THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BARBARA CARSON,

Grievant,

v. **Docket No. 06-HE-174**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Barbara Carson ("Grievant"), employed by West Virginia University ("WVU") at Jackson's Mill, filed a level one grievance on December 21, 2004, in which she stated, "I have not been receiving the pay to which I am entitled for an extended period of time." For relief, Grievant requests the difference between pay grade 6 and 11, with interest, for the time period beginning December 1, 1989, through December 1, 2004. The grievance was denied at level one on July 11, 2005, and at level two on May 19, 2006. Grievant elected to by-pass consideration at level three, an appeal was made to level four on May 25, 2006. Under cover letter dated August 18, 2006, WVU filed a "Motion To Dismiss" the grievance as untimely and moot. A hearing on the Motion was conducted by telephone with WVU counsel Kristi A. McWhirter, Assistant Attorney General, and WVEA consultant Mary Snelson on August 21, 2006. WVU filed an Addendum to the Motion on August 22, 2006.

The following facts essential to a ruling on the Motion are undisputed, and may be set forth as follows.

Findings of Fact

___1. Grievant was first employed as a part-time, temporary Food Service Worker II, pay grade 1, assigned to Jackson's Mill Dining Services on May 6, 1983. Grievant became a full-time, regular employee on August 1, 1986. Throughout her employment at WVU, Grievant has received and signed annual Notices of Appointment stating her job title and pay grade.

2. Grievant was reclassified to Food Services Assistant II, pay grade 2, on August 16, 1991.

3. On January 1, 1994, Grievant was reassigned as Food Service Assistant II, pay grade 6, pursuant to the Mercer classification system.

4. In March 1995 and again in May 2003, Grievant completed Position Information Questionnaires ("PIQ"). The PIQ's were apparently never forwarded by Grievant's supervisors, and were never received by the WVU Human Resources Department.

5. In June 2004 Grievant completed a PIQ, and was subsequently reassigned as a Food Service Worker, pay grade 8.

6. On August 23, 2004, Grievant requested a review of her classification after she was advised that she was not classified or paid as a lead worker. At that time, Grievant requested back pay to 1989.

7. Grievant completed another PIQ in October 2004. The job duties included on this PIQ were different than those on the June 2004 document. Grievant also made a second request for back pay at this time. 8. On or about November 19, 2004, Grievant was notified that she would be reclassified as a Food Services Worker, Lead, pay grade 11, effective December 1, 2004.

9. On December 13, 2004, Grievant made a third request for back pay, and WVU denied the request.

10. Grievant did not file a grievance until December 21, 2004.

11. WVU raised the issue of whether the grievance was timely filed at levels one through three.

Discussion

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. *(See footnote 1)*

Pursuant to *W. Va. Code* § 29-6A-3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." Although not made part of the record, WVU represents that the issue of timeliness was raised at levels one and two. Grievant does not challenge that representation. Accordingly, the undersigned finds the timeliness defense was properly raised.

As to whether the grievance was timely filed, *W. Va. Code* § 29-6A-4(a) provides:

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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *(See footnote 2)*

Grievant's claim for misclassification beginning in 1989 cannot be reviewed because effective January 1, 1994, the higher education system implemented a new classification system, commonly referred to as the "Mercer classification." (See footnote 3) Prior to its effective date, the position held by each employee was reviewed to determine the correct classification. A procedure was established for employees to seek an internal review of the classification to which they were assigned, if they believed it to be incorrect. If the employee continued to disagree with their classification after the internal review, they were given the opportunity to file a grievance. If the employee did not seek an internal review, he or she was barredfrom filing a grievance challenging his/her initial classification. (See footnote 4) There is no evidence that Grievant challenged her initial Mercer classification, and that fact must be accepted as accurate.

Of course, higher education employees may continue to challenge their classification, to the extent that their position duties may have changed since the initial classification was completed in 1994. Grievant questioned whether her classification was correct when she completed PIQs in 1995 and 2003. Certainly, Grievant's supervisors erred by not transmitting the documents to WVU; however, Grievant did not follow up on the revised PIQs, nor did she file a grievance at either time. Grievant was reclassified in July 2004, but again, did not challenge the classification by filing a grievance. Grievant's failure to file grievances at any of these times constitutes a waiver of her rights, and a finding that the classification held at that time was correct. Even after Grievant was reclassified as a Lead worker on December 1, 2004, she delayed filing this grievance until December 21, 2004, beyond the ten-day time frame.

In *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990), the West Virginia Supreme Court of Appeals defined an exception to the time lines, *i.e.,*an employee may file a

grievance within ten days after discovering the facts which give rise to his or her grievance. (See footnote 5) Grievant asserts that she filed the grievance promptly upon learning she would not receive back pay. Grievant further argues that she had no reason to question whether her pay grade was correct, and had not been told to check with Human Resources, therefore, she was not aware of her misclassification until 2004. The fact that Grievant was advised of her classification and pay grade annually, and even questioned her status as evidenced by completing PIQs in 1995 and 2003, support a finding that she had long been aware of the facts leading to this grievance. The discovery of a legal theory to support a grievance does not constitute discovery of an "event" giving rise to a grievance within the intent of *W. Va. Code* § 18-29-4 as interpreted in *Spahr*. (See footnote 6) In any event, Grievant was compensated in pay grade 11 beginning December 1, 2004, more than ten days prior to filing the grievance, and would not be entitled to any additional back pay.

Based upon the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. 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. *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)

___2.___A grievance must be filed 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. *W. Va. Code* § 29-6A-4(a)

3. Grievant failed to file this grievance within the statutory time lines.

4. An exception to the statutory time lines, known as the “discovery rule” allows an employee may 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). However, the discovery of a legal theory to support a grievance does not constitute discovery of an "event" giving rise to a grievance within the intent of *W. Va. Code* § 18-29-4 as interpreted in *Spahr*.

5. The facts of this case establish that it does fall within the discovery rule exception to the statutory time lines.

Accordingly, the Motion To Dismiss is **GRANTED,** and the grievance ORDERED stricken from the docket of the Education and State Employees Grievance Board.

Either 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: SEPTEMBER 20, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

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 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).

Footnote: 2

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).

Footnote: 3

The reader is referred to Burke, et al., v. Bd. of Dir./Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995), for a detailed background and procedural history of the Mercer reclassification and the grievances arising from the reclassification.

Footnote: 4

The Higher Education Procedural Rule, Title 133, Section 18.1 provides:

An employee may seek a review of his/her initial classification under the new program implemented pursuant to this rule and may appeal such initial classification through the procedures of W. Va. Code §18-29 after completing such review. . . If an employee does not first seek a review of his/her initial classification through the internal procedures set out herein, they shall be prohibited from grieving that classification under W. Va. Code §18-29.

Footnote: 5

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).

Footnote: 6

Parkins v. W. Va. Dep't of Envtl. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996).