AGNES E. KESSLER,

Grievant,

v. **Docket No. 96-DOH-445**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Agnes E. Kessler (Grievant), employed by Respondent West Virginia Department of Transportation in the Division of Highways (DOH), filed this grievance under W. Va. Code §§ 29-6A-1, et seq., on December 15, 1995. Her original statement of grievance stated the following:

> I filed an appeal on my classification and won the appeal for 11-16-93. At the time of the classification change, I was a Secretary II in a pay grade 8. The appeal brought my classification from Secretary II to a Transaportation (sic) Realty Trainee - pay grade 10.
>
> The attached salary advancement form indicates that a 3 1/2% increase was given on 2-1-94. It was my understanding that this increase was a merit increase. This form also indicates that on the date of the form I was given a 1 1/2% increase to make up the difference in what I would have been given had I received the reclassification at the time of reclassification.
>
> Even though our most stringent rules regarding reclassification now would have allowed me to have 5% for each pay grade, my increase was only 1 1/2% for two pay grades.
>
> Bill Ramsey who works in my department as a right of way agent, under the old guideline, received a 17% increase when he went from a Right of Way [Agent] I to a Right of Way Agent II. He received a 9% pay increase when he went from a Right of Way Agent II to a Right of Way [Agent] III.

> I feel that since Charleston recognized that I should have received an increase with the reclassification then I should have received an equitable amount of increase, not a 1 1/5% as shown.
>
> If it were processed under the old regulations, I feel I should have gotten a raise at least comparable to other employees, or if processed under the new regulations I should have received a 10% increase.

After her grievance was denied at Levels I and II of the grievance procedure, Grievant appealed to Level III where an evidentiary hearing was conducted on September 4, 1996. The grievance was denied at Level III in a written decision issued by Commissioner of Highways Fred VanKirk on October 1, 1997. Grievant appealed to Level IV on October 16, 1996, electing to have her grievance decided on the basis of the record developed through Level III. On November 15, 1996, the undersigned issued an Order establishing a briefing schedule for the parties. At Grievant's request, the due date for written arguments was extended to February 10, 1997. No written argument was received from Grievant, but Respondent filed a written argument on February 18, 1997. (See footnote 1) This matter became mature for decision at that time.

As the facts in this case are substantially uncontroverted, the following findings of fact are made from the evidence of record through Level III.

FINDINGS OF FACT

1. Grievant is employed by the Department of Transportation in the Division of Highways (DOH).

2. On November 16, 1993, Grievant's position was classified as a Secretary II in the statewide reclassification project, the same job title she held under the previous classification system.

3. On February 1, 1994, Grievant received a 3.5% merit raise.

4. Grievant successfully challenged her classification as a Secretary II, and was reclassified as a Transportation Realty Agent Trainee. On June 16, 1994, Grievant's salary was increased an additional 1.5%. It was noted on her payroll record that Grievant would have received a 5% increase had she not previously received the 3.5% merit increase. See G Ex B at L II. The source of this notation was not established.

5. On November 16, 1993, Grievant's salary of $1591.00 per month was above the minimum established for the Transportation Realty Agent Trainee classification.

6. This grievance was initiated on December 15, 1995.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. Initially, DOH contends that this grievance is untimely as the grievance was not initiated within the time limits contained in W. Va. Code §§ 29-6A-4(a). Where the 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 that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The running of the relevant time period is ordinarily deemed to begin to run when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, No. 23450 (W. Va. Sup. Ct. Feb. 24, 1997). In this particular matter, Grievant's pay was adjusted as a result of her reclassification in June 1994. Nearly eighteen months later, Grievant initiated this grievance. DOH noted in the Level II decision that the grievance was untimely. Nonetheless, Grievant failed to establish a proper basis for permitting this extensive period of time to elapse between the employer's action andinitiation of the grievance. See Sayre, supra; Jack, supra. In these circumstances, the grievance must be deemed untimely.

Even if this grievance had been timely filed, a preponderance of the evidence of record indicates that Grievant received more compensation than she was entitled to receive under the Division of Personnel's Administrative Rule governing the statewide reclassification project. The unrebutted testimony of DOH Human Resources Director Jeff Black indicates that Grievant did not meet the minimum requirements for the Transportation Realty Agent Trainee classification, but received that classification only because of a "grandfathering" process that allowed employees who had been assigned the duties of a particular position to hold that position. This circumstance was overlooked when Grievant was awarded a pay increase based upon her reclassification. Accordingly, Grievant's entire case is built upon an oversight in the Human Resources Division resulting in Grievant receiving the benefit of a policy which did not truly apply to her situation, rather than some statutory or regulatory provision which requires that she be given a specific pay raise in the circumstances presented. Awarding Grievant the relief she seeks would be inconsistent with the statewide compensation rules under which DOH is required to operate. Certainly, DOH is not bound by this error. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Consequently, Grievant would not have prevailed on the merits of her grievance, even if it had been timely filed.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this decision.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. W. Va. Code § 29-6A-4 provides that a grievance must be filed within ten days 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.

3. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996).

4. Because Grievant did not file her grievance until nearly eighteen months following the event upon which the grievance is based, the grievance was not timely filed pursuant to W. Va. Code § 29-6A-4.

Accordingly, the grievance is **DENIED**.

Any party 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 StateEmployees 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 28, 1997

Footnote: 1

Grievant did not file an objection to Respondent's untimely argument. That argument simply reiterated the position taken by DOH in the Level II decision.