JONATHAN N. HARVEY,

Grievant,

v. **Docket No. 96-BEP-484**

BUREAU OF EMPLOYMENT PROGRAMS,
WORKERS' COMPENSATION DIVISION,

and

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,
DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This is a grievance by Jonathan N. Harvey (Grievant), filed pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that, upon his reclassification as a Deputy Claims Manager on April 1, 1996, Respondent Bureau of Employment Programs, Workers' Compensation Division (BEP), should have awarded him compensation retroactive to October 12, 1994, when he first began performing the duties of the Deputy Claims Manager classification. This grievance was initiated at Level I on April 17, 1996. The grievance was denied at Levels I and II, and Grievant appealed to Level III on May 13, 1996. The West Virginia Department of Administration, Division of Personnel (DOP), became a party at Level III, and an evidentiary hearing was conducted on July 29, 1996. BEP Commissioner Andy Richardson denied the grievance at Level III on October 30, 1996. Grievant appealed toLevel IV on November 13, 1996. Thereafter, this matter was continued to allow Grievant an opportunity to obtain legal representation. Ultimately, a Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on December 8, 1997. This matter became mature for decision upon receipt of timely

post-hearing arguments on January 26, 1998.

There is no significant dispute regarding the facts in this matter. Accordingly, the following Findings of Fact are made based upon the record created at Levels III and IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent Bureau of Employment Programs (BEP) in its Workers' Compensation Division.

2. In September 1994, Grievant volunteered to work on a prototype claims team. Grievant was selected to participate in this project.

3. On October 12, 1994, Grievant completed the Claims Management Training Course and was assigned to a prototype claims team, Claims Management Team IV under the supervision of Sally Edge, Team Leader. See G Ex 1 at L III. Grievant was subsequently advised by Ms. Edge that he would "be taken care of" in terms of increased compensation when new classifications for the team positions were established by the West Virginia Division of Personnel (DOP).

4. Grievant began working for BEP in September 1991. At the time he was accepted for the prototype claims team project he was classified as an Office Assistant II in Pay Grade 4. Each team member was paid in accordance with the classification they held at the time they joined the prototype claims team. 5. On July 19, 1995, Grievant attended a meeting with other claims team members and Team Leaders where employees were trained on completing the Position Description forms needed by DOP to evaluate their jobs for possible reclassification. Lowell Basford, DOP's Deputy Director for Classification and Compensation, conducted that training. See DOP Ex 1 & G Ex 1 at L III. During the course of the meeting, Mr. Basford informed those in attendance, including Grievant, in the presence of BEP's Personnel Administrator, Thomas Rardin, that retroactive pay would not be authorized in the reclassification process.

6. Subsequent to the DOP training session described in Finding of Fact Number 5, Ms. Edge told Grievant that she and other BEP managers would continue to "fight" DOP for retroactive pay for prototype claims team personnel who were working "out of classification."

7. In August 1995, Grievant elected not to apply for posted vacancies of Medical Claims Analyst I in Pay Grade 8, expecting that he would receive additional compensation upon reclassification. See G Ex 1 at L III. Ms. Edge, Grievant's Team Leader, and Steve White, her immediate supervisor, discouraged claims team members from applying for these vacancies,

suggesting that prototype claims team employees would not be selected for the positions.

8. On March 21, 1996, the West Virginia Division of Personnel established a new classification entitled "Deputy Claims Manager." The Deputy Claims Manager classification became effective on April 1, 1996.

9. Grievant was reclassified to the newly-created classification of Deputy Claims Manager in Pay Grade 11 on April 1, 1996. See DOP Ex 2 at L III. 10. Since October 12, 1994, Grievant has performed the essential duties of the newly-created classification of Deputy Claims Manager.

11. DOP's regulations governing reclassification do not provide for retroactive compensation when an employee is reclassified to a higher pay grade. See Administrative Rule of the W. Va. Div. of Personnel, 143 C.S.R. 1 § 5.04 (1995).

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); 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). See W. Va. Code § 29-6A-6.

Initially, BEP and DOP contend this grievance is untimely because 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. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate 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 StateCollege, 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 time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v.

Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). In this particular matter, Grievant began performing duties outside his assigned classification of Office Assistant II on October 12, 1994. It is apparent that Grievant and his co-workers were well aware that they were not being compensated for the duties they were then performing, as this matter was the subject of documented discussion at numerous meetings with their BEP managers. (See footnote 1) Further, on July 19, 1995, Grievant attended a meeting regarding DOP's reclassification activity wherein Lowell Basford, DOP Deputy Director for Classification and Compensation, explained that DOP had no intention of making any reclassification of Grievant's position retroactive.

Nonetheless, Grievant's supervisors, particularly Sally Edge, repeatedly told Grievant and his co-workers that they would continue to "fight" DOP for backpay for those employees who had been working "out of classification." In these circumstances, theundersigned is unable to conclude that Grievant was unequivocally informed that BEP would not award retroactive compensation upon eventual reclassification of his position to a classification title in a higher pay grade. See Rose, supra; Naylor, supra. Accordingly, the limited issue of whether Grievant should receive retroactive compensation at the higher pay grade was timely grieved.

Turning to the merits of this grievance, Grievant, an Office Assistant II, was selected for a prototype claims team from a group of employees who volunteered to work in this new approach to claims processing. Grievant completed a Claims Management Training Course on October 12, 1994, and began working as a member of a prototype claims team. Grievant continued to work in this capacity until he was reclassified from Office Assistant II to Deputy Claims Manager on April 1, 1996.

Grievant understood that he would be compensated as an Office Assistant II until a new classification was approved and established for his role on the claims team. He attended a meeting in July 1995 where Lowell Basford, the Deputy Director of the Division of Personnel for Classification and Compensation told the employees who were awaiting reclassification that, whenever reclassification took place, they would not receive retroactive compensation for working in a higher classification. Nonetheless, Grievant's immediate supervisor, Sally Edge, continued to indicate that she and other Team Leaders would continue to seek approval for retroactive compensation.

This Grievance Board has previously determined that an employee who voluntarily "fills in" for an employee in a higher classification without a guarantee of additional pay may not later successfully claim that he should have received the pay of the higher classification. Freeman v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-237 (Dec.26, 1990). Accord, Deel v. Bureau of Employment Programs, Docket No. 96-BEP-361 (Mar. 11, 1997); Spencer v. W. Va. Dept. of Health & Human Resources, Docket No. 93- HHR-523 (Oct. 28, 1994); Thornton v. W. Va. Workers' Compensation Fund, Docket No. 90-WCF-077 (Dec. 26, 1990). See also Gregg v. Bd. of Trustees, Docket No. 94-MBOT- 863 (Dec. 18, 1996). Grievant's situation in the instant matter is indistinguishable from the circumstances in Freeman, supra, and the above-cited cases which followed Freeman.

Grievant voluntarily began working on a prototype claims team with full knowledge that, once he completed the initial training course, he was no longer working in his assigned classification of Office Assistant II. Grievant had a reasonable expectation that he would eventually be reclassified to a new classification title at a higher pay grade, although there was no guarantee what that pay grade would be. There was likewise no guarantee how long the reclassification process would take, although it obviously took longer than Grievant had anticipated. Certainly Ms. Edge, who similarly wanted to receive retroactive compensation upon being reclassified to a higher pay grade as a District Manager, had no authority to bind either BEP or DOP to awarding a retroactive pay raise. See Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985); Cunningham v. County Court of Wood County, 148 W. Va. 303, 134 S.E.2d 725 (1964). Grievant ultimately received what he had a reasonable expectation of receiving: he was reclassified from Office Assistant II in Pay Grade 4 to Deputy Claims Manager in Pay Grade 11.

It is unfortunate that the process of establishing a new classification for the work Grievant was performing was not completed in a shorter time frame. Nonetheless, there is no evidence that any of the parties prolonged the reclassification process simply to take advantage of Grievant, or to avoid having to pay a higher salary to those employeesassigned to prototype claims teams. Indeed, because this was an innovative approach resulting in a completely new series of classifications, BEP and DEP were proceeding deliberately and cautiously with developing, approving and implementing the new classification scheme. Grievant has not established that either BEP or DOP violated any statute, policy, rule, regulation, or written agreement within the meaning of W. Va. Code § 29-6A-2(i)

through their conduct in this matter. Likewise, Grievant has failed to demonstrate that the conduct of BEP and DOP was arbitrary and capricious in the circumstances presented. See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the 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); 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. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997); 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. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. An employee who voluntarily agrees to work outside his current classification in a prototype position which is ultimately awarded a higher classification, may not later successfully claim that he should have received the pay of the higher classification for the time he worked in the new classification. See Deel v. Bureau of Employment Programs, Docket No. 96-BEP-361 (Mar. 11, 1997); Spencer v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-523 (Oct. 28,

1994); Freeman v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-237 (Dec. 26, 1990); Thornton v. W. Va. Workers' Compensation Fund, Docket No. 90-WCF-077 (Dec. 26, 1990).

6. Grievant failed to prove that the West Virginia Bureau of Employment Programs or the West Virginia Division of Personnel violated any rules, policy, regulation, or statute when it reclassified him to the newly-created classification of Deputy Claims Manager in April 1996 without awarding back pay to October 1994, when he beganperforming the essential duties of the new classification in the context of a prototype claim processing program. See Deel, supra; Freeman, supra.

Accordingly, this 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 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: March 6, 1998

Footnote: 1

Any claim that Grievant was working out of his proper classification would be time- barred under W. Va. Code § 29-6A-4(a), except for the ten-day period immediately preceding the filing of his grievance.