H. LEON DRYE,

Grievant,

v. **Docket No. 98-EBA-030**

EDUCATIONAL BROADCASTING

AUTHORITY/WSWP-TV,

Respondent.

D E C I S I O N

Grievant, H. Leon Drye, filed this grievance alleging the newly created position of Director of Engineering was filled without posting or the acceptance of applications. He seeks as relief for the Educational Broadcasting Authority ("EBA") to follow its policies, and for the position to be posted and a different group to be selected to choose the candidate to fill the position. (See footnote 1) At Level I, this grievance was denied as being untimely filed. At the nextlevel the parties agreed to hold a combined Level II and III hearing. The grievance was denied at that level as untimely. At Level IV, EBA filed a Motion to Dismiss based on two reasons. The first reason was untimely filing, and the second reason was that all positions at EBA are unclassified, thus, the State's Division of Personnel rules and regulations requiring posting and certain methods of filling vacant positions do not apply.

A hearing on these matters was held on March 23, 1998, and April 21, 1998, and the testimony of multiple witnesses was taken on these issues. (See footnote 2) This case became mature for decision on May 6, 1998, the deadline for the parties' proposed findings of fact and conclusions of law.

After a detailed review of the record in its entirety, including the Level II and Level IV testimony, the undersigned Administrative Law Judge makes the following Findings of

Fact.

Findings of Fact

1. Grievant has been employed by EBA for many years as a Chief Engineer, at the Beckley television station. This is a management position, and Grievant supervises seven employees.

2. Early on December 2, 1997, Grievant learned Mr. Michael Galik had been appointed to the position of Director of Engineering, as well as maintaining his Chief Engineer duties at the Morgantown station. Mr. Galik was to be "responsible for planning, coordinating, and managing the technical resources of WVPTV (West Virginia PublicTelevision)." This appointment meant Mr. Galik would be in charge of all the engineering aspects of EBA's television stations. (See footnote 3)

3. Grievant was very upset by this turn of events and went immediately to his supervisor, Mr. Michael Meador, the Beckley Station Manager and Chief Financial Officer and questioned the decision. He felt he should have been considered for and placed in the position.

4. Mr. Meador warned Grievant twice during this conversation that he must closely watch the timelines for filing a grievance. He recommended Grievant discuss the issue with Mr. Bill Acker, General Manager, who had made the decision. Mr. Meador told Grievant he would talk to Mr. Acker about the possibility of assigning Grievant certain specific duties and asking that Grievant could remain under his (Mr. Meador's) supervision. Mr. Meador did not indicate he would ask Mr. Acker to reevaluate his decision in light of Grievant's displeasure and his desire for the position. Mr. Meador only agreed to seek possible modifications that might make Grievant more comfortable with the situation. Grievant informed Mr. Meador he would be filing a grievance. Mr. Meador also indicated a copy of the grievance form could be obtained from Ms. Holtteen Mitchell, the Business Clerk. 5. When Grievant left Mr. Meador's office, he asked Ms.

Mitchell for a grievance form, and she informed him they were located in Mr. Meador's office. (See footnote 4) Mr. Meador was in his office at that time, but Grievant did not ask him for a form.

6. Grievant met with Mr. Meador again on December 9, 1997, and again discussed the appointment of Mr. Galik. Mr. Meador informed Grievant the suggestions he had made to Mr. Acker, discussed in Finding of Fact 4, were not acceptable. Grievant again indicated he would be filing a grievance, and Mr. Meador again indicated Grievant should pay close attention to the timelines. Grievant received a copy of the grievance form on that date.

7. Grievant called Mr. Dale Rhodes, the Director of Planning and Administration, on or about December 12, 1997. Mr. Rhodes recommended Grievant call Mr. Acker.

8. Grievant called Mr. Acker on December 12, 1997, and arranged to meet with him on December 17, 1997, to discuss the appointment of Mr. Galik.

9. Grievant met with Mr. Acker on December 17, 1997, and decided to file a grievance at that time.

10. This grievance was filed on December 22, 1997.

11. Grievant was absent from work due to personal illness on December 15 and 18, 1997. 12. When Grievant filed his grievance he followed the procedure outlined in the 1987 Employee Handbook. (See footnote 5) This procedure allowed for the filing of a verbal grievance five days after the grievable event.

13. Grievant was at the EBA meeting in 1990 when EBA adopted a new employee handbook. This Handbook stated that when filing a grievance the State procedure should be followed. This Handbook also contained information about the grievance procedure, and stated the forms for filing a grievance were available in the business offices of the various divisions.

14. Grievant signed that he received a copy of this Handbook on June 6, 1990.

15. All employees in Grievant's division received a copy of the booklet,

"Grievance Procedure for State Employees" in 1993. (See footnote 6)

16. As a manager with many years of experience, Grievant is expected to have knowledge about the current policies which govern the employees he supervises.

17. Grievant is a classified-exempt employee, as are all employees of EBA. (See footnote 7)

18. For the past several years EBA has been under a mandate to consolidate the separate television and radio stations under one umbrella to decrease costs, become more efficient, and to follow recent changes in funding requirements. In order to decrease the number of lay offs this process could require, EBA has shifted and enlarged job dutieswhen employees have retired or quit. Additionally, with the change of going from three television stations to one overall system, EBA did not need or want to have a person filling each position as it did before the stations were consolidated. For example, there was no longer a need for a program manager at each station, because all programing was performed by one person in a central location.

Issues

The issues Respondent raises for dismissal of this grievance are: 1) as all employees of EBA are classified-exempt, EBA is not required to follow the rules and regulations required by the State Department of Personnel when filling positions; (See footnote 8) and 2) this grievance was not timely filed. EBA argues Grievant knew or should have known the correct procedure for filing a grievance, especially since he had been a manager for many years and had been reminded several times that the timelines were important. Respondent also indicates Grievant never filed a verbal grievance, because all he said to the various people he talked to was that he was "going to" file a grievance.

Grievant alleges he was following the 1987 grievance procedure, and this procedure allowed for a verbal grievance and had different timelines. He also argues he did not have the data he needed to decide whether he wanted to file a grievance until he

discussed thissituation with Mr. Acker. Grievant alleges Ms. Mitchell told him that the 1987 procedure was the correct one to follow. (See footnote 9)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988).

EBA contends this grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis 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 a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his 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).

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A-4(a), which states 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 the grievant or within ten days of the most recent

occurrence of a continuing practice giving rise to a grievance. . . .

The relevant time period is ordinarily deemed to begin 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, 403 S.E.2d 566 (1997).

In this case, Respondent demonstrated Grievant did not file in a timely manner even though he was frequently reminded that the timelines were important. Grievant's excuse for his failure to file is that he was following an old procedure and had in actuality filed a verbal grievance when he discussed the issue with Mr. Meador on December 2, 1997. This explanation is contradicted by Grievant's own words, "I am going to file a grievance", and his testimony that he did not have the data to file a grievance until he had discussed the issue with Mr. Acker on December 17, 1997. (Emphasis added). Thus, it is clear Grievant did not intend to file a verbal grievance on December 2, 1997, when he talked to Mr. Meador, even if such a plan could be accepted as substantial compliance. Grievant's explanation that the time frame for his grievance did not begin to run until he discussed the situation with Mr. Acker is without merit. Grievant became aware of the grievable event on December 2, 1997, when he received the E-mail informing him that Mr. Galik had receivedthe position he wanted. A discussion with Mr. Acker would not and did not change this fact. Indeed, if Grievant had filed his grievance on December 17, 1997, after his meeting with Mr. Acker, it would have been timely filed. (See footnote 10)

As for Grievant's argument that he did not know the grievance procedure had changed, this argument is incredible. Grievant was at the meeting where the State procedure was adopted, and he received the Handbook that confirmed this fact several months later. He was a supervisor of seven employees, and as such he is charged with having a basic understanding of the grievance procedure. Further, although he does not

specifically remember receiving a copy of either the Supervisor's or Employee's Guide to the Grievance Procedure in 1993, Grievant also did not dispute that these booklets were given to all the staff. As for the allegation that Ms. Mitchell informed him that the 1987 Handbook was the proper one to follow, this statement was not confirmed by Ms. Mitchell. She does not remember a conversation about the Handbook, and the Handbook in her possession was the most recent one.

Although the fact Grievant did not receive a grievance form the first time he requested it is somewhat troublesome, it is not dispositive of the timeliness issue. All Grievant had to do was to return to Mr. Meador's office, request the form, and it would have been given to him. In fact, this is exactly what happened when Grievant returned for further discussion on December 9, 1997. Grievant requested the form from Mr. Meador, and it was given to him. It is noted a filing on December 9, 1997, or even several days later, would have been considered timely. Although not raised clearly by the parties, the issue of whether the timelines should have been tolled until Mr. Meador discussed possible modifications with Mr. Acker needs some discussion. The standard on this issue has been whether a grievant has made "a good faith, diligent effort to resolve a grievable matter" and has "relie[d] in good faith upon the representations of [their supervisor] that the matter will be rectified." Blevins v. Fayette County Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987); Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). Subsequent to these decisions, the West Virginia Supreme Court stated "equitable estoppel is available only if the employees otherwise untimely filing was the result 'either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" Indep. Fire Co. v. Human Rights Comm'n, 376 S.E.2d 612, 615 (W. Va. 1988) (citing Mull v. Arco Durethene Plastics, Inc. 784 F.2d 284, 291 (7th Cir. 1986) citing Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982)); See also Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d

843, 846 (W. Va. 1989).

The evidence in this case is insufficient to support a finding of equitable estoppel. Mr. Meador only indicated he would seek some modifications that might make the decision more palatable to Grievant. He never indicated he would ask to have the decision reversed or that "the matter w[ould]l be rectified." Blevins, supra. None of Mr. Meador's actions would have or should have caused Grievant to delay filing.

Although it is always preferable to decide a case on the merits, such a decision is not allowed in an instance such as this where a respondent has raised and proven the affirmative defense of untimely filing. Grievant did not meet the mandated timelines, andthe undersigned Administrative Law Judge cannot rule on the issue raised by this grievance.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. 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).

3. W. Va. Code § 29-6A-4 provides 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.

4. Respondent proved Grievant did not file his grievance within the time frames mandated by W. Va. Code § 29-6A-4. 5. Grievant did not file present a reason that would excuse his failure to file his grievance within the specified timelines. It was clear from the evidence that Grievant knew or should have known that his 1987 Handbook was out of date, the EBA grievance was controlled by the state grievance procedure, and that he did not file any grievance until December 22, 1997.

6. The defense of equitable estoppel is not available to Grievant because there was no "deliberate design" or other action by his employer that would reasonably cause him to delay filing his grievance. Indep. Fire Co. v. Human Rights Comm'n, 376 S.E.2d 612, 615 (W. Va. 1988) (citing Mull v. Arco Durethene Plastics, Inc. 784 F.2d 284, 291 (7th Cir. 1986) citing Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982)); See also Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843, 846 (W. Va. 1989).

Accordingly, the 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 29, 1998

Footnote: 1

The undersigned Administrative Law Judge asked Grievant clarify his grievance and the requested relief at Level IV, as these issues were somewhat unclear from his statement of grievance. The statement above reflects this clarification. Grievant's original grievance speaks at length about EBA's failure to follow the EEO requirements in hiring procedures, and Grievant discussed this issue during the Level IV hearing. Grievant appeared confused about the grievance procedure and apparently believed that all his EEO issues would or should be addressed during his grievance. The undersigned Administrative Law Judge explained that though at times the Grievance Board did address issues that were typical EEO issues, the Grievance Board was a State agency and our mandate was to deal with the issues discussed in the grievance statute.

Additionally, it was unclear exactly what EEO issues Grievant believed related to this grievance, as Grievant did not specify any EEO issues in his statement of grievance. Grievant is a white male protesting the selection of another male to perform additional duties. Further, although the age of both Grievant and the chosen employee were not revealed, since both were hired on a permanent basis in 1972, it is assumed they are both over the age of forty.

Footnote: 2

At Level IV, Respondent was represented by Senior Assistant Attorney General Kelli Talbott, and Grievant was pro se.

Footnote: 3

Mr. Galik was appointed as Grievant's supervisor on February 26, 1998.

Footnote: 4

This apparent confusion about where the forms were placed arose from a recent move. Ms. Mitchell had placed the forms in Mr. Meador's office, and he thought they were still in her office.

Footnote: 5

Although Grievant discussed the 1987 procedure at length, neither this procedure nor a copy of this Handbook was submitted into evidence, even after the undersigned Administrative Law Judge pointed out to the Grievant there was no copy of this procedure in the record.

Footnote: 6

It is unclear if Grievant received the separate guide for supervisors.

Footnote: 7

The parties stipulated that all EBA employees are classified-exempt.

Footnote: 8

The issue of the effect of classified-exempt status need not be addressed by this decision due to the ruling on timeliness. However, this matter was discussed in some detail in Wendling v. W. Va. Real Estate Comm'n, Docket No. 95-REC-514 (May 16, 1996). Wendling states "the provisions of the legislative rule promulgated by the Division of Personnel dealing with applications and examinations and appointments and promotions do not govern [the] actions of a [classified-exempt agency]. This decision also notes the Real Estate Commission had not adopted formal policies for filling positions. EBA has adopted a policy for filling newly created positions, but it did not appear to apply to this situation where additional duties are assigned to an employee with his consent.

Footnote: 9

As revealed in the Findings on Fact, the undersigned Administrative Law Judge did not find this to be the case.

Footnote: 10

See Finding of Fact 11.