BILL PRYOR, et al.,

Grievants,

v. **DOCKET NO. 97-DOH-341**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants, Bill Pryor, Michael Jarrett, and Kenneth Merinar, initiated this proceeding pursuant to the provisions of W. Va. Code § 29-6A-1, et seq., alleging that they were not properly compensated for periods of time in which they were required to perform duties out of their classification as Bridge Maintenance Inspector IIs ("Inspector II"). They seek as relief the difference in the two compensation levels, with interest, for all periods during which they performed such duties. After relief could not be provided at levels one and two, a level three hearing was conducted on April 24, 1997, followed by a written decision denying the grievances on July 15, 1997. Although consolidated at the lower levels, Grievants filed separate level four appeals on July 21 and July 23, 1997. Due to common issues of fact and law, the grievances were consolidated at level four, and a hearing was conducted in this Grievance Board's office in Morgantown, West Virginia, on September 9, 1997. The parties briefly supplemented the record at that time and declined to submit written arguments, so this matter became mature on that date.

The following facts are undisputed by the parties.

Findings of Fact

1. Grievants initiated their grievances at level one on March 22, 1995. 2. Grievant Pryor seeks compensation as a Bridge Maintenance Inspector III ("Inspector III") for the period of January

1, 1990, through February 16, 1991.

3. Grievant Merinar seeks compensation as an Inspector III between January, 1987, and February 16, 1991.

4. Grievant Jarrett seeks compensation as an Inspector III between December 16, 1986, through September 22, 1993. (See footnote 1)

5. Grievants were required by their superiors, with Respondent's knowledge, to perform the duties of Inspector IIIs for the periods stated above, during which time they were classified as Inspector IIs. (See footnote 2)

6. During the time they were performing the work of Inspector IIIs and working out of their assigned classification, Grievants requested to be compensated at the salary assigned to that job title, which request was refused by their superiors.

7. Grievants were told by their supervisors that there was no procedure available for compensating them for performing work at a higher classification level.

8. Grievants did not initiate this proceeding until they discovered that a fellow Inspector II had won a level four grievance, in which he claimed he was entitled to increased compensation for time periods during which he was required to perform the work of an Inspector III. Thisinformation was given to Grievants on March 17, 1997, and they filed their grievances shortly thereafter.

Discussion

Respondent concedes that Grievants were required to perform work at a higher classification level, for which they would be entitled to back pay. However, it has raised the issue of untimely filing, which is an affirmative defense which it must establish by a preponderance of the evidence. Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996). 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. Dept. of Trans., Docket No. 97-DOH-060 (July 16, 1997).

The pertinent statute, W. Va. Code § 29-6A-4(a), provides as follows:

> 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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The evidence is undisputed that no Grievant filed his claims until years after the last time period in which they were required to work out of their classification. Although admitting that they were fully aware that they were working out of their assigned job titles for several years, Grievants contend that they complied with the statute by filing their grievances within ten days of discovering that another employee had won a similar case. Additionally, Grievants claim that they should not have been expected to file a grievance when their supervisors told them it was not possible tocompensate them at a higher level for performing such work.

It is clear that W. Va. Code § 29-6A-4(a) provides for a "discovery rule," in 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., 18 W.Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. However, "it is not the discovery of a legal theory which triggers the statute, but the event." Lynch, supra at 8. The instant case is clearly one in which the event, working out of assigned classification, was known to Grievants, but the legal theory to support it was not discovered until much later, i.e. March 17, 1995. "[T]he date a [g]rievant finds out an event or continuing practice was illegal is not the date for determining whether a grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (March 23, 1989) (emphasis in original). (See footnote 3) In fact, it has specifically been held by this Grievance Board that "learning of the success of another employee's grievance . . . does not constitute discovery of an 'event' giving rise to a grievance." Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996) at 7.

At level four, Grievants testified that, when they asked their supervisors to provide compensation for the higher level duties they were performing, the supervisors said this was not possible, because there was no policy in place allowing for it. However, Grievants did not indicate that a possible grievance was ever discussed. This Grievance Board has previously recognized that, in some instances, the principle of equitable estoppel may excuse an untimely filing. The doctrinewas explained in Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994):

> The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing 'was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge.'

A supervisor's statement that an employee's request cannot be granted does not rise to the level of conduct contemplated in Lilly, supra, and Naylor, cited therein. There is absolutely no evidence which would indicate that Grievants were discouraged in any way from filing a grievance over this matter, nor that their supervisors took any action which they should have known would be interpreted by Grievants as discouragement.

The event giving rise to this grievance was Grievants' working as Inspector IIIs while classified as Inspector IIs, which Grievants knew about for a considerable period of time, well more than ten days prior to the filing of their grievances. Even if working out of classification is to be considered a “continuing practice,” none of the grievants filed their claims within ten days of the last date upon which such work was performed. Accordingly, as this grievance was not timely filed, this Grievance Board is without jurisdiction to decide the merits of the claims raised.

Conclusions of Law

1. Timeliness is an affirmative defense which a respondent must establish by a preponderance of the evidence. Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996). 2. A grievance must be filed 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 thegrievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. W. Va. Code § 29-6A-4(a).

3. The timeliness statute is not triggered by a grievant's discovery of a legal theory to support his claim or the success of another employee's grievance, but by the event or practice which is the basis of the grievance. See Spahr v. Preston County Bd. of Educ., 18 W.Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1; Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996); Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (March 23, 1989).

4. Untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dept. of Trans., Docket No. 97-DOH-060 (July 16, 1997).

5. The latest dates when Grievants knew of the events giving rise to their grievances and/or the last dates of the continuing practice were more than ten days prior to the date upon which they filed their grievances in March of 1995; therefore, these grievances were not timely filed.

6. An untimely filing will only be excused on grounds of equitable estoppel if the untimely filing resulted from deliberate conduct by the employer or actions which the employer should have known would cause the employee to delay filing his claim. Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (1989); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41- 195 (Nov. 28, 1994).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievanceoccurred, 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.

Date: October 29, 1997 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Mr. Jarrett's grievance form stated that he sought pay at this level for the period of "December 16, 1986, to present." However, at the level three hearing, Mr. Jarrett clarified that he did not have evidence to support the allegation that he worked out of classification after September 22, 1993.

Footnote: 2

Grievants Pryor and Merinar were reclassified to the Inspector III job title in February of 1991.

Footnote: 3

This provision of the education grievance statute, W. Va. Code § 18-29-4(a), is virtually identical to the state grievance statute, the only exception being that education employees are given fifteen days to initiate the process, rather than ten.