| | |
|---|---|
| **MARK WYLIE,**<br>**Grievant,** | |
| **v.** | **Docket Number: 94-T&P-628** |
| **WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES / DIVISION OF TOURISM AND PARKS and WEST VIRGINIA DIVISION OF PERSONNEL,**<br>**Respondents.** | |

**D E C I S I O N**

Mark Wylie (hereinafter Grievant) filed this grievance against his employer, the West Virginia Department of Natural Resources / Division of Tourism and Parks (hereinafter T&P) and the West Virginia Division of Personnel (hereinafter Personnel) on July 14, 1994, pursuant to the provisions of West Virginia Code §§29-6A-1, et seq. Basically, he claims that as a result of Personnel's reclassification project, he is entitled to back pay for having formerly served in a position that has since been reallocated to a higher classification and salary level. This claim was filed at

level three of the grievance procedure consistent with Code §29-6A-3(c) and denied thereafter. An appeal was made to level four on

October 27, 1994, and the parties agreed that this Decision could be based upon the record evidence developed at level three. The parties were given an opportunity to present legal argument on their behalf, through briefs which were received on or about January 4, 1994.[1] The case became mature on February 22, 1995, after the Undersigned's receipt of the record from the level three hearing. The material facts are not in dispute and shall be set forth below as formal findings.

Findings of Fact

1. Grievant is employed by T&P as a Park Superintendent III and assigned to Babcock State Park. Grievant functions as the park's assistant superintendent.

2. Notice is taken that in late 1991, Personnel began a statewide reclassification project. To accomplish this project, Personnel created Pilot Guidelines to establish the groundwork for its creation of a new classification plan and accompanying pay plan. The personnel actions taken by Personnel were to be taken in accordance with these new administrative guidelines as opposed to its already-existing administrative regulations. 143 C.S.R. 1.

3. In 1990, Grievant transferred from his position as assistant superintendent at Pipestem State Park to his current position. Prior to the transfer, Grievant held the classified position of Superintendent III. At this time, the Superintendent of the Park was classified as a Superintendent V.

[1]Personnel declined to file any briefs.

4. Prior to 1982, the assistant superintendent's position at Pipestem State Park was classified only one step below the superintendent's position in Personnel's Superintendent series.

5. In October 1993, the positions in T&P were allocated into Personnel's new classification plan. As a result of the reallocation, the position Grievant once held at Pipestem is now assigned the title of Park Superintendent IV. The entry level salary for the current Superintendent IV position is $2257.00 more than Grievant's current salary.

5. The superintendents in both parks are assigned to the Superintendent V classification.

Discussion

Grievant does not challenge his current classification. What he is challenging is the classification and salary assignment of his former position. He contends that his former position at Pipestem was misclassified during the period of 1982 through 1993 as evidenced by Personnel's reclassification of said position from that of Superintendent III to Superintendent IV pursuant to its reclassification project. He asserts that the assistant superintendent position was erroneously lowered to two steps below the superintendent's position in 1982; therefore, all those employees who held the position during the period of 1982 through 1993 should be granted the difference between the minimum salary for the positions of Superintendent III and IV. He also asserts that the current assistant superintendent at Pipestem has less duties than he had while occupying that position.

At level three, T&P contended that the classifications assigned to the various assistant superintendent and superintendent positions were appropriate given the circumstances at the different time periods in question. It asserted that the changes in the classifications were justified and that the reclassification of positions in 1993 was based on an evaluation of all of the positions at that time irrespective of how the positions were classified before. At level four, T&P simply contends that Grievant's complaint is untimely given that he is, in effect, contending he was misclassified from 1990 to 1993. It avers that the last occurrence of any alleged continuing practice of wrongdoing occurred in July 1990, at the time Grievant transferred to Babcock State Park. Grievant avers that his complaint was timely filed as he only learned of the fact that his former position was misclassified when that position was reallocated by Personnel in 1993.

Respondent is correct in that Grievant's complaint was untimely filed. His argument is that his salary is currently too low and he bases this claim on the fact that he was misclassified prior to 1990; he does not claim that he is currently misclassified. Although a claim of misclassification is normally based upon a continuing violation or practice, that violation or practice ceases to be continuing once the employee leaves his/her position. Gaskins v. W. Va. Dept. of Health, Docket No. 90-H-032 (Apr, 12, 1990). In this case, Grievant transferred in 1990 from a position he claims he held while being misclassified. At that

time, he had fifteen days to file a grievance over the position's allocation and pay grade assignment. He failed to file the instant complaint until July 1994.

Grievant's argument that he only discovered that his former position was misclassified when it was reallocated by Personnel in 1993 is unpersuasive. Personnel's reclassification and reallocation of positions as a result of its statewide project cannot be relied upon as an admission that positions under its previous plan were misclassified. Personnel created a new classified plan and pay plan based upon numerous concerns, goals and purposes. It does not flow from this action that the assistant superintendent's position at Pipestem was misclassified from 1982 to 1993. Therefore, Grievant's reliance upon this action in support for his argument that he then discovered a violation is misplaced.

Even assuming that Grievant's complaint was timely filed, there is insufficient evidence in the record to support a finding that it is more likely than not Grievant had been the subject of discrimination as that term is defined in Code §29-6A-2(d) or that Personnel abused its discretion in 1982 by allocating the assistant superintendent's position to the classification of Superintendent III within its classified plan pursuant to Code §29-6-10. The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

## Conclusions of Law

1. W.Va. Code §29-6A-4(a) states, in pertinent part,

> 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.

2. Although Grievant's claim was filed directly at level three, it is determined that his grievance was not timely filed pursuant to Code §29-6A-4.

Accordingly, this claim is hereby **DISMISSED** as untimely and the Grievance Board cannot assume jurisdiction over the merits of Grievant's claim.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

**ALBERT C. DUNN, JR.**
**Administrative Law Judge**

**March 7, 1995**