THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

STANLEY POLEWAY, II,

Grievant,

v. **DOCKET NO. 05-WCC-152**

WORKERS' COMPENSATION

COMMISSION and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant Stanley Poleway, II filed this grievance against his employer, the Worker's Compensation Commission (WCC) (See footnote 1) on December 23, 2004, claiming he was misclassified when he held a prior classification. His stated relief sought is that he be retroactively reallocated from Self Insurance Specialist 1 to Underwriter 2, from an unspecified date in 2002 to December 1, 2004.

A level four hearing was held in the Grievance Board's Charleston office on April 18, 2006. Grievant was represented by Charles Phalen, Jr., Esq. and Respondent was represented by David M. Fryson, Esq. The Division of Personnel, which was joined as a party Respondent, was represented by Lowell D. Basford. The matter became mature for decision on May 26, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant claimed he had been misclassified when he was in a prior classification, and sought a retroactive reallocation to a higher classification. Respondent contended he wasalways properly classified, and that this grievance was untimely. Although misclassification is a continuing practice, Grievant did not file his grievance while the practice continued, and was outside the time limit for doing so after it ended. This ruling holds the grievance was untimely, and denies the grievance on

that procedural basis without consideration of the merits.

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

Findings of Fact

1. Grievant was employed as an Underwriter 1 by WCC from June 1999 to December 1, 2004, when his position was reclassified as a Self-Insurance Specialist 1. He had been originally hired as an Accountant Assistant 3 in 1995, and was subsequently reallocated to Accountant Technician 3 and then to a Data Analyst 3, from whence he was reallocated to Underwriter 1 in 1999. He did not challenge his Underwriter 1 classification at the time.

2. Grievant's job duties and responsibilities have essentially been the same since he began working in the self insurance unit in 1995.

3. Sometime in 2002, Grievant found out that some Underwriters 1 had been reallocated to Underwriter II. He discussed the matter with his supervisor, Gwen Stone, suggesting she should be reallocated to Underwriter III and he should go to Underwriter II. No action was taken, and Grievant made no formal reallocation request and filed no grievance over the issue.

4. There was no “mass reallocation” of Underwriters 1 to Underwriters 2 as Grievant believed had happened

5. DOP conducted a desk audit of Grievant's position in 2003, and determined he was properly classified. Grievant prepared a Position Description Form (PDF) in September 2003, but did not submit the PDF to anyone for review.

6. Grievant prepared a new PDF in January 2004. The PDF was submitted to DOP.

7. DOP had undergone an agency-wide analysis of WCC classifications. This process resulted in several positions being reclassified, including Grievant's, on December 1, 2004.

8. Despite the several reclassifications of his position, Grievant believes he has been doing the same job since 1995.

Discussion

Although Respondent argues this claim is untimely, misclassification “is a continuing practice, and thus, a grievance may be initiated at any time during which the misclassification continues.” (See

footnote 2) The normal effect of misclassification claims is to fix the period for which any back pay may be awarded to ten days prior to the filing of the grievance. (See footnote 3)

However, this matter is somewhat different, in that Grievant is claiming he should have been reallocated from Underwriter 1 to Underwriter 2 “retroactively” to 2002. At Level III, the Grievance Evaluator determined that Grievant's supervisor had informed him that misclassification was a continuing practice, and that he could file a grievance at any time. Respondent's lower-level motion to dismiss was denied on the basis that Grievant had relied on this representation by his supervisor in delaying his grievance filing. However, as of December 1, 2004, Grievant was no longer classified as an Underwriter 1, because he had been reclassified to Workers' Compensation Self Insurance Specialist 1. This grievance was not filed at level one until December 23, 2004, sixteen days (See footnote 4) after his alleged misclassification ended.

A grievance must be filed with the immediate supervisor of the grievant “[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. . . .” (See footnote 5) Here, even if Grievant relied on his supervisor's representation that misclassification could be grieved at any time while it continues, this does not excuse his failure to file a claim after it ended. In addition, Grievant testified at Level IV that he was told that, once he became something other than an Underwriter 1, he had nine days in which to file.

In his Statement of Grievance, Grievant alleges he was informed of the reclassification on December 10, 2004, by letter from the DOP. There is no evidence in the record of this letter, but Respondent's Exhibit No. 3 at Level IV clearly shows the reallocation took place on December 1. December 10 was nine days prior to his grievance filing, within the required time limit. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. (See footnote 6) Although it was alleged Grievant was notified by a letter of his reallocation within the time limits, it is clear he was actually reallocated prior to that time. Grievant believed his tenure as an Underwriter 1 ended December 15, 2004, but the record does not reflect this date asaccurate. The undersigned takes judicial notice that a reasonable inference may be drawn that Grievant knew, or should have known, he was to be reallocated before the event took place, and that he knew the date certain upon which it would happen, which was December 1, 2004.

This was a major reclassification project that had been ongoing throughout WCC for some length of time before it was implemented, and the employees knew about it. (See footnote 7)

If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *(See footnote 8)* Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. *(See footnote 9)* Grievant did not demonstrate a proper basis to excuse his failure to file a claim in a timely manner.

Even if this were timely filed, Grievant cannot prevail on his claim as it is stated. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than the one he is currently in. (See footnote 10) Here, Grievant claims that he should be promoted to the higher classification _ that of Underwriter 2 _ because the level and complexity of his duties changed as he became more experienced. He does not claim that his basic job functions/responsibilities have changed since his original hire. He does not claim he was originally misclassified. Instead, he feels he should have been promoted based on the longevity of his service in whathe characterizes as an “entry-level” classification. He provided no evidence his duties fit into a different classification, only that he was able to do more complex duties within his classification as he gained experience.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant bears the burden of proving must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than the one his is currently in. *See Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989); *Oiler v. W. Va. Dep't of Health and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00-HHR-361 (Apr. 5, 2001).

2. Misclassification “is a continuing practice, and thus, a grievance may be initiated at any time during which the misclassification continues.” *Thomas v. Dep't of Health & Human Res.*, Docket No. 01-HHR-385 (Nov. 20, 2001)(citing *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995)).

3. A grievance must be filed with the immediate supervisor of the grievant “[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). For a continuing practice, the grievance must be filed within ten days after the practice ends. *Thomas, supra*; *Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H-032 (Apr. 12, 1990).

4. 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). Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995). *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).

5. Grievant did not file his grievance within the required time for doing so, and has not proven a legitimate excuse for his failure to file.

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.

[DATE]

_____**M. Paul Marteney**

Administrative Law Judge

Footnote: 1

The WCC no longer exists as a public entity, and its remaining state functions have been taken over by the Offices of the Insurance Commissioner.

Footnote: 2

Thomas v. Dep't of Health & Human Res., Docket No. 01-HHR-385 (Nov. 20, 2001).

Footnote: 3

Syl pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Footnote: 4

"Days" means working days exclusive of Saturday, Sunday or official holidays. W. Va. Code § 29-6A-2(c)).

Footnote: 5

W. Va. Code § 29-6A-4(a).

Footnote: 6

Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

Footnote: 7

See Carothers v.Workers' Compensation Comm'n, Docket No. 05-WCC-235 (Apr. 27, 2006); Coutz & Hanning v. Workers' Compensation Comm'n, Docket No. 05-WCC-286 (Nov. 17, 2005).

Footnote: 8

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

Footnote: 9

Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997)

Footnote: 10

See Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989)