents were marked at the Level III hearing, they were not admitted into evidence. Thus, no evidence was presented at the Level III hearing, and the statements made can only be considered argument. W. Va. Code § 29-6A-6 provides that, at Level III, "[t]he chief administrator or his designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross-examine and to rebut evidence." That Code Section also gives the grievance evaluator the power to administer oaths and affirmations.

respondent to raise the issue of timeliness at or before the Level III hearing. Greathouse v. W. Va. Dep't of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). Corrections did so.

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

A grievance must be filed within 10 days following the occurrence of the event upon which the grievance is based. 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. . . ..

Only working days are counted in determining when the 10 day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Harvey, supra; 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). Grievant knew what her salary was when she was promoted on September 1, 2000, and this was the grievable event.

Grievant argued her grievance could be filed at any time because each time she received a pay check, it represented a continuing practice. "This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ.,

Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996)." Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). However, this grievance does not allege pay disparity, and when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. 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., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995). See also Jones v. Div. of Rehabilitation Services, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases). Grievant did not file her grievance within ten days of learning of her salary upon promotion. The grievance was not timely filed, and this grievance does not fall within the continuing practice exception.

Grievant also relied upon the discovery rule found in W. Va. Code § 29-6A-4, and as discussed in relation to the education grievance procedure, in Spahr, supra. Syllabus Point 1 of Spahr, states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Although Grievant's representative stated Grievant did not make the discovery that led to the filing of the grievance until eight days before the grievance was filed, there was no sworn testimony on this, and exactly what Grievant discovered was not identified. It appears that it may have been the discovery of the existence of a memorandum authored by Joe Smith of Personnel, upon which Grievant relies for the proposition that her salary was not correctly calculated. If this is the case, this type of discovery is not included in the discovery exception. "It is not the discovery of a legal theory which triggers the statute, but

the event . . .." Lynch v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993). This exception cannot be addressed further.

Even were the grievance timely, Grievant could not prevail. Relying upon Mr. Smith's memorandum, which apparently was developed to assist in the implementation of Executive Order 10-98, Grievant asserted her pay had been improperly calculated when she was promoted from a Cook to a Correctional Officer I. Grievant pointed to language in the memorandum that the $756 across the board pay increase shall not constitute a pay increase which would limit an employee's eligibility for a salary increase due to meritorious performance or promotion, and argued the $756 should have been added to her new salary upon promotion, and that she effectively lost the across the board pay increase upon promotion. Grievant's representative argued it simply was not fair, because, he asserted, Grievant had more seniority than he, but was making less. No evidence was introduced in support of this argument. The undersigned would note that the salaries of state employees are not based upon seniority, and inasmuch as Grievant began her employment with Corrections as a Cook, and was only recently promoted, whereas her representative asserted he had begun his employment as a Correctional Officer I prior to Grievant's promotion to this classification, it is not surprising, or inherently unfair, that her representative would be paid more than Grievant.

Lowell Basford, Personnel's Assistant Director of the Classification and Compensation Section, testified he was involved in the discussions which led to Executive Order 10-98. He testified that the purpose of the Executive Order was to address Personnel's Rule which provides that an employee who is at the top of the pay scale, and receives a salary increase anytime during the year, is not eligible for any other increase in pay during the year. He explained that, without the Executive Order, the across the board

pay increase would block such an employee from receiving a pay increase upon promotion.

Grievant questioned Mr. Basford's authority to interpret Mr. Smith's memorandum, and argued with the interpretation. However, Mr. Smith's memorandum was not made a part of the record. Further, this Grievance Board has previously found that an employee who was demoted and suffered a salary decrease after receiving the across the board pay increase, was not entitled to have the across the board increase added to her decreased salary, as the across the board pay increase and the demotion were two separate transactions. Ashley v. Div. of Envtl. Protection, Docket No. 99-DEP-120 (May 28, 1999). The same is true here. Grievant has not demonstrated she was entitled to have the across the board pay increase added to her new salary.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before the Level III hearing. Greathouse v. W. Va. Dep't of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). Corrections did so.

3. A grievance must be filed within 10 days following the occurrence of the event upon which the grievance is based. W. Va. Code §§ 29-6A-3(a) and 29-6A-4(a).

4. This grievance was not filed within 10 days following Grievant's promotion which resulted in an increase in her pay, which was the grievable event.

5. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. 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., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995).

6. This grievance was not timely filed.

7. No facts were shown which would excuse the late filing.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD
Administrative Law Judge

Dated: July 10, 2001