ALLEN HUNTER,

Grievant,

v. **Docket No. 05-HHR-322**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU
FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Grievant, Allen Hunter, filed this grievance on June 23, 2005, alleging discrimination, pay inequity and unfair labor practice. The grievance was denied at the lower levels. A Level IV hearing was held on March 28, 2006, at the Grievance Board's Beckley Office. Grievant was represented by Jeffery Pritt, Esq., and Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General. This case became mature for decision on April 28, 2006, upon the parties' submission of findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts he was discriminated against when he was forced to take a pay decrease upon voluntarily leaving his position as a Protective Service Worker (pay grade 13) and accepting the position Social Service Worker III (pay grade 12) in July, 2003. Respondent first argues this grievance is untimely. Respondent also argues that the voluntary decrease in salary was its practice at the time Grievant accepted the new position. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant has been employed with the State of West Virginia for approximately fourteen years. (Stipulated by the parties).

2. On July 16, 2003, Grievant left his position as a Protective Service Worker and took a position as a Social Service Worker III, going from a pay grade 13 to a pay grade 12. (Stipulated by

the parties).

3. Grievant voluntarily made this change.

4. By correspondence dated June 9, 2003, Respondent notified Grievant that as a result of his voluntary demotion, he would be assigned to a lower pay grade and would take a salary reduction.

5. On the same date, Grievant submitted a letter to John Najmulski, the Region IV Direction, confirming he understood he was being assigned to a lower pay grade and would be receiving a 5% decrease in salary. (Stipulated by the parties).

6. At the time of Grievant's voluntary demotion, it was Respondent's practice to reduce an employee's salary 5% per pay grade upon a voluntary demotion unless the demotion was to an adoption or home finding position. At the time of the agreement, adoption and home finding positions were considered priority positions.

7. Grievant was not moving into a position Respondent deemed as a priority position.

8. Grievant's co-workers Melody Martin, Mike Horton, and Lisa Rose took similar voluntary demotions on October 1, 2004; April 1, 2005; and December 16, 2004, respectively. These employees did not receive a pay decrease. (Stipulated by the parties). 9. On June 23, 2005, Grievant discovered his co-workers were not required to take the 5% pay decrease when they took a voluntary demotion, and he initiated this grievance on that date.

10. Grievant's prior pay was within the range of a pay grade 12. (Stipulated by the parties).

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. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); *Higginbotham v. W. Va. Dep't of Public 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). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-

524 (May 14, 1991).

___*W. Va. Code* § 29-6A-4(a) provides:

At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within ten days following the occurrence of the event uponwhich 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. 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. *Harvey, supra*; *Kessler v. Dep't of Transp./Div. of Highways*, 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).

In this case, Grievant knew when he accepted the Social Service Worker position in 2003 that he would incur a salary reduction. He did not file a grievance seeking reinstatement of his salary until June 2005, approximately two years later, and well beyond the ten day time frame. However, Grievant argues that he filed promptly upon learning that his co-workers, who voluntarily transferred after him were not required to take a pay demotion. He argues the delay falls under the “discovery rule exception” to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. Because Grievant knew of the facts giving rise to this grievance in July 2003, when he voluntarily accepted the new position, the discovery rule exception does not apply in this case. The Grievance Board has previously held that timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. *Cole/Knight v. Div. of Corrections*, Docket No. 99-CORR-187/183 (July 23, 1999); *Childers v. Dep't of Health & Human Res.*, Docket No. 98-HHR-477(Feb. 24, 1999). Neither does the fact that Grievant

erroneously believed the salary reduction was mandatory, and/or not grievable in 2003, delay the time period for filing.

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). Because Respondent has proven the grievance is untimely, there is no need to address the merits of this 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. A grievance must be initiated within ten days of the event upon which it is based or within ten days of the grievant's discovery of that event. W. Va. Code § 29- 6A-4(a).

2. 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). 3. Under the discovery rule exception to the statutory time lines, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

4. DHHR has proven that the grievance was not filed within ten days of Grievant's demotion, and because Grievant knew of the facts giving rise to this grievance in July 2003, the discovery rule exception does not apply in this case. Therefore, the grievance was not timely filed.

Accordingly, this grievance is **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." 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: May 19, 2006

Wendy A. Campbell

Administrative Law Judge