DANA BOWEN, II,

Grievant,

v. Docket No. 04-DOH-319

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Dana Bowen ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Engineering Technician assigned as a Utility Inspector in District Seven, filed a level one grievance on February 5, 2004, in which he alleged a violation of W. Va. Code § 29-6-10 when all employees were not given an equal opportunity to bid on a position of Assistant Utility Coordinator/Supervisor. For relief, Grievant requested the position be posted. The grievance was denied at levels one, two, and three. Appeal was made to level four on August 20, 2004. An evidentiary hearing was conducted in the Grievance Board's Elkins office on January 11, 2005. Grievant was represented by William A. McCourt, Jr., Esq., of Losch & McCourt, and DOH was represented by Barbara Baxter, Esq. Counsel waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for decision at the close of the hearing.

The following facts are derived from a preponderance of the evidence made part of the record at the hearings conducted at levels two and four .

Findings of Fact

1. Grievant has been employed by DOH since 1997, and been assigned to District Seven as a Transportation Engineering Technician 3 (TRET3), serving as a Utility Inspector at all times pertinent to this grievance

2. Due to a change in duties, a TRET3 position held by Gary L. Weaver wasreallocated to a TRETSR (TRET4) position, effective April 1, 2003. The reallocation process had been started in February 2003.

3. Grievant, as well as other staff members, were advised by Rodney Myers,

Construction Engineer, in March 2003, that Mr. Weaver's position would be reallocated to Assistant Utility Supervisor. Mr. Myers confirmed that Mr. Weaver was a supervisor at a staff meeting conducted on January 26, 2004.

4. **Grievant filed a level one grievance on February 5, 2004.**
5. **Grievant does not hold the requisite certification for the position of TRETSR.**
6. **Grievant has incurred no harm as a result of the reallocation.**

Discussion

Respondent asserts that the grievance was not filed within the statutory time lines. 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. 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); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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).

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 agrievance 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). Grievant contends that he did not know that Mr. Weaver had become a supervisor until Mr. Myers made the announcement on January 26, 2004. This argument is in the nature of a discovery rule exception as discussed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Under Spahr the statutory deadline for filing a grievance begins to run when the employee discovers the facts that give rise to the 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 Res., Docket No. 98-HHR-092 (July 27, 1998).

Grievant does not deny having heard Mr. Myers' announcement in March 2003, that Mr. Weaver would be the Assistant Utility Supervisor. Thus, all employees were put on notice of the personnel change. Indeed, another employee whose recent request for an upgrade to TRETSR had been denied, promptly filed a grievance in April 2003. It is incredible that an Assistant Supervisor would be in an office from April 1, 2003, until January 26, 2004, without the employees' knowledge. Accordingly, the undersigned finds that this grievance was not filed in a timely fashion and must be dismissed on that basis.

Even if found to be timely filed, the Grievant lacks standing in this instance. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievant must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997).

It is necessary for a Grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

Grievant argues that should DOH continue to reallocate positions rather than filling vacancies by posting and application, he could suffer future harm when he is certified to hold a higher position. A similar, potential action was found too speculative to create standing in Farley v. West Virginia Parkways Authority, Docket No. 96-PEDTA-204 (Feb. 21, 1997), and does not establish standing in the present case.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Respondent asserts that the grievance was not filed within the statutory time lines. 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. Once the employer has demonstrated a grievance has notbeen 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).

2. 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). The discovery rule exception to the statutory time lines allows an employee to file a grievance within ten days after discovering the facts which give rise to his or her grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. In March 2003, Grievant was notified of the personnel change in question, which became effective April 1, 2003. Grievant's delay in pursuing a grievance until February 2004, renders the grievance untimely filed.

4. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievant must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997).

5. Possible future harm suggested by Grievant is too speculative to create standing. Farley v. West Virginia Parkways Authority, Docket No. 96-PEDTA-204 (Feb. 21, 1997). Thus, Grievant lacks standing to pursue this grievance. Accordingly, the 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 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.

DATE: FEBRUARY 1, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE