RICHARD CYRUS,

Grievant,

v. **DOCKET NO. 01-HHR-425**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR PUBLIC HEALTH (See footnote 1)
and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed by Grievant, Richard Cyrus, against Respondent, Department of Health and Human Resources/Bureau for Public Health ("HHR"), on or about May 30, 2001. The Division of Personnel was joined as a party at Level IV, based upon the statement of grievance, but decided after the beginning of the Level IV hearing that it did not need to participate. The statement of grievance reads:

> January 2000 a meeting was held, with Greg Nicholson, Sterling Smith and me (Richard Cyrus) in regards of leaving 1411 Va. St. to the Diamond Bld.[,] a change of jobs for me (Richard Cyrus) to work for Greg as a driver. I was to get a raise in pay said Greg.

As relief, Grievant sought, “my raise in pay, and pay stay the same as raise. Back pay plus interest.” (See footnote 2)

HHR moved that this grievance be dismissed as untimely filed, as the events upon which the grievance was based occurred in the year 2000, and the grievance was not filed until May of 2001. Grievant responded that he did not know he had to file a grievance in order to get the pay raise he believes was offered to him by Greg Nicholson, until his supervisor told him he would have to file a grievance to get it.

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Prior to January 2000, Grievant was employed by HHR as a mail runner.

2. In January 2000, the location of the office in which Grievant was employed was moved to the Diamond Building in Charleston. It was believed that when this move occurred, the office would no longer need Grievant as a mail runner. Greg Nicholson, Director of Central Facility Management at the Diamond Building, and Sterling Smith, Associate Director of the Office of Maternal, Child and Family Health, talked about moving Grievant into a Driver position, with an accompanying pay raise. They met with Grievant, and talked to him about transferring him to a Driver position. Mr. Nicholson told him that if they were successful in accomplishing this transfer, they would try to get him classified as a Driver, and a pay raise. 3. Grievant began working as a Driver in February 2000, but he was not given a pay raise, as funding was not obtained for a Driver position, and he was returned to his mail runner duties in May of 2000.

4. This grievance was filed on May 30, 2001. Grievant did not file a grievance earlier because he was not aware he needed to do so.

5. HHR asserted a timeliness defense at Level I.

Discussion

HHR asserted this grievance should be dismissed as untimely filed. 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 28, 1997).

The first issue which needs to be addressed is whether this defense was timely raised by HHR. Effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before Level II. HHR 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 grievantor 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. Kessler,supra. 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 case, Grievant was returned to his mail runner duties in May of 2000. At that point it was clear that Grievant was not going to continue as a Driver; he was not going to receive the pay raise he believed was offered to him; and he was no longer entitled to be compensated as a Driver, if he, in fact, was working out of classification for the period from February 2000 through May 2000. The grievance had to be filed within 10 days of the date Grievant returned to his mail runner duties.

Grievant stated he did not file a grievance earlier, because he was not aware that he had to do so in order to get his pay raise. "'[A]s a general rule, ignorance of the law . . . will not suffice to keep to keep a claim alive.' Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). '[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice.' Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989)(emphasis in original)." Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997). Grievant's failure to timely file his grievance is not excused by the fact that he did not know he could or should file one.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the party 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).

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

3. This grievance was not timely filed.

4. The grievant may 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 28, 1997).

5. "'[A]s a general rule, ignorance of the law . . . will not suffice to keep to keep a claim alive.' Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). '[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice.' Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989)(emphasis in original)." Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

6. Grievant has not demonstrated a valid excuse for his failure to file this grievance in a timely manner.

Accordingly, this grievance is **DISMISSED**.

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.

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BRENDA L. GOULD

Administrative Law Judge

Date: September 26, 2001

Footnote: 1

Respondent had previously been identified as the Department of Health and Human Resources/Bureau for Children and Families. The parties stated at the Level IV hearing that this was incorrect.

Footnote: 2

The grievance was denied at Level I on May 31, 2001, on the grounds that it was not timely filed. Grievant appealed to Level II, where the grievance was denied on June 8, 2001, on the merits, and on the basis that it was not timely filed. Grievant appealed to Level III, where a hearing was held on June 19, 2001. The grievance was denied at Level III on June 26, 2001, on the grounds that it was not timely filed. Grievant appealed to Level IV on June 29, 2001. A Level IV hearing was held on August 20, 2001. Grievant represented himself, HHR was represented by B. Allen Campbell, Esquire, and the Division of Personnel was represented by Lowell Basford. The parties declined to submit written argument, and this matter became mature for decision at the conclusion of the Level IV hearing.