ELIZABETH A. THEWES and

ROSS H. THOMPSON,

Grievants,

v.

DOCKET NO. 02-HHR-366

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievants, Elizabeth A. Thewes and Ross H. Thompson, filed this grievance against their employer, the West Virginia Department of Health and Human Resources/Pinecrest Hospital ("DHHR") on August 20, 2001:

> As Administrative Services Manager I's, we have been discriminated against and treated disparately as opposed to other managers, supervisors, professionals and other staff within this organization, which has adversely impacted upon various arenas of our employment with Pinecrest Hospital.
>
> Relief sought: To be made whole in every way, including the right to fair and equal treatment in all aspects of our employment to fulfill our job duties and responsibilities as Administrative Services Manager I's.

The grievance was denied at level two by Administrator Thomas McGraw, and following a level three hearing on August 29, 2002, by Grievance Evaluator David M. Adkins on November 4, 2002. Grievants appealed to level four on November 8, 2002, and following several continuances for good cause, the parties agreed to submit this matter on the record developed at the lower levels. This matter became mature on August 22, 2003,the deadline for the parties' submission of proposed

findings of fact and conclusions of law. Grievants were represented at level three by John Wooten, Esq., and at level four by John F. Parkulo, Esq., Anderson, Parkulo, Stansbury & Associates, L.C., and DHHR was represented by B. Allen Campbell, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Grievants' Exhibits

Ex. 1 -

Pinecrest Hospital Exempt Employee List - July 2000.

Ex. 2 -

DHHR Policy Memorandum 2102, Hours of Work/Overtime (Pilot Policy).

Ex. 3 -

Pinecrest Hospital Administrative/Nursing Call Schedule, June 2000-March 2001.

Ex. 4 -

November 17, 2000 memorandum from Betty King to DHHR Representative- Office of Personnel Services; Personnel Action Form for Leah A. Taylor.

Ex. 5 -

November 17, 2000 letter from Elizabeth A. Thewes to Leah T. Taylor.

Ex. 6 -

November 6, 2000 Department Head Meeting minutes.

Ex. 7 -

DHHR Average Salary vs. WV State Government Average Salary by Classification, August 2, 1999.

Ex. 8 -

Administrative Services Manager Salaries Prior to 7/1/02 within DHHR.

Ex. 9 -

DHHR Policy Memorandum 2106, Employee Selection.

Ex. 10 -

July 21, 2000 letter from Elizabeth A. Thewes to Carolyn Robinson; Application for Examination.

Ex. 11 -

Certified Mail Receipt.

Ex. 12 -

Hospital Administrator I Classification Specification.

Ex. 13 -

October 6, 1998 memorandum from E. R. Eades to All Staff.

Ex. 14 -

W. Va. Division of Personnel Temporary Classification Upgrades Policy, revised June 19, 1997.

Ex. 15 -

May 21, 2002 draft letter from John D. Wooten to Tom McGraw.

Ex. 16 -

9/1/99-8/30/00 Employee Performance Appraisal for Ross H. Thompson.

Ex. 17 -

August 24, 2000 Department Head Meeting Minutes.

Ex. 18 -

Time and Attendance Chart for Ross H. Thompson, 1999-2000.

Ex. 19 -

October 27, 2000 memorandum from Betty King to Ross H. Thompson.

Ex. 20 -

October 16, 2000 handwritten note from Sandy Reitmire to Devona Smith.

DHHR Exhibits

Ex. 1 -

Determination of Administrative Exemption for Elizabeth A. Thewes, dated November 14, 1996.

Ex. 2 -

9/1/99-8/30/00 Employee Performance Appraisal for Ross H. Thompson.

Testimony

Grievants testified in their own behalf, and presented the testimony of Elizabeth Dunlap. DHHR presented the testimony of Thomas H. McGraw.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievants Thewes and Thompson are employed as Administrative Services Managers I (ASMs I) for DHHR, assigned to work for the Bureau for Behavioral Health and Health Facilities at Pinecrest Hospital in Beckley, West Virginia.

2. Grievants are exempt employees. As such, they are not entitled to receive overtime compensation for work performed beyond a 40-hour work week.

3. Some exempt employees at Pinecrest were paid overtime under very limited circumstances. Administrative nurses were paid overtime when they were performing duties outside of their classification for a limited amount of time. Supervisors in the Dietary Department were incorrectly classified as exempt employees and were paid overtime when this error was recognized. Finally, one employee was paid overtime by the Hospital Administrator due to a mistake by the Hospital Administrator. This mistake occurred only one time.

4. Pinecrest's management team rotates on-call duty a week at a time. From June 2000 to March 2001, the breakdown of on-call time was as follows:

Grievant Thewes
7 weeks
Rose
7
weeks

Grievant Thompson

12 weeks
Reitmire
8 weeks

Coenour

1 week
King
7
weeks

Coy

1 week

McCray

1 week

Huffman

2 weeks

G. Ex. 3.

5. When on call, team members are required to wear a beeper, and must stay within the Beckley area.

6. Grievant Thompson received his Performance Appraisal for the time period 9/1/99-8/30/00 on September 26, 2000. Grievant Thompson signed the evaluation without reading it.

7. In November 2000, the Human Resources Manager at Pinecrest resigned. Grievant Thewes was responsible for the Human Resources duties until another Manager was hired. G. Ex. 6. The then-Acting Administrator posted the position, and a candidate was recommended, but the Commissioner decided not to fill the position at that time.

8. Grievant Thewes continued to perform Human Resources duties, and in June 2001, she

decided to post the position, although no one told her to do so. The new Administrator, Thomas McGraw, told her not to fill the position.

9. Later, Mr. McGraw posted the Human Resources position as an Administrative Services Manager III position, and filled it effective May 28, 2002.

10. Grievants are paid less than other Administrative Services Managers I within DHHR, but their pay is within the pay grade for the position. G. Ex. 8.

11. Grievant Thewes applied for the position of Hospital Administrator on July 21, 2000. G. Ex. 10. She never received an acknowledgment of receipt of her application, and was not interviewed for the position. See G. Ex. 9.

12. Grievant Thewes served as Acting Administrator at Pinecrest from September through December 1998. She did not receive a temporary upgrade while serving in this capacity. G. Exs. 13, 14.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievants alleged they have been discriminated against and treated disparately as opposed to other managers, supervisors, professionals, and other staff, as evidenced by the examples set forth in the above Findings of Fact.

W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

(a)

that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24,1996). Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employmentdecision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

DHHR denies it has discriminated against Grievants, or treated them in a disparate manner. DHHR also claims that many of the incidents described by Grievants happened years before the grievance was filed, and are thus untimely, and any relief specific to those incidents should be denied. For example, Grievants' claim they are entitled to back wages for overtime worked from 1996 to 2002. Grievant Thewes claims she is owed $5,659.57, and Grievant Thompson claims back wages of $19,162.74. The grievance was filed in August 2001, and because DHHR raised the timeliness defense at level two, any claim for monetary relief prior to the ten days preceding August 20, 2001, is precluded by statute.

While evidence of the incidents as a whole is relevant and admissible towards proving discrimination and disparate treatment, to the extent Grievants are requesting some dollar amount specific to those incidents, the relief may be barred or limited if the claims are untimely. Therefore, each incident must be analyzed under applicable timeliness law, as well as under the more general discrimination and disparate treatment laws.

1.

Grievants assert that Pinecrest Hospital operated and continues to operate in violation of FLSA and DHHR overtime policy as a result of the discrepancy in the application of, and rulings on, decisions regarding the overtime pay which is received by other exempt employees.

Grievants, using their time sheets from 1996 through 2002, tallied up the amount of “overtime” they worked, and came up with a total of 573.50 hours for Grievant Thompson, equaling $19,162.74, and 208.25 hours for Grievant Thewes, equaling $5,565.70. Clearly, any award should Grievants prevail on this claim would limited to tendays prior to the filing of the grievance, as Grievants undoubtedly knew they were working overtime and not being paid for it. Therefore, with respect to any claim of overtime for the period prior to ten days before filing the grievance, those claims are untimely. Moreover, the FLSA has its own statute of limitations for overtime claims. Pursuant to 29 U.S.C. § 225

> [a]ny action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*), the Walsh-Healey Act (41 U.S.C. 35 *et seq.*), or the Bacon-Davis Act (40 U.S.C. 276a *et seq.*), - (a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

See Sarin v. W. Va. Dept. of Envtl. Protection, Docket No. 02-DEP-326 (Jan. 13, 2002).

With respect to their timely claims of overtime, Grievants claim they are entitled to overtime even though they are exempt because Pinecrest has paid other exempt employees overtime, resulting in discrimination against Grievants.

Grievants presented no tangible evidence showing Pinecrest paid any exempt employees overtime. Grievants admit they have no first-hand knowledge or records of exempt employees receiving overtime, but make their assertions based upon other employees' assertions they were paid overtime.

Mr. McGraw, Pinecrest's Administrator, testified he knew of only a few instances where exempt employees were paid overtime. On one occasion, exempt Administrative Nurses were paid overtime when they were allowed to work out of classification in a non- exempt capacity as floor nurses because of a coverage crisis. Mr. McGraw testified thatprior to approving this overtime he consulted with DHHR's Director of the Office of Personnel Services, Michael McCabe. Mr. McGraw was also aware that some supervisors in the Dietary Department were paid overtime. As a result of an EEO investigation, Pinecrest discovered these employees were not correctly classified as exempt

employees and should have been paid overtime as non-exempt employees. Pinecrest has corrected this error, and paid these employees all overtime due. The only other incident of which Mr. McGraw was aware was a mistake he attributed to himself. He posted a memo seeking a door monitor, and the memo offered overtime to any employee who volunteered. He intended for this position to be filled by a non-exempt employee. However, Mr. McGraw discovered that an exempt employee had been performing these duties, and out of fairness, he felt he should pay the individual for the overtime worked. Subsequently, Mr. McGraw has specified that only non-exempt employees are eligible to perform this task.

The overtime paid to the nurses was clearly part of a legitimate, non-discriminatory action on the part of Pinecrest. It had to have floor coverage for its patients, or risk losing its license. Grievants are not nurses, nor does their absence create a crisis situation in the hospital. With respect to the nurses, Grievants have failed to establish a prima facie case of discrimination.

The overtime paid to the Dietary supervisors was to make up for the error made in designating them exempt employees in the first place. Grievants do not dispute that they are exempt employees, and thus, there is no comparison to the Dietary supervisors' situation and the Grievants. Again, Grievants have failed to establish a prima facie case of discrimination. Finally, with regard to the one mistake made by Mr. McGraw, that one mistake alone does not entitle Grievants to overtime compensation. Mistakes made by employers do not usually entitle a grievant to relief, even in cases where an employer refuses to grant a benefit to an employee that was granted to another employee in error. *See* Walker v. W. Va. Dept. of Transp., Docket No. 01-DOH-450 (Sept. 19, 2001); White v. W. Va. Dept. of Transp., Docket No. 00-DOH-313D (Jan. 17, 2001).

With regard to overtime in general, Grievants have failed to establish a prima facie case of discrimination or disparate treatment, or entitlement to overtime pay.

2.

> Grievants assert Pinecrest Hospital has failed to implement proper, adequate, fair and equitable policy procedures regarding Administrative Call and the assignment of Managers to Administrative Call. More specifically, Pinecrest Hospital made it a general practice to exclude specific managers from taking Administrative Call during a period of time in the year 2000 and 2001.

Grievants, along with other members of Pinecrest management, are required to be on call on a rotating basis for a week at a time. While on call, the managers are required to carry beepers, and

are basically restricted to the general Beckley area. Grievants contend they were required to be on call more than any other managers, and averaged on call duty 9 weeks per year from 1993 through 2001. Grievants want to be compensated for the 40 hours per week they are on call, multiplied by 9 weeks per year, or 1,240 hours. Additionally, Grievants claim that during 2000-2001 they were required to be on call even more than the required rotation, or once every month as opposed to once every two months.

Grievants' testimony is basically that they were the only ones performing on call duty from June 2000 through March 2001. Grievants' exhibit shows that some managersperformed on call duty more than others; indeed, some managers only performed on call duty once during that entire time period. However, Grievants' own exhibit shows that they were not the only ones performing on call duty during that time. Grievant Thewes performed on call duty 7 times, as did Mr. Rose and Mr. King. Ms. Reitmire performed on call duty 8 times during that time period. Therefore, Grievant Thewes has failed to demonstrate she performed on call duty any more than any other employee. Grievant Thompson performed on call duty 12 times during the time period June 2000 through March 2001.

There is no written policy regarding how Administrative Call should be scheduled. Ms. Thewes testified she had never complained to her supervisor, Mr. McGraw, about the on call schedule. Mr. Thompson did not testify about the on call schedule at all. Ms. Thewes did admit that since Mr. McGraw became Administrator, the on call schedule seemed to be more fair than it was. Despite Grievants' belief, however, they have produced no evidence to show the schedule was unfair, and they certainly have failed to prove any entitlement to compensation for on call duty. Indeed, Grievants failed to even show they ever had to work while performing on call duty. Merely being restricted to the Beckley area by the beeper requirement does not constitute “work” for which an employee must be paid, as long as the employee is free to pursue her own pursuits while on call. *See* Wingfield v. W. Va. Dept. of Health and Human Resources, Docket No. 02-HHR-031 (June 27, 2002).

Grievants have failed to establish a prima facie case of discrimination with regard to the Administrative Call requirement. 3.

Grievant Thompson asserts that Pinecrest Hospital failed to provide him with an adequate and fair performance appraisal for the time period ending 8/31/00.

For the time period 9/30/99 through 8/31/00, Grievant Thompson was evaluated by someone

other than his immediate supervisor. He received an overall rating of 2.0, or meets expectations. Grievant Thompson testified he had perfect attendance during that time period, and according to office guidelines, employees with 0-5 absences shall get an exceeds expectations rating in the attendance category. Grievant Thompson received a “meets expections” rating in that category. He contends that, had he been correctly rated as “exceeds,” he would have received an overall rating of “exceeds expectations.” Consequently, he would have been entitled a higher salary increase.

There does not seem to be a dispute that Grievant was given an incorrect score in the attendance category with respect to absences. However, Grievant admits that he did not read his evaluation when he signed it. Moreover, he did not raise the issue at the time of his evaluation, and the statutory time period has passed for grieving the evaluation.

With regard to the claim of discrimination, Grievant Thompson alleges another employee received an incorrect numerical rating on his evaluation which was corrected even though the time period for filing a grievance had passed. Grievant claims he should be given this same consideration. Other than Grievant Thompson's own testimony, no evidence was presented to verify this claim. Mere allegations by themselves are not enough to satisfy the burden of proving a claim by a preponderance of the evidence. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Lincoln County Bd. of Educ., Docket No. 00-22-081 (June 28, 2000); Baker v. Bd. of Trustees, Docket No. 97 BOT-359 (Apr. 30, 1998). Therefore, Grievant Thompson has failed to establish a prima facie case of discrimination with regard to his evaluation.

4.

Pinecrest purposefully and intentionally failed to provide Grievant Thewes with the adequate resources needed to fulfill her job responsibilities as the Director of Administrative Services.

Grievant Thewes contends Pinecrest interfered with her ability to effectively perform her job duties when it did not allow her to hire someone into the Human Resources position from November 2000 to May 28, 2002. Grievant requests compensation for this time period when she had to perform the Human Resources duties in addition to her own duties. Grievant claims she has been discriminated against because other managers and supervisors were given authority and resources to select staff and fill vacancies.

Grievant has failed to establish a prima facie case of discrimination. She did not identify any other

managers or supervisors who were permitted to select staff and fill vacancies while she was not. Moreover, she has failed to demonstrate by a preponderance of the evidence that said failure interfered with her abilities to effectively perform her job duties. The Human Resources position reported directly to Grievant, and as such, Grievant was responsible for the work performed by this position while the position remained vacant. Grievant speculated that she could be given an unsatisfactory evaluation if she did not fulfill all of her job duties, but did not introduce any evidence to show that she could, indeed, get an unsatisfactory evaluation, or that she did not succeed in performing all the job duties assigned to her.

While Grievant clearly believes there was a need to hire someone into the Human Resources position in November of 2000, the administration's decision not to fill the position at that time was not unlawful, nor has she shown it was arbitrary and capricious. 5.

> Pinecrest Hospital intentionally and continuously circumvent Grievants' management responsibilities, including but not limited to, excluding Grievants from the decision making process which is vital to the effective management of the Grievants' designated areas.

This claim is similar to the complaint in No. 4, above, in that both Grievants contend management decisions are made regarding their areas of authority without their input, or in contradiction to their orders. Grievants gave some examples of Mr. McGraw directing some work to be done which would normally fall within their areas of authority, but failed to demonstrate how this adversely affected their ability to perform their duties. Grievants speculated it could adversely affect their evaluations if something was done wrong which they would ultimately be held responsible for, however, neither Grievant has received an unsatisfactory evaluation. Grievants claims are speculative regarding their evaluations, and while they may disagree with the administration's decisions, this does not make those decisions discriminatory or arbitrary and capricious. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). See Ball v. W. Va. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Collins v. W. Va. Dept. of Transp., Docket No. 02-DOH-206 (Sept. 20, 2002); Rice v. W. Va. Dept. of Transp., Docket No. 96-DOH-247 (Aug. 29, 1997).

6.

Pinecrest Hospital failed to provide Grievants with equal pay regarding their positions as Administrative Services Managers.

Grievants contend they are not being paid the same as other Administrative Services Managers I within DHHR, and the difference between their salaries and the next highest Administrative Services Manager salary is approximately $10,000. The conceptof “equal pay for equal work” is embraced by W. Va. Code § 29-6-10. See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). It is not discriminatory for employees in the same classification to be paid different salaries. Moreover, Grievants' own exhibit shows that the individuals to whom Grievants compare themselves are employed in other state hospitals and agencies, and therefore are not necessarily similarly situated to Grievants or performing like job duties and responsibilities. Grievants' evidence shows they are being paid within the pay grade for Administrative Services Manager I, and therefore, there have been no violations with respect to their salaries.

7.

Pinecrest Hospital violated the DHHR policy regarding employee selection when it failed to acknowledge and/or consider Grievant Thewes' application for Hospital Administrator.

Grievant Thewes applied for the Hospital Administrator position at Pinecrest in July 2000. In late 2000, Mr. McGraw was selected as Administrator, and he began his duties in January 2001. Grievant did not file her complaint on this matter until August 2001, contending Pinecrest violated DHHR Policy Memorandum 2106, Employee Selection,when it did not acknowledge and/or consider her application for the position. This claim is clearly untimely, and the merits of the claim will not be discussed.

However, Grievant claims this incident is merely one more example of the overall pattern of discrimination against her at Pinecrest. Grievant has failed to establish a prima facie case of discrimination, however. She has failed to show there were other employees in her same position whose applications were acknowledged, or indeed, that she is entitled to any relief even if there were. Moreover, simply alleging that another employee was hired for a position does not constitute discrimination as contemplated by the Grievance statute definition. Grievant has failed to establish discrimination existed with regard to the selection process for Hospital Administrator.

8.

Pinecrest Hospital failed to provide Grievant Thewes with a temporary upgrade when she acted as Hospital Administrator for the period of time between October and December 1998.

Grievant served as Acting Administrator at Pinecrest from October through December 1998, and did not receive a temporary upgrade in salary while serving in that position. Grievant did not file her complaint on this matter until August 2001, and her complaint is clearly well outside the ten-day time period for filing a grievance. As to her claim of discrimination, Grievant Thewes asserts that other employees have received temporary upgrades while performing duties outside their classifications, but failed to identify any of these individuals, or prove they indeed did receive temporary upgrades. Grievant Thewes has failed to meet her burden of proof on this claim.

9.

Overall Pattern of Discrimination.

Grievants have failed to establish a pattern of discrimination or disparate treatment. They have enumerated specific instances in which they feel they have been wronged, butmany are outside the statutory time frame for filing a grievance. Grievants have presented no evidence of any pattern of discrimination. The events cited occurred over many years and under several different administrators of the facility. In almost all instances, Grievants are not similarly situated to the employees to whom they compare themselves. In the few instances in which they are similarly situated, DHHR has presented a legitimate, non- discriminatory reason for its action.

Even assuming, *arguendo*, that Grievants were able to establish a pattern of discrimination, they

are not entitled to the monetary relief requested. The majority of their claims fall outside the ten day statute of limitations. DHHR raised timeliness as an affirmative defense at level two. Therefore, all of Grievants' claims for monetary relief would be limited to ten days prior to the time they filed their grievance, and most, if not all of cited incidents occurred well before that ten day time period.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case ofdiscrimination by a preponderance of the evidence. In order to meet this burden, a grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see

Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

3. 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. 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 his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 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). 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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

5. 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)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; 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).

6. Mistakes made by employers do not usually entitle a grievant to relief, even in cases where an employer refuses to grant a benefit to an employee that was granted to another employee in error. *See* Walker v. W. Va. Dept. of Transp., Docket No. 01-DOH- 450 (Sept. 19, 2001); White v. W. Va. Dept. of Transp., Docket No. 00-DOH-313D (Jan. 17, 2001).

7. Merely being restricted to an area by a beeper requirement does not constitute “work” for which an employee must be paid, as long as the employee is free to pursue her own pursuits while on call. *See* Wingfield v. W. Va. Dept. of Health and Human Resources, Docket No. 02-HHR-031 (June 27, 2002).

8. Mere allegations by themselves are not enough to satisfy the burden of proving a claim by a preponderance of the evidence. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Lincoln County Bd. ofEduc., Docket No. 00-22-081 (June 28, 2000);

Baker v. Bd. of Trustees, Docket No. 97 BOT-359 (Apr. 30, 1998).

9. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). See Ball v. W. Va. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Collins v. W. Va. Dept. of Transp., Docket No. 02-DOH-206 (Sept. 20, 2002); Rice v. W. Va. Dept. of Transp., Docket No. 96- DOH-247 (Aug. 29, 1997).

10. The concept of “equal pay for equal work” is embraced by W. Va. Code § 29- 6-10. See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH- 555 (Mar. 20, 1995).

11. DHHR has proven that most, if not all, of Grievants' claims are untimely filed.

12. Grievants have failed to prove any single instance, or overall pattern, of discrimination.

Accordingly, this grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 18, 2003