

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN TANDY BONHAM II,
Grievant,

v.

Docket No. 2023-0660-DOT

DIVISION OF MOTOR VEHICLES,
Respondent.

DISMISSAL ORDER

Grievant, John Tandy Bonham II, is employed by Respondent, Division of Motor Vehicles ("DMV"). On February 18, 2023, Grievant filed this grievance against Respondent stating, "Discrimination in pay. As a DMV employee my pay is substantially less than any other DOT agency employee of the same pay grade and years of service. There, I am being unfairly discriminated against and request to be compensated fairly." For relief, Grievant seeks "[t]o be compensated in accordance with the DOT pay schedule at the same amount as all other DOT employees at the same pay grade and years of service plus back pay and interest from the date of the CCC Plan inception."

Respondent filed a motion to dismiss the grievance as untimely on March 23, 2023. On April 3, 2023, the Level One Grievance Administrator dismissed the grievance as untimely. Grievant appealed to level two on April 12, 2023. Following mediation, Grievant appealed to level three of the grievance process on June 14, 2023. Respondent filed a Motion to Dismiss on October 2, 2023. Grievant filed his Response to Motion to Dismiss as Untimely Filed on October 18, 2023. A hearing on the motion to dismiss was held on October 24, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*. Respondent appeared by counsel, Jack E. Clark. The parties elected not to file written Proposed Findings of Fact and Conclusions

of Law, so this matter became mature for decision on the day of the hearing, October 24, 2023.

Synopsis

Grievant is employed by the Department of Transportation within the Division of Motor Vehicles as an Assistant General Counsel, which is classified as an Attorney 3. Grievant asserts pay discrimination due to the adoption of two separate pay schedules for divisions within the Department of Transportation. Respondent asserts the grievance was untimely filed as it was filed almost a year after the pay schedules were adopted. Respondent proved Grievant was unequivocally notified of the adoption of the different pay schedules almost a year prior to the grievance filing. Grievant failed to prove that the discovery exception or the continuing practice exception applies. The grievance was not timely filed. Accordingly, the grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the level one record created in this grievance and the exhibits attached to the motion response:

Findings of Fact

1. Grievant is employed by the Department of Transportation within the Division of Motor Vehicles as an Assistant General Counsel, which is classified as an Attorney 3.

2. In 2017, legislation transferred authority “to make determinations regarding pay, classification, and qualifications” from the Division of Personnel to the Division of Highways (“DOH”) for DOH employees. In January 2022, additional legislation expanded that authority to the Department of Transportation as a whole.

3. The DOH implemented its authority through the Classification and Compensation Career Plan: Pay Plan Policy ("CCCP").

4. The CCCP was implemented for the DOT's other employees, including the DMV, in January 2022.

5. By letter dated January 18, 2022, the CCCP was applied to Grievant's position. Grievant was classified as an Attorney 3 and assigned pay grade 22. Grievant's pay was increased to the maximum, step 8, for the pay grade, which was \$81.225.

6. On March 10, 2022, Secretary of Transportation, Jimmy D. Wriston, P.E., issued a memorandum to all DOT employees by email attaching the revised Employee Handbook, the DOT 3.34 Classification and Compensation Career Plan Policy, and the CCCP. The memorandum states, "Please carefully review this information; all DOT employees are affected by these revisions."

7. The CCCP policy contained an appendix of three separate pay schedules: Transportation Worker Apprenticeship Program Pay, Schedule of Salary Bands 2-26 for DOT Agencies, excluding DMV, and Schedule of Salary Bands 2-26 for DMV.

8. The copy of the policy attached to the memorandum email was not signed or dated.

9. Of relevance to this grievance are the DOT excluding DMV schedule and the DMV schedule. The two schedules both have 26 pay grades and up to twelve steps within each pay grade.

10. For pay grade 22, the pay grade maximums and number of steps are different between the two schedules. Under the DOT excluding DMV schedule, the pay

grade maximum was \$95,000 and there were twelve steps. The DMV schedule pay grade 22 maximum was \$81,225 with only eight steps.

11. By memorandum dated December 20, 2022, Cabinet Secretary Wriston informed DOT employees that step advancements under the CCCP had been placed on hold until the end of the 2023 legislative session.

12. By memorandum dated February 1, 2023, Cabinet Secretary Wriston informed DOT employees that the CCCP policy had been revised and attached the revised policy. The revision included updated pay schedules to account for across-the-board raises.

13. Grievant received the across-the-board raise, which increased his salary to the new maximum for the pay grade, \$83,474.94,

Discussion

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).

An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

The time period for filing a grievance begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff’d*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016). However, “This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995) disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck.

See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996).” *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999).

Respondent asserts that Grievant was unequivocally notified of the decision being challenged on March 10, 2022, when he received Cabinet Secretary Wriston’s all staff memorandum enclosing the DOT’s updated employee handbook and the CCCP. Grievant asserts the grievance is timely because he did not become aware of the difference in pay scale until February 1, 2023, when he received the revised version of the CCCP. Grievant argues both that he did not receive unequivocal notice until that time and also asserts the application of the discovery rule. Grievant further asserts that he is challenging ongoing pay disparity, which qualifies as a continuing practice that he may grieve at any time.

Respondent proved that Grievant was unequivocally notified of the decision being challenged on March 10, 2022. Grievant admitted that he received the March 10, 2022, email with the attached CCCP plan but argues that the pay schedules were “buried” within sixty-two pages of attachments and that the policy was not final because it was unsigned. The memorandum was clear that the action was final and specifically directed employees to carefully review the information as all employees were affected by the revisions. The pay schedules were included in the policy and were clearly marked to show that there was a different schedule for DMV employees. Grievant cannot fail to heed the directive of the Cabinet Secretary and then claim ignorance of the contents of the policy.

Grievant further asserts the application of the discovery rule in this case. “[West Virginia Code § 6C-2-4(a)(1) [2008]]¹, contains a discovery rule exception to the time limits for instituting a grievance. 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.’ Syllabus, *Barthelemy v. W. Virginia Div. of Corr., Pruntytown Corr. Ctr.*, 207 W. Va. 601, 535 S.E.2d 200, 535 S.E.2d 201 (2000). See Syl. pt. 1, *Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990)” *W. Va. Div. of Highways v. Powell*, 243 W. Va. 143, 146, 842 S.E.2d 696, 699 (2020).

The discovery rule exception does not apply in this case. “[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event.’ *Bailey v. McDowell Cnty. Bd. of Educ.*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 00-AA-168 (Aug. 12, 2003), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 032841 (Apr. 1, 2004)” *Powell*, 243 W. Va. at 149, 842 S.E.2d at 702 (citing *Wolford v. Hampshire County BOE*, Docket No. 2018-0549-HamED (Mar. 1, 2019)). In this case, Grievant was unequivocally notified of the difference in the pay scales but chose not to read the policy until it was revised again to account for the across-the-board raises almost a year later. The difference in the pay schedules existed from March 22, 2022; the revision of the scales to account for the across-the-board raises did not create the difference in the pay schedules.

¹ The West Virginia Public Employees Grievance Procedure was amended effective June 9, 2023, but this provision was not amended.

Grievant last asserts the grievance was timely filed due to the continuing practice exception. Grievant argues that he is grieving pay disparity and may, therefore, file within fifteen days of each disparate paycheck he receives. Although there is a continuing practice exception for timeliness, a single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. See *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990). Following *Spahr*, timeliness based on continuing damage versus continuing practice has been addressed by the West Virginia Supreme Court of Appeals in a line of cases. See *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Flint v. Bd. of Educ.*, 207 W. Va. 251, 255, 531 S.E.2d 76, 80 (1999) (*per curiam*) (overruled, in part, on other grounds by *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Breza v. Ohio Cty. Bd. of Educ.*, 201 W. Va. 398, 497 S.E.2d 548 (1997) (*per curiam*); *Clark v. W. Va. Div. of Nat. Res.*, No. 14-0626 (W. Va. Sup. Ct., May 15, 2015).²

In this case, unlike *Martin*, which Grievant cites, Grievant does not compare himself to any particular employee that he discovered is paid a higher salary than he; Grievant simply protests the different pay schedules contained in the CCCP. Grievant asserts the separate pay schedules are discriminatory and that he should be paid to the maximum of the DOT excluding DMV schedule. The adoption of the different pay scales was a discrete event that has caused continuing damage.

The following Conclusions of Law support the decision reached.

Conclusions of Law

² For a detailed discussion of this line of cases, see *Goodman et al. v. Div. of Highways*, Docket No. (Jun. 22, 2021).

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. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

3. The time period for filing a grievance begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff’d*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016).

4. “This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995) disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. See *Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996).” *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999).

5. “[West Virginia Code § 6C-2-4(a)(1) [2008]], contains a discovery rule exception to the time limits for instituting a grievance. 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.’ Syllabus, *Barthelemy v. W. Virginia Div. of Corr., Pruntytown Corr. Ctr.*, 207 W. Va. 601, 535 S.E.2d 200, 535 S.E.2d 201 (2000). See Syl. pt. 1, *Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990)” *W. Va. Div. of Highways v. Powell*, 243 W. Va. 143, 146, 842 S.E.2d 696, 699 (2020).

6. “[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of

the grievable event.’ *Bailey v. McDowell Cnty. Bd. of Educ.*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 00-AA-168 (Aug. 12, 2003), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 032841 (Apr. 1, 2004)” *Powell*, 243 W. Va. at 149, 842 S.E.2d at 702 (citing *Wolford v. Hampshire County BOE*, Docket No. 2018-0549-HamED (Mar. 1, 2019).

7. A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. See *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990).

8. Respondent proved Grievant was unequivocally notified of the adoption of the different pay schedules almost a year prior to the grievance filing.

9. Grievant failed to prove that the discovery exception or the continuing practice exception applies.

10. The grievance was not timely filed.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

³ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: December 11, 2023

Billie Thacker Catlett
Chief Administrative Law Judge