# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**BERNARD MANCINO,**

**Grievant,**

**v.** **Docket No. 06-HE-421**

**Sue Keller**

**Senior Administrative Law Judge**

**WEST VIRGINIA UNIVERSITY,**

**Respondent.**

## D I S M I S S A L O R D E R

Bernard Mancino ("Grievant"), employed by West Virginia University ("WVU"), filed a level one grievance on February 1, 2005, in which he alleged "favoritism which leads to discrimination by upgrading personel [sic]." For relief, he requests an upgrade and back pay with interest from September 2, 2004. The grievance was denied at all lower levels, and appeal was made to level four on November 13, 2006. Under cover letter dated February 22, 2007, WVU counsel Samuel R. Spatafore, Assistant Attorney General, filed a "Motion To Dismiss" the grievance. Grievant's counsel, Kathleen Abate of Cohen Abate & Cohen, L.C., filed a response to the Motion on April 10, 2007, and a conference call on the matter was conducted on April 17, 2007.

The following facts have been derived from the lower-level record.

### Findings of Fact

1. Grievant has been employed by WVU since 1990, and has been classified as a Trade Specialist I - plumber, pay grade 13, at all times pertinent to this grievance.

2. On September 2, 2004, two preventative maintenance shift workers were upgraded to pay grade 14.

3. Grievant filed a level one grievance on February 1, 2005. 4. WVU raised the issue of timeliness at the level two hearing.

5. Grievant's own Personal Information Questionnaire (PIQ) was completed and submitted to Human Resources for review in July 2005.

6. Human Resources determined that Grievant was properly classified, and Grievant did not grieve that decision.

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 Pub. Safety*, Docket No. 97- DPS- 018; *Buck v. Wood County Bd. of Educ*., Docket No. 96-54-325 (Feb. 28, 1997).

*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.

WVU has established that the grievance was not filed within ten days of the grievable event, *i.e.*, the upgrade of the preventive maintenance employees. However, an exception to the statutory time lines, commonly referred to as the discovery rule, provides that "the time in which to invoke the grievance procedure does not begin to run until thegrievant knows of the facts giving rise to the grievance." Thus, the time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *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). When relying on the discovery rule exception, the grievant bears the burden of proving when he or she learned of the facts giving rise to the grievance.

Grievant claims that he did not confirm the upgrade of the employees until early in 2005, and that he filed the grievance within ten days of that time. Specifically, Grievant testified at level two that he

had been told by co-workers that they had heard rumors of an upgrade. He then substantiated the information by checking the University directory. Grievant does not even estimate the date he confirmed the information, making it impossible to determine whether it was in October or January. Therefore, Grievant has not established that he filed the grievance within ten days of learning of the facts giving rise to the grievance.

As a secondary argument, Grievant states that misclassification is a continuing practice, therefore the grievance was timely filed. Grievant is correct that misclassification is a continuing practice; however, he is not alleging that he is misclassified. Instead he is alleging favoritism and discrimination. To the extent that Grievant alleges the other employees are currently misclassified, he has no standing. Finally, Grievant's argument that the failure to grant him the same allegedly improper upgrade results in discrimination, is patently wrong. An employee is not entitled to receive a benefit to which he would otherwise not be entitled, based upon a possible erroneous decision made regardinganother employee. Grievant did not appeal his most recent classification review, and does not now assert that he is misclassified. Therefore, he is not entitled to the relief requested.

Accordingly, the Motion To Dismiss is **GRANTED**, and the matter is Ordered DISMISSED and stricken from the docket of the Grievance Board.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

**DATE: MAY 10, 2007**

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**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**