WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW BLAND HUTCHINSON
Grievant,

v. **Docket No. 2010-0442-MAPS**

WEST VIRGINIA STATE FIRE COMMISSION,
Respondent.

DISMISSAL ORDER

Grievant, Matthew Bland Hutchinson, filed a grievance against the West Virginia State Fire Commission ("SFC"), Respondent, on September 28, 2009, protesting he was left out of an office wide merit raise in 2005.[1] Grievant requested he be granted the salary increase, backpay and overtime difference back to the January 2005 merit raise.

Respondent informed Grievant by written documentation dated October 5, 2009, that his request was being rejected. Grievant appealed to Level Two on October 13, 2009, and a mediation session was docketed. Prior to the mediation session, Respondent filed a Motion to Dismiss. A telephonic motion hearing was held before the undersigned Administrative Law Judge on December 2, 2009. The parties by and through their legal representatives argued the merits of the pending Motion. Grievant appeared by and through counsel Belinda Morton, Esquire. Respondent was represented by Stacy L. DeLong, Assistant Attorney General. Parties were provided the option of briefing the issue and submitting proposed findings of fact and conclusions of law documents.

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[1] Subsequent to Grievant's original filing he became aware that a date specified on the document was inaccurate. Grievant filed follow-up document(s) with corrected information. For the purpose of this Order the original filing date will be cited with the corrected data recognized.

This matter became mature for decision on the motion upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 18, 2009. Both parties submitted fact/law proposals.

Synopsis

Grievant alleges entitlement to the benefits stemming from a merit raise granted office wide in January of 2005. Grievant contends information which became known to him in 2009 and further information, he believes to be, evident in Respondent's personnel records establishes that Respondent inexcusably denies him the benefit(s) of the merit raise. Respondent moved to dismiss this grievance.

Respondent argues that this grievance was not timely filed in that Grievant was aware of the material facts of the grievance in 2005. Not being granted the increase in salary in January 2005 was the grievable event. The grievance as filed does not allege discrimination or favoritism with the granting of the 2005 merit raise(s) but does tend to allude to such with regard to allowing Grievant to retroactively correct the fact that he was not awarded the benefits of said merit raise.

This grievance, as filed in 2009, was not timely filed as the Grievant knew of the grievable event in 2005. The discovery rule exemption to toll Grievant's time limit for filing his grievance is not applicable in this case. This claim is untimely and the merits of this grievance need not be reached. For the reasons set forth below, Respondent's "Motion to Dismiss" is **GRANTED** and the above-styled action is **DISMISSED**.

In support of this decision, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed with the WV State Fire Commission, Respondent, as a Fire Marshal 2.

2. A merit pay raise was approved by the Fire Commission in December of 2004 for the majority of the employees of the Fire Commission. In January 2005, Respondent granted merit raise(s) office-wide.

3. Grievant was employed by Respondent at the time of the merit raise; however, Grievant was on disability during the decision to give the merit raise, and had been for a period of over two and one-half years.[2] Grievant's first day back at work was January 3, 2005.

4. Grievant did not receive an increase in salary as a result of the merit raise of January 2005.[3] Grievant did receive the Governor's across-the-board raise (effective on July 1, 2004) granted by the Executive Office while he was on disability.

5. On January 14, 2005, the Fire Marshal held a full staff meeting to inform employees that they were going to receive a merit based pay raise and that it would begin appearing in the paycheck issued that day, January 14, 2005.

6. Grievant was aware of the awarding of the merit pay raise and further he was aware that he was not granted a merit raise in January 2005. Grievant received paychecks in the months of January 2005 through August 2009 and none reflected an increase in salary as a result of the 2005 merit pay raise.

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[2] The Grievant was out on disability from May 16, 2002 until January 3, 2005.

[3] There was no work history during the previous year upon which to justify a merit increase.

7. Allowing a “grace-period” of one month for Grievant to realize that the raise was not included in his check, one thousand six hundred eighty-six days passed before the instant grievance was filed by the Grievant.

8. The grievable event was a one time, merit-based raise in 2005.

Discussion

Respondent contends this grievance is untimely filed, as it was not initiated within the time lines contained in W. VA. CODE § 6C-2-4(a). When an 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. *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), *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).

The first issue to address is whether this grievance is timely filed. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp.*, 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). W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and provides that a grievance must be filed within 15 days of the occurrence of the event upon which the grievance is based, or within 15 days of the date on which the event became known to the grievant, or within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance.

Grievant did not receive an increase in salary as a result of the merit raise granted by Respondent in January 2005. Grievant was aware he did not receive a raise and that Respondent perceived the issue finalized. This grievance was filed over four and a half **years** later in September of 2009. *See* Finding of Fact 7. Once an Employer has met its burden of proving that the grievance is filed outside of the time parameters set forth in West Virginia Code § 6C-2-4(a)(1), the burden is shifted to the Grievant to "demonstrate a proper basis to excuse his failure to file in a timely manner." Grievant's counsel represented that Grievant waited the extra-ordinarily long time period because he had requested the raise, and was waiting for Respondent to make a decision. Respondent highlights that the Grievant did not even question this matter until the beginning of 2009, when another employee won a grievance contesting that he did not receive the July 2004 raise instituted by the Governor. Information provided by Grievant with the 2009 grievance statement tends to verify that Grievant became aware that another employee successfully retrospectively adjusted his salary in connection with another raise and Grievant contends he too should be granted this opportunity.

"The Grievance Board has repeatedly held that it is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the

statutory time lines." *Fincham v. Division of Corrections, et, al.*, Docket No. 05-CORR-400 (December 22, 2005). Grievant was not granted a merit raise in January of 2005. Not being granted the increase in salary was the grievable event. The decision to not grant Grievant the benefit of an office wide merit increase was not unknown to Grievant. It is improper, unfair and prejudicial to allow an employee to create his own discovery event by intentionally ignoring unequivocal information that gives rise to a grievance, and waiting to obtain collateral information long after the actual grievable event occurs to justify filing a grievance.

When 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. . . ."*Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001). The Grievant was not granted the merit raise which took effect on January 14, 2005. This was an isolated, one time decision made by Respondent.

The facts of the case as alleged by Grievant do not constitute a continuing practice but what is recognized as a continuing damage. While Grievant contends Respondent has previously corrected salary errors of other employees, it is not established that Respondent is obligated to review all salary disputes in perpetuity. The discovery rule exemption to the statutory time lines for filing a grievance, provides that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

The Grievant was not granted the merit raise which took effect on or about January 14, 2005. This was an isolated, one time decision made by Respondent. Grievant was aware he was not granted a salary increase on that merit raise. Grievant received the January 14, 2005 paycheck, and continuously received paychecks throughout 2005, 2006, 2007, 2008, and 2009. Each of those paychecks (totaling 112 paychecks received prior to filing this grievance) reflected that he did not receive the merit pay raise. It was clear that a decision had been made. To state that he was waiting on the Respondent to make a decision as to whether he was going to receive the raise is disingenuous. It is more likely than not that Grievant became aware that another employee won a grievance contesting entitlement to a previous raise. Given these facts, the discovery rule to toll this Grievant's time limit for filing his grievance may not be applied. "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).

West Virginia Code § 6C-2-4(a)(1) requires that a grievance be filed within 15 days of the employee knowing of the event upon which the grievance is based. The event occurred on January 15, 2005. The instant grievance was not filed until September 28, 2009, making such filing untimely. Given that the grievance was untimely filed, the merits must remain unaddressed.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. When an 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. *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), *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).

2. A grievance must be filed within 15 days of the occurrence of the event upon which the grievance is based, or within 15 days of the date on which the event became known to the grievant, or within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance. W. VA. CODE § 6C-2-4(a)(1).

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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).

4. The discovery rule exemption to the statutory time lines for filing a grievance, provides that "the time in which to invoke the grievance procedure does not begin to run

until the grievant knows of the facts giving rise to the grievance." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

5. Grievant was not granted a merit raise in January of 2005. Not being granted the benefit of the increase in salary was the grievable event. The decision to not grant Grievant the benefit of a 2005 merit raise was known to Grievant in 2005. Grievant did not initiate the instant grievance within fifteen days of the grievable event.

6. Grievant did not establish information that became known to him years later negated his knowledge of the grievable event in 2005 and justified the tolling of the time period for filing the instant grievance. This grievance is not an example which satisfies the discovery rule exemption to the statutory time lines for filing a grievance.

7. This is not a continuing occurrence, providing that each paycheck reconstitutes the running of the statute of limitations, it is continuing damage. *Spahr v. Preston County Board of Education*, 182 W.Va. 726, 391 S. E. 2d 739 (1990).

8. Respondent has met its burden, showing that the filing of this grievance is outside the 15 day limitation. Grievant has not met his burden of "demonstrating a proper basis to excuse his failure to file in a timely manner."

9. This grievance was untimely filed.

Based upon the foregoing, the "Motion to Dismiss" is **GRANTED** and the above-styled action is **DISMISSED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 23, 2009

Landon R. Brown
Administrative Law Judge