JOHN ROSSELL,

Grievant,

v. **Docket No. 02-DOF-218**

WEST VIRGINIA DIVISION OF FORESTRY,

Respondent.

DECISION

John Rossell ("Grievant") initiated this proceeding on January 24, 2002. There were initially six separate, unrelated issues included in this grievance. On January 25, 2002, Grievant's immediate supervisor determined that he did not have the authority to provide relief. The grievances were denied at level two on February 19, 2002. A level three hearing was conducted on May 2, 2002, and March 22, 2002. In a level three decision dated July 15, 2002, relief was granted on three issues, one grievance was withdrawn, and the remaining grievances were denied. Grievant appealed to level four, and a hearing was conducted in the Grievance Board's office in Elkins, West Virginia, on January 31, 2003, and March 12, 2003. Grievant was represented by counsel, Tony Tatano, and Respondent was represented by Shirley Skaggs, Assistant Attorney General. After several lengthy extensions for filing post-hearing submissions were granted, this matter became mature for decision on September 5, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Division of Forestry ("DOF") as a Forester I. 2. On an unspecified date in 2000, DOF assigned "team leader" responsibilities to Barbara Breshock, who was classified as a Forester II. In addition to her previous duties as a Forester II, Ms. Breshock became the "contact person" for all state lands management, relaying information between DOF administration and foresters, and was given some decision-making authority. She remained in her

previously held position while performing these additional duties.

3. After Ms. Breshock performed team leader duties for a year, DOF administrators determined that the system was a success, so it created a new Forester III position which would be entirely responsible for all DOF activities in state forests and public lands. It included more administrative duties than Ms. Breshock's team leader position. This was an administrative position located in the Charleston office, as reflected on the posting, and the applicants were advised of the position's location during their interviews. Ms. Breshock was selected to fill the position, but was allowed to remain in her local district office.

4. Following the level three decision, which determined that the Forester III position should be reposted, DOF complied with that order. The position was posted in late March 2003, eliminating the requirement that the position be physically located in Charleston. Ms. Breshock was the only internal applicant, and she was appointed to the position on April 16, 2003.

5. In 1998, DOF adopted a "mid-point" pay raise policy, the objective of which is to put new employees on a salary "fast track." Because of competition with private industry, DOF implemented a practice of granting higher pay raises to new employees, with the objective of getting their salaries to the mid-point of their pay range within their first fiveyears of employment. These raises were given to new employees at DOF who did not have disciplinary issues or unfavorable evaluations. Any leftover funds were used to give older employees raises.

6. The Division of Personnel ("DOP") approved DOF's mid-point pay raise policy. DOP also uses this type of system, which first prioritizes employees according to performance, then places them in categories of pay raise amounts, with the newer employees receiving the highest raises until they reach the mid-point.

7. Grievant has not received a merit increase since 2000.

8. The new employees who have received salary increases pursuant to the mid- point system were all younger than Grievant, who is 40 years old.

9. The performance evaluations of the new employees who received salary increases were not introduced as evidence in this proceeding.

10. In 1990, DOF adopted an overtime pay policy, which designates Forester I as a non-exempt position which works a fluctuating workweek. The fluctuating workweek system applies to employees who are paid their full salary, regardless of whether they actually work 40 hours each

workweek. Under this system, overtime pay is granted pursuant to a formula and coefficient table, based upon the actual number of hours worked. These employees do not receive the traditional time and one half rate of pay for overtime hours.

11. Grievant and other Forester Is are required to take annual leave if they do not actually work forty hours in any given week. They do not work a fluctuating workweek.

12. DOF uses a database system for what it calls "the fire report." The fire report is a system for reporting forest fires and the personnel involved in eliminating them. Thedatabase is available to all DOF employees statewide and, prior to this grievance, contained the social security numbers and birthdates of numerous DOF employees, including Grievant. The purpose of including this information in the report is unknown. The information is necessary for other individuals included in the report, such as local firefighters, who receive compensation from DOF for their work.

13. As a result of this grievance, new software was created, which substitutes an identification number for all DOF employees in place of the previously used social security number. The software was distributed to all DOF offices, with instructions to install it on all computers using the fire report, and this was certified in writing by all field offices by May 7, 2003.

14. Grievant's personal information had not been misused by any individual as of the date of the level four hearing in this matter.

15. At the beginning of the level four hearing in this matter, Grievant withdrew his claim regarding the lateral transfer of another employee, Roger Ozburn. (See footnote 1)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va.Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

___Regarding the numerous issues Grievant has raised, Respondent contends that they are all either untimely, or no further relief can be granted. W. Va. Code §29-6A-4(a) provides that a level one grievance 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 . . . ..

Timeliness is an affirmative defense, and the burden is upon the party asserting the grievance was not timely filed to prove that defense by a preponderance of the evidence. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). Respondent challenged the timeliness of Grievant's claims initially at level two. Each of Grievant's claims will be addressed separately.

The Breshock Position

Grievant made two allegations concerning Ms. Breshock's position. First, he contends that her team leader position was a new position which should have been posted, and, second, he challenges DOF's failure to tell other applicants for the Forester III position that they would not have to work in Charleston if they received the position. Obviously, DOF's reposting of the position this year, with the clarification regarding the work location, is all the relief to which Grievant is entitled regarding that position.

As to the alleged requirement that Ms. Breshock's team leader position be posted, this grievance is clearly untimely. She was performing those duties in 2000, Grievant admittedly knew about it, and he did not file this grievance until January of 2002. Accordingly, this claim is barred because of its untimeliness. **Mid-point Pay Raise Policy**

Grievant contends that DOF's pay raise policy has unfairly deprived him of salary increases to which he was entitled, and that it discriminates against him because of his age. DOP's Administrative Rule states in § 5.9 (2003) that "salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." See Cogar v. W. Va. Dep't of Transp., Docket No. 01-DOH-520 (Dec. 20, 2001); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

___As noted by the level three hearing evaluator, it appears that Respondent's mid- point raise policy fails to first consider performance as a basis for merit increases. Although Lowell Basford, Assistant Director of DOP, testified that this system is an accepted mechanism for fast-tracking new employees' salaries to make them competitive, he was also quite clear that all raises must be based upon performance first and foremost. It appears that DOF's system gives the salary increases to new employees first, then gives leftover funds to older employees as merit increases. This clearly violates DOP's rule. As Mr. Basford explained, DOP first places the employees with the best evaluations on a grid, including old and new employees, then the increases are divided according to their longevity, giving the new employees the bigger increases to get them to mid-point. The testimony offered in this

proceeding does not indicate that DOF is following that system.

Nevertheless, even if DOF has been misusing the mid-point system, Grievant has not provided sufficient basis to award him a merit increase. A key element of proving illegal deprivation of a merit increase is a comparative analysis of the performance evaluations of the employees involved. As recently observed in Ours v. Division of Highways, Docket No. 03-DOH-097 (August 8, 2003), an employee cannot proveentitlement to merit increases unless he shows that his evaluations were better than those of employees who received them. Because Grievant has not done this, the undersigned is unable to grant him relief on this issue.

Overtime Policy

Grievant contends that Respondent's overtime policy, as it applies to himself and other Forester Is is illegal, and has deprived him of a significant amount of overtime pay since 1990. As noted above, DOF has clearly erred by designating Grievant and his colleagues as employees who use the fluctuating workweek, which is simply untrue. Employees who work under this system received their full salary, regardless of whether they work 20 hours or 40 hours in any given week. Although the parties have not done a particularly thorough job of explaining to the undersigned how the fluctuating workweek operates, it does appear that its use provides for a lower hourly rate of pay than the Forester Is would receive if not using the system. Nevertheless, it is clear that the Forester Is do not work a fluctuating workweek, because they are required to use leave if they are unable to work 40 hours a week for any reason. Accordingly, Grievant is entitled to overtime pay at the traditional time and one-half rate of pay for overtime hours exceeding forty in a workweek, as provided for by the Fair Labor Standards Act. See 29 U.S.C. 207(a).

___However, Respondent also has asserted a timeliness defense to this claim. DOF notes that Grievant admitted he has known about the policy since its adoption in 1990. In fact, Grievant testified that he has “complained about it over the years” at various meetings and occasions. Grievant contends that DOF's continued use of its illegal overtime policy is a continuing practice under W. Va. Code §29-6A-4(a). "This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No.

95-20-567 (May 30, 1996)." Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). However, Grievant is not arguing pay disparity, but merely continued use of an illegal policy which affects his pay. This "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §§29-6A-4(a). See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995).

Nevertheless, a grievant may challenge a policy at any time it affects him. Even if considered in the light most favorable to Grievant, he should have filed this claim within ten days of the most recent application of the overtime policy to him. Grievant's records indicate that he only worked one hour of overtime during the entire year of 2001, in November, and he initiated this grievance at the end of January 2002. Therefore, there can be no escaping the conclusion that this claim is untimely.

Social Security Numbers

Grievant's concerns regarding the dissemination of this information to numerous employees is quite understandable. Identity theft is a prevalent crime in our society, and it often begins with acquisition of someone else's security number. However, it appearsthat DOF has taken all possible steps to eradicate use of the social security numbers by implementing a new system and verifying its installation on all Division computers. Since Grievant has not demonstrated any actual harm he has suffered as a result of the use of the numbers in the previous version of the fire report, he is entitled to no further relief on this issue.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. A level one grievance 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 . . . .. W. Va. Code §29-6A-4(a).

3. Timeliness is an affirmative defense, and the burden is upon the party asserting the grievance was not timely filed to prove that defense by a preponderance of the evidence. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

4. Respondent has proven by a preponderance of the evidence that Grievant's claims regarding Barbara Breshock's team leader position and DOF's overtime policy are untimely, and Grievant has failed to demonstrate a valid excuse for his untimely filing.

5. DOP's Administrative Rule states in § 5.9 (2003) that "salary advancements shall be based on merit as evidenced by performance evaluations and other recordedindicators of performance." See Cogar v. W. Va. Dep't of Transp., Docket No. 01-DOH- 520 (Dec. 20, 2001); King v. W. Va. Dep't of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

6. Although Grievant has proven that DOF's mid-point pay raise policy does not comply with DOP's Administrative Rule, he has failed to show that his performance was better than that of any employee who received a pay increase, so he has not shown entitlement to any relief.

7. DOF has taken all possible steps to discontinue use of employee social security numbers in its fire report, and Grievant is entitled to no further relief on that issue.

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, and 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.

Date: September 26, 2003 _____ **DENISE M. SPATAFORE**

Administrative Law Judge

Footnote: 1

This finding is deemed necessary only because Grievant's counsel included an argument regarding this issue in his post-hearing submission, and the undersigned is not sure why this was done.