

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DANA JOE SMITH,
Grievant,**

v.

Docket No. 2016-1877-LinED

**LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.**

DISMISSAL ORDER

Grievant, Dana Joe Smith, filed a grievance against his former employer, Respondent, Lincoln County Board of Education, on June 30, 2016. The grievance stated “18A-4-5a Uniformity shall apply to salary supplements, compensation to all persons performing like assignments...” The relief sought provided “Back pay applied to retirement. Settle previous grievance w/ regard to uniformity.”

Respondent denied this grievance by Level One Decision dated August 10, 2016. Grievant appealed to level two on August 16, 2016. A level two mediation was conducted on November 9, 2016, and after a requested abeyance period, Grievant appealed to level three on December 16, 2016. On May 30, 2017, Respondent, by counsel, Leslie Tyree, Esquire, filed a Motion to Dismiss alleging that this grievance was not timely filed. The undersigned conducted a telephonic conference on June 1, 2017, to discuss the pending Motion to Dismiss. Present by telephone were Grievant, *pro se*, and Leslie Tyree, counsel for Respondent. The timeliness of the filed grievance was of issue. After hearing the parties’ arguments, and providing the parties the option of presenting written proposed findings of and conclusions of law, the motion is ripe for decision. Both parties presented argument/law proposals.

Synopsis

Grievant, Dana Joe Smith, was employed by Respondent, Lincoln County Board of Education. Grievant first filed this grievance on June 30, 2016, challenging salary determinations dating as far back as fifteen to seventeen years ago. Grievant has now retired and contesting prior salary determinations. It is established that this grievance was not timely filed, and Grievant has not offered lawfully adequate justification or excuse for the extreme delay. This grievance is **DISMISSED**.

The following Findings of Fact are made based on the documentation submitted by both parties.

Findings of Fact

1. Grievant, Dana Joe Smith, was employed by Respondent, Lincoln County Board of Education, as a Director.
2. Grievant retired from the Lincoln County Board of Education on June 30, 2016.
3. On the same date, Grievant filed the instant grievance which stated "18A-4-5a Uniformity shall apply to salary supplements, compensation to all persons performing like assignments..." The relief sought provided "Back pay applied to retirement. Settle previous grievance w/ regard to uniformity."
4. Grievant alleges that approximately 17 years ago, he was assigned the additional duties of Transportation Director as well as Maintenance Director and was not given additional compensation. Grievant is now seeking back pay and any other applicable benefit that may have accrued to be applied to his retirement benefits.

5. Grievant acknowledges that approximately 15 years ago there were grievances filed by employees of Lincoln County Board of Education, Respondent, in that they believed they were not being paid in uniformity with other employees.

6. Grievant admits he was aware of the grievances and indicated he did not file a grievance at the time these other older grievances were being filed even though at the time he had concerns about his pay.

7. Grievant was further concerned and to some degree fearful of potential reprisal.

8. Grievant considered and did vocalize to others he should be given an increase in salary. Grievant indicated he might someday file a grievance.

9. Grievant is aware that a group of Directors requested an increase in pay as recently as three years ago. Grievant is of the opinion that some Directors are provided more compensation than others.

10. Grievant acknowledges filling out grievance paperwork around January 2016, but the documents were never filed.

11. Grievant did in fact wait until the day he retired to file a grievance regarding his salary, contending his salary was not in uniformity with other comparable employees dating back some fifteen to seventeen years.

12. Grievant did not timely file his grievance within the required statutory time frames.

Discussion

Respondent asserted this grievance should be dismissed as untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to

prove this affirmative defense by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). 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).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See generally*, W. VA. CODE § 6C-2-1 *et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. An untimely filing, if proven, will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997), *aff'd*, *Circuit Court of Kanawha County*, No. 97-AA-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating 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

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). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating “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.” The instant Grievant was well aware of distinct facts and key information which reasonably informed him of Respondent’s determination regarding his salary.

Grievant was aware of similar grievances filed by employees of Respondent, who believed they were not being paid in uniformity with other employees. Grievant indicated, 15-17 years ago, that he felt he should be given an increase in salary, but did not want to raise the issue. Grievant’s fear of “potential” reprisal is not sufficient justification for his failure to file a formal grievance. Grievant was aware he could litigate any perceived

disparity between his salary and those employees of similar rank and responsibility. Instead, Grievant waited until the day he retired to file this grievance.

In addition to the forgoing facts, were the Grievance Board to allow this grievance to go forward it would most likely create a case of hardship for Respondent to prepare a proper defense. Parties involved in the decision to assign Director of Transportation duties to Grievant as well as Maintenance Director duties are retired, unlikely to recall significant facts from fifteen years ago, and possibly deceased. The time for this grievance was long past. Grievant did not demonstrate a proper basis for such an extreme delay in filing this 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 pursuant to Code §29-6A-4(a). See *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).’ *Nutter v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). See also *Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases).” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001). While Grievant truly wishes the converse, this is a case of continuing damage from salary determinations made in the past, and does not fall within the continuing practice exception.

The timeframe during which Grievant could file the grievance began when Grievant allegedly took on the additional duties of Transportation and Maintenance Director, and ended fifteen working days after Grievant realized he would not be getting additional compensation for the duties. Grievant was specifically aware of similar grievances filed some fifteen years ago. He is informed about some fellow Directors requesting an increase in pay as recently as three years ago, and Grievant acknowledges filling out grievance paperwork in January 2016. The record of this grievance established that this grievance was filed on June 30, 2016, long after Grievant was aware of relevant facts and triggering event(s). There are applicable deadlines for filing a viable grievance. Accordingly, this grievance is **DISMISSED**.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). 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).

2. 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). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating “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.”

3. A continuing practice may be grieved with each new occurrence. However, “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 pursuant to Code §29-6A-4(a). See *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).’ *Nutter v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). See also *Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases).” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001).

4. Respondent established Grievant failed to timely file his grievance. Grievant has offered insufficient basis to excuse the late filing of this grievance.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

DATE: JUNE 14, 2017

LANDON R. BROWN
ADMINISTRATIVE LAW JUDGE