**DEBORAH S. KING,**

**Grievant,**

**v. Docket No.03-T&R-335**

**DEPARTMENT OF TAX & REVENUE,**

**Respondent.**

## D E C I S I O N

Deborah S. King ("Grievant"), employed by the Department of Tax & Revenue, Compliance Division, ("T&R" or "Respondent") as a Secretary I, filed a level one grievance on September 22, 2003, challenging her $16,932.00 salary. For relief, she requested a salary increase to $24,200.00, retroactive to March 3, 2003. The grievance was denied at levels one through three, and appeal to level four was made on October 30, 2003. An evidentiary hearing scheduled for January 13, 2004, was canceled after the parties agreed to submit the matter for decision based upon the lower-level record. Both Grievant, representing herself, and T&R, represented by Assistant Attorney General Esther T. Van Dall, waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for decision upon receipt of the record on January 14, 2004.

The following facts have been derived from the lower-level record.

## Findings of Fact

1. Grievant was employed by T&R effective March 3, 2003, as a Secretary I, pay grade 8, in the Compliance Division. Grievant accepted the position with the entry level salary of $16,932.00. The pay range for pay grade 8 is $16,932.00 to $31,320.00.

2. Prior to March 2003, Grievant had been employed by the Bureau ofEmployment Programs from 1990-1999, and the Department of Highways from 1999 until 2001, when she began working as a Secretary I for the Bureau of Child Support Enforcement (BCSE). When Grievant resigned from BCSE on October 4, 2002, her salary was $24,200.00.

3. T&R raised the issue of timEliness at levels one, two, and three.

## Discussion

T&R asserts that the grievance was not filed within the time lines set forth in W. Va. Code § 29-6A-4, and must be denied. When 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate 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. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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). 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. Dep't 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 her level four appeal statement Grievant concedes that during her interview she was advised by David Kilmer that the beginning salary was $16,932, and he didn't believe it would be any more. Grievant was advised of her salary prior to beginning work when she completed the necessary paperwork, but most certainly was aware of her earnings upon receipt of her first paycheck in either April or May 2003. T&R has established that the grievance was not timely filed.

Grievant explained that she delayed filing a grievance based upon a belief that she was not eligible to do so until the expiration of her probationary period. Grievant does not explain why she believed a probationary employee could not file a grievance, and it is remarkable, given the efforts of the Division of Personnel and the Grievance Board to educate employees of their grievance rights,

that a thirteen-year employee would not check with either of those agencies or T&R to confirm her rights. In any event, Grievant's mistaken belief that she was not eligible to file a grievance does not constitute a properexcuse for her failure to timely file this complaint. (See footnote 1) See Miano v. Div. of Highways, Docket No. 02-DOH-008 (June 27, 2002)

Even if the grievance had been timely filed, Grievant could not prevail. Grievant is understandably unhappy to have been re-employed by the State of West Virginia in the same position classification, but at a substantially lower salary. Grievant does not dispute that she is compensated within the pay range for her pay grade, but asserts that the Division of Personnel Administrative Rule allows for a higher than minimum salary upon initial employment or reinstatement. Respondent argues that it is properly compensating Grievant.

Grievant is correct that Division of Personnel Administrative Rule, Section 5, permits the employer to compensate a new employee at more than the entry level salary, if she has the requisite experience and training. Section 5.4 states, in pertinent part:

(b) Entry Salary - The entry salary for any employee shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, **may** be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class. Emphasis added. While this provision clearly would permit T&R to compensate Grievant at a higher salary, the decision to do so is entirely discretionary. The decision not to offer more than the minimum salary did not violate the Administrative Rule, or any other statute, policy, or regulation. (See footnote 2)

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

## Conclusions of Law

___1. When 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. Casey v. Mason County Bd. of Educ., Docket No. 01- 26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate 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. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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).

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3. T&R established that the grievance was not timely when Grievant delayed filing at level one for six months after learning the facts of the grievable event.

4. Grievant's erroneous belief that she was not eligible to file a grievance until the expiration of her probationary period does not constitute a proper basis for her failure to timely file.

Accordingly, the 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 StateEmployees 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: FEBRUARY 2, 2004** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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*Footnote: 1*

*.This matter does not fall within the discovery exception set forth in Spahr v.Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), because Grievant was fully aware of the facts constituting the grievance in March 2003.*

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*Footnote: 2*

*[2]Grievant refers to her employment with T&R as a reinstatement. This is inaccurate because while she was previously employed by the State of West Virginia she was not employed by T&R. However, the Administrative Rule, Section 5.8 also provides that a higher than minimum salary is discretionary in cases of reinstatement.*