ROSELIE PRICE,

Grievant,

v. **DOCKET NO. 98-DOA-138**

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION, INFORMATION SERVICES AND COMMUNICATIONS, and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant Roselie Price appeals the partial denial of her grievance to Level IV, maintaining that she is entitled to back pay for a period of time in which she worked out of classification for the Respondent, West Virginia Department of Administration. (See footnote 1) The Grievant claims she had been working as a Purchasing Assistant, and should have been so classified, for the period April 1, 1993, through January 15, 1997. The West Virginia Division of Personnel was joined as a party at Level III. Respondents contend that the grievance was properly denied in part as untimely.

Based upon the findings of fact and conclusions of law set forth herein, theundersigned finds that the grievance was untimely filed. The following findings of fact are made from the evidence presented at Level III.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Department of Administration, Information Services and Communications Division.

2. Grievant became aware in October of 1996, that she was misclassified. On October 30, 1996, she submitted a position description form, seeking reallocation of her position.

3. On January 16, 1997, Grievant was reclassified from an Office Assistant II, Pay Grade four (4), to a Purchasing Assistant, Pay Grade six (6).

4. Grievant did not file a grievance until February 26, 1997, and no valid reason was given for the delay in filing. Grievant's supervisor did not take any action or make any statements that would have caused Grievant to delay filing.

DISCUSSION

In a non-disciplinary grievance, Grievant has the burden of proving each element by a preponderance of the evidence. Procedural Rules of W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant suggests that she is due back pay in the amount of the difference between the Pay Grades of the two positions, and also wishes to receive interest, from April 1, 1993, up until January 16, 1997. The record indicates that the Grievant may indeed have been working out of classificationfrom approximately April 1, 1993, until January 16, 1997. This is illustrated by the fact that on January 16, 1997, the Grievant was reclassified to more acurately reflect the duties which she had been regularly performing. Furthermore, it would appear that the Grievant's current classification of Purchasing Assistant, Pay Grade six (6), is the “best fit” for her required duties and is the correct classification. Simmons v. W. Va. Dept. of Health and Human Resources /Div. Of Personnel, Docket No. 90-H-433 (1991).

This factual finding does not necessarily lead to a finding for the Grievant as concerns back pay. At the Level III hearing, the Respondent, Division of Personnel, raised the defense that the grievance was not timely filed. Timeliness is an affirmative defense. The burden of proving the affirmative defense by a preponderance of the evidence, is upon the party asserting that the grievance was not timely filed. Norton v. Bd. of Directors/ W.Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

A grievance must be filed within ten days from the date of the grievable event, or ten days from the date the grievant becomes aware of the grievable event, as provided by W. Va. Code, § 29-6A-4(a). (See footnote 2) A misclassification, however, is a continuing practice, and thus, a grievance may

be initiated at any time during which the misclassification continues. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). Backpay, nonetheless, is limited to the ten day period preceding the filing of the grievance. However, in this case the Grievant's position was reallocated as of January 16, 1997, at which time the misclassification ceased as a continuing practice. This grievance was not filed within ten working days of that date.

Another issue presented here is when exactly the Grievant became aware of the grievable event, or in this case her working out of classification. It is obvious from the record that the Grievant became aware in October 1996, that she was working out of classification. This is evidenced through witness testimony as well as the Respondents' exhibits. The Grievant's position is that she was not aware of her right to initiate the grievance process to request back pay until informed by a co-worker on February 13, 1997. “Ignorance of the law or of the right to invoke the grievance procedure will not excuse or toll the running of the limitation period.” Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052 (Sept. 27, 1991). The Respondents have met their burden of proving the grievance was not timely filed. While it is unfortunate that Grievant's employer did not take any action to get her position reallocated while reaping the benefits of her labor, the undersigned cannot award Grievant back pay, as she was not working out of classification at the time she filed her grievance, or at any time during the ten working days preceding the filing of the grievance.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, Grievant has the burden of proving each element by a preponderance of the evidence. Procedural Rules of W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va.Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. The burden of proving a grievance was not timely filed, which is an affirmative defense, rests upon the party asserting the defense. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996).

3. A grievance must be filed within ten days of the grievable event, or ten days from the time the grievant becomes aware of the grievable event, 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).

4. Misclassification is a continuing practice, but where a timeliness defense is raised, the right to back pay is limited to ten days preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

5. Grievant did not meet the statutory deadline for filing her grievance.

6. "Ignorance of the law or of the right to invoke the grievance procedure will not excuse or toll the running of the limitation period." Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052 (Sept. 27, 1991).

7. No facts were shown to excuse Grievant's late filing.

8. This grievance was not timely filed.

Accordingly, this grievance is **DISMISSED** for untimeliness, and **STRICKEN** from the docket of the Grievance Board.

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 thisdecision. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 24, 1998

Footnote: 1

The record does not reflect what occurred, if anything, at Levels I and II. The grievance was originally filed on February 26, 1997. After the parties efforts to settle this matter were unsuccessful, a hearing was held at Level III on

March 27, 1998, and judgement was entered, on April 21, 1998, granting the Grievant relief from ten (10) days preceding the filing of her grievance. Grievant appealed to Level IV on April 29, 1998, asking that a decision be rendered on the record developed below . After both parties failed to file briefs before the stated deadline, this case became mature for decision on May 26, 1998. Grievant was represented by Jerry Payne. For the Respondents, Lowell D. Basford represented the Department of Administration, and James D. Wells represented the Division of Personnel.

Footnote: 2

The statute provides, 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 . . . may file a written grievance with the immediate supervisor of the grievant."