PAMELA BLETHEN, et al.,

Grievants,

v. **DOCKET NO. 03-T&R-416R**

DEPARTMENT OF REVENUE/STATE TAX DEPARTMENT and DIVISION OF PERSONNEL,

Respondents.

DECISION ON REMAND

Each Grievant separately filed two different grievances against their employer, the Department of Revenue/State Tax Department ("Tax"). The Division of Personnel ("DOP") was joined as an indispensable party at level three. All of the grievances were consolidated by order of the undersigned at level four. After a Decision (Decision I) (See footnote 1) was issued in the grievance on September 15, 2004, Grievants appealed to the Circuit Court of Kanawha County. Judge Louis Bloom affirmed parts of that decision, but remanded the case to the Grievance Board. In his Amended Final Order entered March 17, 2005, Judge Bloom directed the Grievance Board to further consider "the remaining Grievants' claims in terms of whether a continuing practice exception should apply to both their Blethen claims and the Ferguson claims. The Grievance Board shall review the continuing practice issue and enter a subsequent decision addressing such issue." The parties agreed to submit the remand issue to the undersigned for consideration based on the record already developed in the case. This issue became mature for decision on August 19, 2005, upon receipt of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

At issue is whether the continuing practice exception to the timely filing requirement applies to the claims of the grievants. Grievants argue that a pay disparity exists because the Division of Personnel placed the positions of Revenue Agents 2 employed by the Department of Revenue into a different

pay grade than Credit Analysts 2 employed by Workers' Compensation Commission. Grievants argue that a new grievable event is created each and every time Grievants are paid based on the differing pay grades, perpetuating a continuing practice that would allow a grievance to be timely filed if it is filed within ten days of any of those events. Respondents' position is that the effects Grievants complain about are the continuing effects of a singular event, and not a continuing practice.

The Circuit Court's Amended Order found no error in the determination in Decision I that certain claims of twenty of the grievants were barred by *res judicata.* With respect to those grievants, the timeliness and continuing practice issues are therefore moot as to those claims.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. All of the Findings of Fact contained in Decision I in this matter are adopted and incorporated as part of this Decision.

2. Decision I, in Conclusion of Law No. 7, held:

> For each of the remaining grievants who were also *Bonnett* grievants, *Blethen I* is both untimely and precluded by *res judicata*; *Ferguson II* is untimely. For all other grievants, their filings are untimely.

3.

Judge Bloom's Amended Order states:

> ALJ Marteney's Decision addresses the continuing practice claim by the following statement: “The date a grievant finds out an event or continuing practice is 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 ten days of the event or occurrence of the practice.”

> ALJ Marteney made no findings or conclusions in regard to when the most recent practice occurred and whether the grievants filed their grievances within ten days of that event.

> ALJ Marteney did not commit error in holding that the grievants knew of the facts giving rise to their claims when they accepted the Revenue Agent 2 position, along with the applicable pay grade.

ALJ Marteney did not commit error in finding that the *Stanley* matter did not create a new grievable event.

4. The event that gave rise to the claims raised by the Grievants under both of their legal theories is the same event, and occurred at the time each grievant accepted the position of Revenue Agent 2.

5. The paygrade difference between CA2 and RA2 was created in October, 1997 when CA2 was assigned to pay grade 14.

6. The grievable event occurred when Grievants became subject to the pay structure in which CA2s are paid at pay grade 14 while RA2s are paid at a lower pay grade. This can happen in one of two ways, either (1) a Grievant may have been working as an RA2 in October 1997; or (2) a grievant may have been hired or promoted into the RA2 classification at a subsequent time.

7. The earliest date any of the grievants filed at level one was May 8, 2003. 8. Given that all of the grievants requested in their "Relief Sought" back pay from October 1997, it may be inferred that all were in the RA2 position at that time, hence they knew of the grievable event more than ten days prior to filing their grievances.

Discussion

Grievants argue that "the pay disparity that forms the basis of the Blethen Grievance is a continuing practice that still exists." As support for this contention, Grievants cite *Lipscomb v. Tucker County Commission* (Lipscomb II), 206 W. Va. 627, 527 S.E.2d 171 (1999), and its predecessor case, *Lipscomb v. Tucker County Commission* (Lipscomb I), 197 W. Va. 84, 475 S.E.2d 84 (1996), stating in their Proposed Findings of Fact and Conclusions of Law that the case "stated that on a wage payment violation, **every pay period** is a new violation." (Emphasis in original). However, what *Lipscomb I*, actually held was fairly limited in scope: In Syllabus point 4, it is there stated that "[a] claim for unpaid wages under the West Virginia Wage and Payment Collection Act is a continuing claim, and, therefore, a separate cause of action accrues each payday that the employer refuses to pay the wages claimed." No claim is made in this case for unpaid wages under the Wage Payment and Collection Act. Nevertheless, "[t]his 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[(See footnote 2)] of the most recent occurrence, i.e. the issuance of a paycheck." (See footnote 3) The claims of Grievants in this matter are more properly characterized as reactions to continuing "damage" flowing from a past decision of the employer and the DOP. "[W]hen 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 footnote 4)*

As stated in *Blethen I,* there are two separate claims presently under contention:

> 1) The claim from the *Blethen I* grievance that Revenue Agents 2 (RA2s) should have been assigned the same pay grade as Credit Analysts 2 (CA2) working for the Workers' Compensation Division, because they perform similar work; and
>
> 2) The claim from *Ferguson II* that the four-pay grade difference between the RA2s and their supervisors was arbitrary and capricious.

The term "pay disparity" is not well defined, but caselaw suggests that an essential element to a pay disparity claim is a difference between similarly-situated employees. (See footnote 5) No such assertion is made with respect the *Ferguson II* claims. As with *Young*, the *Ferguson* claims challenge a salary determination that was made in the past, a discrete event with lasting effects. There is no evidence either Respondent makes a new paygrade determination every pay period, but simply follows a decision made previously. Like *Lipscomb*, the holding in *Martin* that Grievants rely upon is also limited in scope, to caseswhere the pay disparity arises from discrimination. "Unlawful employment discrimination in the form of compensation disparity. . . is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists. . . . Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if [it] is filed within the statutory limitation period after such compensation disparity last occurred." (See footnote 6)

The separate *Blethen* I claims of the Grievants are essentially and materially identical, if not verbatim iterations. As stated in Ms. Blethen's Statement of Grievance,

> A credit analyst II (CAII) is at Pay Grade 14, while I, as a Revenue Agent II (RAII), have a Pay Grade of 12. This is a clear violation of paragraph 3.15 of the Administrative Rules of the WV Division of Personnel. Positions with similar training, experience, responsibilities and qualifications should be paid the same.

The Statement of Grievance arose from a holding that some CA2s were found to be similarly situated to some other CA2s, all of whom were employed by the same employer. In fact, it goes on to articulate many of the differences between the two classifications, such as the difference in required qualifications. Here, there is no viable discrimination claim: CA2s are not similarly-situated to RA2s and Grievants are not claiming their pay is disparate from the pay received by other RA2s.

As with the *Blethen I* claims, Grievants' *Ferguson II* claims cannot be considered a continuing practice. Again, Grievants are simply experiencing the effect of a prior personnel decision to assign a particular paygrade to their classification. The complaint,or grievable event is no different, but the pay grade gap between Grievants and their supervisors is simply the basis for an alternate legal theory as to why that assignment might be wrong.

To answer the circuit court's question succinctly, there is no continuing practice that would extend the time for filing a grievance, such that Respondent's assertion that these grievances are untimely would be defeated. Grievants all knew of the facts giving rise to their grievances at the time they assumed their positions, and no new grievable events have since occurred. The timeliness ruling in *Blethen I* should, therefore, not be disturbed. As stated in *Blethen I*, “[i]f proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” This is because the Grievance Board is without jurisdiction to hear a claim that has not been timely brought before it. Therefore, this consolidated grievance must be denied without consideration of the merits of Grievants' claims.

The following conclusions of law support this discussion:

Conclusions of Law

1. The Conclusions of Law set forth in *Blethen, et al. v. Dep't of Revenue and Div. of Personnel*, Docket No. 03-T&R-416, (Sept. 15, 2004) are hereby adopted and incorporated as part of this decision.

2. “A claim for unpaid wages under the West Virginia Wage and Payment Collection Act is a continuing claim, and, therefore, a separate cause of action accrues each payday that the employer refuses to pay the wages claimed.” *Lipscomb v. Tucker County Commission*, 197 W. Va. 84, 475 S.E.2d 84 (1996). 3. “Unlawful employment discrimination in the form of compensation disparity . . . is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as

long as such compensation disparity exists. . . . Therefore, a disparate- treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if [it] is filed within the statutory limitation period after such compensation disparity last occurred." *Martin v. Randolph County Bd. of Educ.*,195 W. Va. 297, 465 S.E.2d 399 (1995), citing *W. Va. Inst. of Technology v. W. Va. Human Rights Commission*, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989). *See also Lilly v. Randolph County Bd. of Educ.*, Docket No. 02-41-037 (June 5, 2002); *Garvin v. Webster County Bd. of Educ.*, Docket No. 01-51-616 (Apr. 23, 2002).

4. "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).

5. "[W]hen 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 Res.*,Docket No. 94-HHR-630 (Mar. 23, 1995)." *Young v. Div. of Corrections and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

6. An essential element to a pay disparity claim is a difference between similarly-situated employees. *See Flint v. Bd. of Educ. of the County of Harrison*, 207 W. Va. 251, 531 S.E.2d 76 (1999).

7. Grievants have not established that their claims are founded on a continuing grievable practice. Respondent has met its burden of proving Grievants' claims were untimely.

8. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97- DOH-060 (July 16, 1997).

For the foregoing reasons, this grievance is hereby **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, and such

appeal must be filed within thirty 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.

September 6, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Blethen, et al. v. Dep't of Revenue and Div. of Personnel, Docket No. 03-T&R-416, (Sept. 15, 2004)(Blethen I).

Footnote: 2

The fifteen-day time limit mentioned in this citation is due to the fact that the time limits for county board of education employees is longer than for state employees. As applied to this case and other state employee grievances, the grievance must be filed within ten days.

Footnote: 3

Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999).

Footnote: 4

Young v. Division of Corrections and Division of Personnel, Docket No. 01-CORR-059 (July 10, 2001).

Footnote: 5

See Flint v. Bd. of Educ. of the County of Harrison, 207 W. Va. 251, 531 S.E.2d 76 (1999).

Footnote: 6

Martin v. Randolph County Bd. Of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995), citing W. Va. Inst. of Technology v. W. Va. Human Rights Commission, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989). See also Lilly v. Randolph County Bd. of Educ., Docket No. 02-41-037 (June 5, 2002); Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002).