DAVID LYNCH,

Grievant,

v.

DOCKET NO. 97-DOH-060

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, David Lynch, filed this grievance on September 25, 1996, alleging the following:

> Grievant has been employed by the Department of Transportation, Division of Highways for many years. He has been passed over for promotions, pay raises and other job improvement opportunities on several occasions each time due to non-merit factors including, but not limited to, political and friendship factors. Such activity has continued over a long period of years and constitutes a pattern of wrongful conduct dating back to 1992, when he applied for a position subsequently filled by Martha Gibson.
>
> In addition, it has recently come to the attention of the grievant that the position presently held by Bill Byus which the grievant applied for in 1992, was wrongfully filled. Apparently Mr. Byus failed to meet the minimum qualifications necessary for the position and as a result of such, grievant should have been placed in that position. The position requested is an Accountant III (supervisor) in the Finance Division.
>
> In that Mr. Byus is not qualified, and received the position due to mistake, error, intentional wrongdoing and/or favoritism factors, grievant is entitled to be placed in that position and receive all back pay and benefits.

<u>Relief Sought:</u>

Placement of grievant to the Accountant III (supervisor) position presently held by Bill Byus, together with full pay raises and back pay for the years he was deprived of the same. Grievant requests such further relief as is necessary to make him whole, including costs and expenses incurred, lost benefits, attorney fees, and such other relief as available. (See footnote 1)

Following adverse decisions at the lower levels, Grievant appealed to level four on January 30, 1997. Hearing was held on March 13, 1997, and this case became mature for decision on April 17, 1997, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

SUMMARY OF THE EVIDENCE

Grievant's Exhibits

LIII Ex. 1 -

Classification Specification for Accountant III, effective July 1, 1979.

LIII Ex. 2 -

Internal Employee Placement Review for William Byus, dated January 6, 1993.

LIII Ex. 3 -

University of Charleston Transcripts for William Byus.

LIII Ex. 4 -

Transaction Information Sheet for William Byus.

LIV Ex. 1 -

Nepotism Guidelines Established by the WV Ethics Commission.

LIV Ex. 2 -

Accreditation information for Beckley College and College of West Virginia.

LIV Ex. 3 -

Memorandum from Tim Basford to Michael T. Smith, dated March 29, 1993, regarding Division of Personnel Proposal #1569, Revision of the Accountant II, III and IV Classification Specifications.LIV Ex. 4 -

West Virginia Department of Highways Administrative Operating

Procedures, dated May 1, 1986.

LIV Ex. 5 -

West Virginia Department of Highways Administrative Operating Procedures, dated January 18, 1982.

Transportation's Exhibits

LIII Ex. 1 -

Classification Specification for Accountant III.

Testimony

Grievant testified in his own behalf and offered the testimony of Max Farley, Jeff Black, Reginald Lynch, Michael Smith, Bill Feazelle, Don Adams, Shirley Ranson, Drema Smith, and Fred Thomas. Transportation offered the testimony of Bill Byus, Bill Feazelle, and Jeff Black.

AFFIRMATIVE DEFENSE

Department of Transportation ("Transportation") raises the affirmative defense of timeliness.

ISSUES

The first issue is whether this grievance was timely filed pursuant to the grievance procedure set forth in W. Va. Code § 29-6A-1, et seq. If it was, the second issue is whether Transportation violated its own and Division of Personnel policies with regard to the selection of Bill Byus for the Accountant III position. Because I find this grievance was not timely filed, it is unnecessary to address the second issue.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following pertinent facts.

1. Grievant is employed by Transportation in its Finance Division as an Accountant II. He has been employed in the Finance Division since 1989.

2. On September 1, 1992, Mr. Keyes Barnes resigned from the Finance Division, vacating an Accountant III position. 3. The Accountant III position was properly posted in or about September 1992.

4. Grievant and Mr. William Byus were the only two applicants for the position in 1992.

5. Mr. Byus was selected for the Accountant III position in 1992, and entered into his duties on or about January 1, 1993.

6. Following Mr. Byus' appointment, there was a question within Transportation's Human Resources Department and the Division of Personnel whether he possessed the required minimum qualifications for the position, specifically, whether he possessed the requisite credit hours in Accounting.

7. Following a review of Mr. Byus' college transcripts, the appointment of Mr. Byus to the Accountant III position was approved by the West Virginia Division of Personnel on April 6, 1993.

8. Grievant knew before he even interviewed for the Accountant III position in 1992 that Mr. Byus had been selected for the position. Tr., p. 41.

9. In February 1996, Grievant met with Mr. John Perdue, an aide in the Governor's office, to discuss Mr. Perdue's role in recommending Mr. Byus for the Accountant III position in 1992. Tr., p. 43.

10. Grievant learned on July 31, 1996, from Keyes Barnes, that Mr. Byus allegedly did not have sufficient hours in Accounting to meet the minimum requirements required in 1992 for the Accountant III position. Tr., p. 41.

11. Grievant met with his immediate supervisor, Don Adams, on or about September 10, 1996, to discuss the allegations raised by Mr. Barnes. He asked Mr.Adams if he knew whether Mr. Byus met the minimum qualifications, and Mr. Adams shook his head “no.”

12. On September 10, 1996, Grievant wrote a letter to Jesse Haynes, Transportation's EEOC officer, regarding his suspicions that favoritism entered into the hiring decision for the position, as evidenced by Mr. Byus' preselection.

13. Grievant met with Joe Smith in the Division of Personnel on or about September 16, 1996, to discuss the allegations raised by Mr. Barnes.

14. Grievant filed this grievance on September 25, 1996.

DISCUSSION

Transportation's timeliness defense 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). As an untimely filing will defeat a grievance, it is necessary to resolve the timeliness issue before addressing the merits of the grievance.

W. Va. Code § 29-6A-4(a) provides:

> 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.

Transportation contends that the “event” which gives rise to this grievance was the selection of Mr. Byus for the Accountant III position in 1992. Alternatively, giving Grievantthe benefit of the doubt, the “event” certainly occurred on July 31, 1996, when Grievant learned that Mr. Byus allegedly did not meet the minimum requirements of the position. Grievant likewise claims the “event” upon which this grievance is based is his “discovery” that Mr. Byus did not meet the minimum qualifications for the position of Accountant III, but contends that it was not until he knew for certain after discussions with various Personnel officials, that he was required to file his grievance. Although informed by Mr. Barnes that Mr. Byus was not qualified for the position on July 31, 1996, Grievant testified he did not want to file a frivolous grievance, and so waited until he had received confirmation to support the allegation, and then filed his grievance on September 25, 1996. While Grievant's rationale is certainly commendable, and the Grievance Board does not condone the filing of frivolous grievances, the statutory limitations for filing of grievances cannot be ignored, and the time for engaging in discovery is after the filing of the grievance, not before. Obviously, if Grievant had discovered after filing his grievance that Mr. Byus did indeed meet the minimum qualifications for the position, there is nothing in the grievance statute that would have prohibited him from withdrawing his grievance. The burden of timely filing is on the grievant to protect his or her interests. Grievant failed to do so in this instance.

It is clear from his own testimony that Grievant had some inkling or suspicion regarding the selection of Mr. Byus at the time it occurred in 1992. He testified he knew before he was even interviewed that Mr. Byus had been selected for the position. He also testified that he knew that favoritism ran “rampant” in Transportation with regard to hiring decisions. As early as February 1996, Grievant requested a meeting with John Perdue, an aide to the Governor, to discuss the circumstances surrounding Mr. Byus' hiring,specifically Mr. Perdue's friendship with Mr. Byus. Mr. Perdue told Grievant at that time that he helped Mr. Byus get the Accountant III position. Nevertheless, it was not until late summer of 1996 that Grievant decided to make formal inquiry regarding Mr. Byus' hiring. This investigation was prompted by the revelation from Keyes Barnes, on July 31, 1996, that Mr. Byus did not meet the minimum qualifications for the position. When Mr. Barnes informed him of this fact, he was surprised that Grievant did not know already. Of course, the fact, true or not, that Mr. Byus did not meet the minimum qualifications did not just occur on July 31, 1996, and with reasonable inquiry, Grievant could have discovered that fact in 1992. It is clear from the record that the question of Mr. Byus' college credentials was well-researched in early 1993 by Transportation and the Division of Personnel. There is no evidence that either agency attempted to hide this investigation or otherwise keep it a secret. The documentation which Grievant obtained from Mr. Byus' personnel file was in that file in 1993 as well, and a simple inquiry from Grievant at that time would have revealed what Grievant attempts to use now as his “discoverable event”. There is also no evidence that Grievant was ever discouraged or dissuaded from filing a grievance over his non-selection for the Accountant III position. See Duruttya v. Bd. of Educ., 382 S.E.2d 40 (W. Va. 1989).

Both parties cite Spahr v. Preston County Board of Education, 391 S.E.2d 739 (W. Va. 1990) to support their arguments. Spahr discussed the discovery rule found in W. Va. Code § 18-29-4(a)(1) and held “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.” Spahrat Syl. Pt. 1. (See footnote 3) In this case, Grievant was aware of the facts giving rise to the grievance in 1992, and did not file this grievance until September 1996. “[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive.” Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). “[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen

days of the event or occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989)(emphasis in original). See also Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

What Grievant "discovered" is not the event which triggers this grievance. Rather, it is evidence which supports a legal theory. It is not the discovery of a legal theory which triggers the statute, but the event: The event in this grievance was the selection of Mr. Byus in 1992. Grievant should have filed his grievance then.

CONCLUSIONS OF LAW

1. A timeliness defense is an affirmative defense which Transportation 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. An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance. 3. The discovery rule exception identified in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990) does not apply to this situation as Grievant knew of the events giving rise to his grievance in 1992.

4. "[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive." Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). "[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989)(emphasis in original). See also Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

5. This grievance was not timely filed pursuant to W. Va. Code § 29-6A-4, as Grievant knew of the events giving rise to his grievance in 1992, but did not file his grievance until September 25, 1996.

Accordingly, this grievance is **DENIED**.

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.

MARY JO SWARTZ

Administrative Law Judge

Dated: July 16, 1997

Footnote: 1

Although vague references were made with regard to favoritism in hiring, Grievant presented no evidence regarding other positions he applied for and did not get. Grievant did not address these other positions in any detail at level two or level four, nor did he discuss them in his post-hearing submission. Therefore, Grievant's claims, other than those directly relating to the Accountant III position, are considered abandoned.

Footnote: 2

The record consists of the level three transcript and exhibits, which are referenced herein as "Tr., p. ", and "LIII Ex. ".

Footnote: 3

This provision of the education grievance statute is virtually identical to the state grievance statute, with the exception that on the education side, the grievants have fifteen days to initiate a grievance by scheduling a conference with the immediate supervisor.