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DANNY BARTH

v.

DOCKET NO. 89-ES-231

W.VA. DEPARTMENT OF EMPLOYMENT SECURITY

DECISION

Grievant, Danny Barth, is employed by the W.Va. Department of Employment Security as an Interviewer II assigned to the Fairmont office. Mr. Barth filed a level one grievance on April 13, 1989 in which he alleged violations of unspecified sections of the West Virginia Code and Civil Service Regulations when Michael Romesburg was appointed as alternate deputy. The matter was denied at levels one, two and three based upon the grievant's failure to file the grievance in a timely manner. A level four appeal was received on May 30 and a hearing was conducted on August 8. By agreement of both parties the level four hearing was bifurcated to allow for the presentation of evidence and a ruling on the issue of timeliness prior to a hearing on the merits.

Mr. Barth testified that he was notified by memo dated March 17 that Michael Romesburg had been appointed to serve an Alternate Deputy in the Fairmont office. On April 13 he discussed the matter with an A.F.S.C.M.E. representative and filed a level one grievance the same day. The grievant's sole reason for the delay was that he did not realize the matter was a grievable issue and no one had advised him of such. However, on cross-examination the grievant stated that he had been given notice of the new grievance procedure which had become effective July 1 when it had been discussed in a staff meeting but that he had not been told what matters were or were not grievable nor was he advised of any time limits.

Virginia Chapman, Manager of the Fairmont office, testified on behalf of the Department that she had advised the staff of the new grievance procedure in October 1988. She stated that no in-depth training had been offered in the procedure but provided a copy of a handout made available to each employee.

In summary the grievant was made aware that he did not receive the position in question on March 17, had been aware of the existence of the grievance procedure since October 1988, and had access to gaining more information concerning

its use. In consideration of the foregoing, the matter was untimely filed and the merits will not be considered.¹

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant is employed by the Department of Employment Security as an Interviewer II assigned to the Fairmont office.

2. On March 17 the grievant received a memorandum advising that another individual had been appointed Alternate Deputy. The grievant had applied for the position but had not been considered because his application was determined not to have been submitted prior to the deadline.

3. The grievant did not file a grievance until April 13, when he discussed the matter with an A.F.S.C.M.E. representative.

4. The grievant had been made aware of the new grievance procedure during a staff meeting held in October 1988 and basic information, including timelines, had been provided in an informational handout.

¹In fact, it appears that there may have been no merits to consider since the grievant stated that he had been advised that he did not submit his application prior to the deadline and was never considered for the position.

5. The grievant offers no reason for the delay in taking any action other than his lack of understanding that this could be a grievable matter.

Conclusions of Law

1. "Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date 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...". W.Va. Code §29-6A-4.

2. In this instance a grievance was to be filed within ten days of the grievant learning that the position had been filled, not within ten days of learning that a grievable issue arose from the event. See Archibald v. Randolph County Board of Education, Docket No. 42-88-171 (Dec. 9, 1988).

3. The grievant has failed to file the grievance in compliance with the timelines set forth in W.Va. Code §29-6A-4.

Accordingly, the grievance is **DENIED**.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Marion and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED September 22, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER