DEBORAH "DEBI" L. McCALLISTER,

Grievant,

v.

Docket No. 05-TD-042

DEPARTMENT OF REVENUE/

STATE TAX DEPARTMENT,

Respondent.

DECISION

The grievant, Deborah L. McCallister (See footnote 1) ("McCallister"), filed this grievance on the day she retired from her position as a Tax and Revenue Manager with the respondent State Tax Department ("Tax"). While she held this position, McCallister frequently arrived at work approximately thirty minutes early. She is now seeking overtime pay for additional time she worked as a result of her early arrivals. This request for previously-unsought overtime pay is based on the theory that if she were to receive monetary payments for overtime it would enhance her retirement income. (See footnote 2)

To support her claim for such overtime pay, McCallister alleges "[f]avoritism & [d]iscrimination. Allowing fellow employees overtime in same level of duties." Her request for relief is "30 minutes of OT for all days worked and that added to my salary for Retirement [sic] the last 3 years like the others [sic] managers had the opportunity." Her claim of discrimination and favoritism in awarding overtime pay relates specifically to Charles "Chuck" Barlow ("Barlow"), a Tax Analyst 2, who was paid

for overtime while Taxand Revenue Managers, such as McCallister, were not. Whenever McCallister was asked to work overtime, Tax made an effort to adjust her schedule to provide her compensatory time off within the same week the overtime was worked. Unfortunately, such adjustments were not always possible.

This grievance was filed at Level I on October 29, 2004. It was denied in a written decision issued on November 9, 2004, by McCallister's immediate supervisor, W. Wade Thompson, Acting Director of the Property Tax Division. In the ordinary course of events, the grievance would have proceeded to Level II. However, the next level of supervision above Thompson was the Tax Commissioner. Because there was no intervening level of supervision, the parties proceeded directly to Level III. Level III Decision at 3.

The Level III evidentiary hearing was held on December 16, 2004. (See footnote 3) At the outset of the Level III hearing, counsel for Tax was invited to make preliminary motions but declined to do so. Tr.4. Subsequently, during his opening statement, counsel for Tax asserted that Tax “anticipates through evidence that there might be an issue of timeliness of the filing of the grievance[.]” Tr.10-11.

A written decision denying McCallister's grievance on the merits was issued February 2, 2005. On February 8, 2005, the Level IV appeal was received at the West Virginia Education and State Employees Grievance Board (“the Grievance Board”). A Level IV evidentiary hearing was held on May 2, 2005, in the Grievance Board's Charleston office. McCallister was represented by Scott Burgess. Tax was represented by Ronald R. Brown, Assistant Attorney General. This grievance matured for decision at Level IV onJune 6, 2005, after both parties had submitted proposed findings of fact and conclusions of law.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. McCallister was a long-term Tax employee who held the position of Tax and Revenue Manager in the Property Tax Division since 1998.

2 2. The Tax and Revenue Manager position is an exempt (See footnote 4) position, meaning that Tax and Revenue Managers are not paid for overtime.

3 3. During her tenure as Tax and Revenue Manager, McCallister arrived approximately thirty

minutes early on many mornings. This was, however, a varying practice on her part and was totally within her own control.

4 4. A memorandum regarding “Attendance Procedures,” dated January 28, 2002, which was directed to all employees in the Property Tax Division, contained a bold-face cautionary note that expressly stated “ **Note: Even though an employee may arrive early, overtime will not be paid unless an *Overtime Authorization Request* form has been processed and approved.**” Tax Exhibit 10 at Level III. This caution was reiterated in a subsequent memorandum, dated October 5, 2004. Tax Exhibit 11 at Level III.

5 5. To the extent that McCallister used time afforded by her early arrival for work- related purposes, she did so on her own initiative rather than at the request of anyone in her supervisory chain. In other words, this was not authorized overtime.

6 6. McCallister was aware that she would not be compensated for arriving at work early, having received the memoranda to the effect that employees could not be compensated for overtime that had not been authorized. Tr.29-30.

7 7. Even if voluntarily arriving early could be considered overtime, McCallister would not have received monetary compensation for it. In her exempt position, she was not paid for overtime.

8 8. Tax's Personnel Policies, section 3.8, authorize “allowances for a later reporting time on an individual basis” where an exempt employee has worked extended hours on a special project or during a peak work period. Tax Exhibit 10 at Level III. Despite the foregoing provision, Tax generally attempted to provide McCallister with an “adjusted work week” when she worked overtime at the request of her superiors.

9 9. As explained during testimony at Level IV, an adjusted work week would allow an employee to leave early on Friday to offset authorized overtime worked by an exempt employee during that week. However, if the employee could not take advantage of an early departure on Friday within the same week the excess hours were worked, the opportunity for compensatory time off was lost.

10 10. There is no evidence that any other Tax and Revenue Manager received monetary compensation for working overtime.

11 11. Her unsolicited practice of arriving at work early on many mornings had been on-going since 1998. However, McCallister did not make any request to be paid for overtime until her last

working day before retirement, when she filed this grievance.

12 12. Employees in McCallister's work unit were required to use a sign-in sheet to document arrival time. Departures from the building for annual or sick leave were recorded, and the departing employees were required to note whether they expected to return during the work day. However, departure time at the end of the work day was not similarly documented.

13 13. McCallister did not report more than eight hours per day on her monthly attendance reports. These reports reflect whether any sick leave or annual leave has been taken within the month. Tax Exhibit 2 at Level III. On the reverse side of this one-page document, leave usage and the remaining balances are summarized. In addition, the employee certifies the accuracy of the report.

14 14. In the first of the two work weeks leading to her retirement, McCallister reported 1 hour of annual leave on October 19 and 8 hours of annual leave on both October 21 and 22. McCallister reported working 8 hours per day for the five days in the final week of her employment. Tax Exhibit 2 at Level III.

15 15. Tax made a conscious decision in 1995 to treat Tax Analyst 2 positions as eligible for overtime pay. *Brogan v. W. Va. Dep't of Tax Revenue*, Docket No. 95-T&R-153 (Nov.6, 1995)("Tax changed its opinion [that Tax Analysts 2 were exempt] and starting [sic] awarded overtime to Tax Analyst IIs, effective April 1995.")

16 16. In or about March 2004, McCallister became aware that a Tax Analyst 2, specifically Barlow, was receiving monetary compensation for working overtime.

17 17. Although McCallister was initially told by her then-supervisor, Jerry Knight ("Knight"), that the practice of paying overtime to those in the Tax Analyst 2 classification would cease as of July 1, 2004, (See footnote 5) she became aware in August 2004 that Barlow was still being paid for overtime.

18 18. Knight neither told nor asked McCallister to refrain from filing a grievance. To the contrary, he told McCallister to do whatever she felt she needed to do.

19 19. In McCallister's presence, Knight asked Office Manager Peggy Parsons to find out why those in the Tax Analyst 2 positions were being paid overtime. Shortly thereafter, on September 1, 2004, Knight retired.

20 20. By the date of her own retirement, McCallister had not received a response to Knight's

request on her behalf for an explanation of why Barlow, as a Tax Analyst 2, was being paid for overtime.

21 21. The overtime for which Barlow was paid was authorized overtime.

22 22. McCallister's early arrivals were not considered authorized overtime and, until this grievance, she never asked that they be treated as such.

23 23. Although there were two other Tax Analysts 2 in the Property Tax Division, McCallister does not dispute their entitlement to overtime because she did not consider that they were acting as managers.

24 24. McCallister attempts to distinguish Barlow from his two colleagues by the fact that Barlow participated in management meetings and performed many of the same managerial type functions as did McCallister and other Tax and Revenue Managers. (See footnote 6)

25 25. At the time pertinent to this grievance, Barlow lacked the requisite qualifications to be classified as a Tax and Revenue Manager.

26 26. McCallister did not file this grievance until October 29, 2004.

DISCUSSION

Raising Untimely Filing as an Affirmative Defense

The initial question that needs to be addressed is whether Tax effectively raised the affirmative defense that McCallister failed to file her grievance in a timely manner. As noted in the Level III decision, there is a statutory requirement that “[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing.” W. Va. Code § 29- 6A-3(a)(2).

However, the Grievance Board has previously determined “that, in cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing.” *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001) (citing *Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)). The issue of timeliness was raised by Tax, albeit in a somewhat anemic manner, during counsel's opening statement at Level III.

This affirmative defense of lack of timeliness was rejected by the Level III grievance evaluator based upon a stringent, literal application of the statute requiring the employer to raise timeliness at or before the Level II hearing. Level III decision at 4. Specifically, the Level III grievance evaluator correctly noted that “the written Level I decision shows no evidence that the Tax Department raised

the defense of timeliness at Level I." Level III Decision at 4. It was further correctly noted that "there is no evidence that a Level II grievance hearing was held with relation to this grievance." Level III Decision at 4. This, of course, meant that Tax could not have raised the issue of timeliness at a Level II hearing.

From the foregoing, the Level III grievance evaluator concluded that Tax "failed to assert the issue of timeliness within the requirements of West Virginia Code §29-6A- 3(a)(2)" and was thus foreclosed from raising "the defense of timeliness at Level III as a bar to the instant grievance." Level III Decision at 5. This conclusion is in error. Because there was no hearing at Level II at which the timeliness defense could be raised, it could be asserted at Level III. Accordingly, Tax effectively raised the affirmative defense that McCallister did not timely file this grievance.

The Merits of the Timeliness Defense

If a grievance is proven to have been filed in an untimely manner, the grievance will be denied without addressing the merits. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97- DOH-060 (July 16, 1997). Therefore, the question of timeliness should be addressed at the outset. As noted, a claim that a grievance was not timely is an affirmative defense and, as such, must be proven by Tax by a preponderance of the evidence. *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 619 S.E.2d 274, 290 n.26 (2005).

Pursuant to the provisions of West Virginia Code section 29-6A-4(a), there are three possible scenarios that trigger a ten-day time limit for filing a grievance. A grievance must be filed as follows:

26.1 1.
within ten days following the occurrence of the event upon which the grievance is based, or

26.2 2.
within ten days of the date on which the event became known to the grievant, (commonly referred to as the discovery provision) or

26.3 3.
within ten days of the most recent occurrence of a continuing practice giving rise to a grievance (commonly referred to as the continuing practice provision).

In this context, “days” are defined as work days. W. Va. Code § 29-6A-2(c). Therefore, the ten-day limitation period is the equivalent of two five-day work weeks.

Tax argues that it was learning that Barlow was receiving monetary compensation for working overtime that prompted McCallister to file this grievance. McCallister first became aware of this practice in March 2004. Tr.21. If this were treated as the triggering event under the discovery provision of West Virginia Code section 29-6A-4(a), her grievance would undoubtedly be untimely because it was not filed until October 29, 2004. This was clearly well beyond the ten-day statutory window. There is, however, the question of whether her employer in some way caused her to delay filing her grievance. An employee may make a claim of estoppel against the employer's use of the timeliness defense “when the untimely filing was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing” her grievance. *Shirkey v. W. Va. Dep't of Transp*., Docket No. 02-DOH-408 (Apr. 1, 2003)(citing *Steele v. Wayne County Bd. of Educ*., Docket No. 50-87-062-1 (Sept. 29, 1987)).

When McCallister broached the subject with her supervisor, Knight, he informed her that it was his understanding that the practice of paying overtime to those in Tax Analyst 2 positions would end as of July 1, 2004, with the beginning of the next fiscal year. Tr.15. Arguably this could have led McCallister to delay filing a grievance. However, by some time in August, McCallister learned that this practice was still on-going.

Construing the facts most favorably to McCallister, she would have known on or before the last day of August that Tax had not abandoned its practice of paying monetary overtime to employees in Tax Analyst 2 positions. If McCallister's knowledge of this fact were the triggering event for purposes of the statutory discovery provision, McCallister would have been required to file her grievance within ten days of August 31, 2004. October 29, 2004, which was the date McCallister filed her grievance, did not fall within the statutory ten-day period following August 31, 2004.

McCallister argues that, at this point, Knight caused her to delay filing her grievance by offering to try to find out why Tax treated Tax Analysts 2 as eligible for overtime pay. This argument is not credible in light of McCallister's own testimony to the effect that Knight told her to do whatever she needed to do with respect to filing a grievance. Based on the discovery provision of West Virginia

Code section 29-6A-4(a), McCallister's grievance would appear to be untimely. However, at Level IV McCallister argued that this grievance is timely based on the “continuing practice” provision in West Virginia Code section 29-6A-4(a). As noted above, a grievance is timely if it is filed “within ten days of the **most recent occurrence** of a continuing practice giving rise to a grievance[.]” W. Va. Code § 29-6A-4(a)(emphasis added).

The record and the parties's arguments reflect a lot of confusion about the continuing practice provision. This is not surprising because, to date, the continuing practice concept has not been readily encapsulated into a precise definition. (See footnote 7) This may, in part, be due to the fact that the existence of a continuing practice is of no legal significance for purposes of West Virginia Code section 29-6A-4(a) unless the most recent occurrence took place within the ten-day window preceding the filing of the grievance. In other words, it is the “most recent occurrence” that acts as the triggering event for the ten- day time limit on filing a grievance. If a grievant is unable to point to such occurrence within that ten-day time frame, then it is of no moment whether the grievable practice can be characterized as “continuing,” within the meaning of West Virginia Code section 29-6A- 4(a).

In this case, McCallister makes an argument in which she improperly blends the discovery provision and the continuing practice provision. Her argument focuses on the fact that she never received the requested explanation for why Barlow was treated aseligible for paid overtime. She argues 1) that she did not “discover” this information because it was not provided to her, and 2) that because her wait for this information was on-going, there was a continuing practice that extended her deadline for filing a grievance. The discovery provision does not toll the filing deadline while a potential grievant investigates the matter to determine the reasons underlying the grievable action. Instead, the discovery provision tolls the deadline for the period of time when the employee did not know about the grievable event or action. It goes without saying that an employee cannot be expected to grieve an action without knowing that it has occurred. To the extent that McCallister's argument misconstrues the discovery provision of West Virginia Code section 29-6A-4(a), it must be rejected.

Further, McCallister misconstrues the meaning of a continuing practice when she attempts to describe waiting for requested information as a “continuing practice” within the meaning of West Virginia Code section 29-6A-4(a). The continuing practice is the grievable practice and, as noted, the grievance must be filed within ten working days of the most recent occurrence of such practice. By

way of example, where an employee is entitled to payment for overtime but is not receiving same, this is a continuing practice in which a cause of action arises every pay day. *Lipscomb v. Tucker County Comm'n*, 197 W. Va. 84, 91; 475 S.E.2d 84, 91 (1996)(quoting *Beebe v. United States*, 226 Ct. Cl. 308, 324 (1981)(relating to a claim for overtime pay as a continuing claim under the federal Fair Labor Standards Act)). Waiting for a response to an inquiry is not the type of action that gives rise to the continuing practice exception to the ten-day limitation for filing a grievance. Despite the parties' lack of specificity regarding what constitutes the “continuing practice,” it is clear that it relates to the disparity in treatment between Barlow andMcCallister with respect to payment for authorized overtime. McCallister did not work any authorized overtime. Because she is now seeking payment for any excess hours she worked, it would be fair to say that McCallister is attempting to compel Tax to, retroactively, treat time she may have worked beyond forty hours a week as authorized overtime. The ultimate goal, of course, is to be compensated for the excess hours in the same way Barlow was compensated for the authorized overtime he worked.

There is no evidence to establish that McCallister did, in fact, work more than forty hours during her last two weeks as a Tax employee. If McCallister cannot prove that she worked in excess of forty hours during the two work weeks that preceded the filing of her grievance, it follows that she did not file her grievance within ten working days of the last occurrence of the grievable practice. As such, her grievance is not timely, even under the continuing practice provision.

Tax has proven, by a preponderance of the evidence, that this grievance was untimely filed. The burden now shifts to McCallister to demonstrate proper grounds to excuse her failure to file her grievance in a timely manner. *Miano v. W. Va. Dep't of Transp*., Docket No. 02-DOH-008 (June 27, 2002). Generally, this would include such grounds as actions on the part of the employer that would have induced delay. However, delay engendered by the employer has already been taken into account in terms of adopting the last day of August as the triggering date for the ten-day window for filing under the discovery provision of West Virginia Code section 29-6A-4(a). McCallister has failed to establish that any action or inaction on the part of Tax excused the untimely filing. This grievance must be denied as untimely. However, it would fail on the merits, as well, because McCallister could not establish that she and Barlow were similarly situated. (See footnote 8) This is the *sine qua non* of proving a case of discrimination or favoritism. *See, Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. There is a statutory requirement that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." W. Va. Code § 29-6A-3(a)(2).

2 2. In cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing." *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001) (citing *Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)). The timeliness defense was properly and effectively raised by Tax at the outset of the Level III hearing.

3 3. "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." *Rhodes v. Div. of Corr.*, Docket No. 03-CORR-152 (Jan. 27, 2004)(citing *Hawranick v. W. Va. Dep't of Health & Human Res*., Docket No. 98-HHR-010 (July 7, 1998); *Harvey v. W. Va. Bureau of Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998)).

4 4. A grievance must be filed "[w]ithin 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[.]" W. Va. Code 29-6A-4(a).

5 5. Tax proved that McCallister did not file this grievance 1) within ten days of learning that a Tax Analyst 2 was receiving monetary compensation for overtime; 2) within ten days of learning that the practice of paying such overtime was on-going; or 3) within ten days after the most recent occurrence of a continuing practice.

6 6. Tax met its burden of proving, by a preponderance of the evidence, that this grievance was not timely.

7 7. "Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997)" *Branch v. W.*

Va. Univ., Docket No. 05-HE-261 (Oct. 4, 2005).

8 8. A grievant is excused for untimely filing where it "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." *Naylor v. W. Va. Human Rights Comm'n*, 180 W, Va, 634, 638, 378 S.E.2d 843, 846 (W. Va. 1989). McCallister failed to demonstrate an excusable basis for her failure to timely file her grievance.

9 9. Because McCallister failed to demonstrate any basis for excusing her delay in filing her grievance, it must be denied as untimely.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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.

Date:

December 30, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

This grievance was filed under her nickname, Debi.

Footnote: 2

The flaw in this theory is discussed in the decision issued at Level III.

Footnote: 3

References to pages in the transcript of the Level III hearing shall appear as "Tr.__."

Footnote: 4

Pursuant to the federal Fair Labor Standards Act ("FLSA"),a covered employee who works in excess of forty hours in a week must receive at least time and one-half overtime pay. Those who are employed in a "bona fide executive, administrative, or professional capacity" are exempt from the FLSA overtime pay requirement. 29 U.S.C. § 213(a)(1). West Virginia has a similar overtime provision, W. Va. Code §21-5C-3(a), as well as an exemption patterned after the foregoing federal provision, W. Va. Code §21-5C-1(f). State ex rel. Crosier v. Callaghan, 160 W. Va. 353, 236 S.E.2d 321 n.1 (1977).

Footnote: 5

There was no suggestion that McCallister's supervisor had any reason to believe that this information was incorrect or that he intended to mislead McCallister.

Footnote: 6

A great deal of testimony at Level IV was directed to establishing that Barlow's duties overlapped the duties of Tax and Revenue Managers. If it was her intention to try to prove that Barlow should have been classified as a Tax and Revenue Manager, McCallister's efforts were misplaced because she lacks standing to claim Barlow is misclassified. W. Va. Code § 29-6A-2(i). See, Rote v. Wood County Bd. of Educ., Docket No. 04-54-438 (Aug. 2, 2005).

Footnote: 7

For instance, the Supreme Court of Appeals of West Virginia has spoken to the confusion between a continuing practice and continuing damage that arose from a discrete event. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Footnote: 8

Not only are they in different classifications, but McCallister did not work approved overtime, whereas Barlow did. Proof that the employees are similarly situated is essential to a claim of favoritism or discrimination. Loudermilk v. Greenbrier County Bd. of Educ., Docket No. 04-13-025 (Apr. 14, 2004).