GLENNA YVONNE WILSON,

Grievant,

v. DOCKET NO. 05-HHR-378

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Grievant filed a grievance on August 1, 2005, in which she claimed that Respondent had unfairly required her to accept a two-step (10%) salary cut when she applied for and was awarded a position in a lower paygrade. She seeks reimbursement for lost wages from July 8, 1998, and to have her current salary increased to its former level.

After being denied at the lower levels on the grounds that the grievance was untimely, Grievant appealed the Dismissal of her claim to level four. On October 28, 2005, Respondent filed Motion to Dismiss asserting that the grievance was untimely. A level four hearing was held in the Grievance Board's Beckley office on November 9, 2005. Grievant presented was represented by Eileen Ewing of AFSCME, and Respondent was represented by counsel, Landon R. Brown, Senior Assistant Attorney General. The matter became mature for decision at the close of the hearing.

Issues and Arguments

The sole issue considered at the hearing was whether the grievance was timely filed. Grievant contends the discovery rule exception applies, while Respondent contends it does not, and that the grievable event occurred seven years ago. The level four hearing was concluded after Respondent's motion to dismiss was granted, and evidence on the merits of the case was not heard.

Based on a preponderance of the evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Social Services Worker 2, which is in pay grade nine.

2. Grievant had been previously employed as a Protective Services Worker, which is in pay grade 11.

3. Respondent posted the position Grievant currently holds, and she applied for the job. On July 8, 1998, Grievant was awarded the position.

4. At the time she was offered the position, Community Services Manager Jack L. Tanner informed Grievant in writing that the new job would be considered a voluntary demotion, and would result in a two-step salary decrease due to the change to a job in a lower pay grade. His letter further informed Grievant she could nonetheless appeal the demotion through the grievance procedure.

5. Grievant then signed a letter, dated July 8, 1998, accepting the voluntary demotion and resultant salary decrease. Her letter stated, “I understand I can grieve this action to the WV Education and State Employees Grievance Board.” 6. In the intervening years since her demotion, Grievant suspected that other employees did not have to accept similar pay cuts, and although she never knew definitively, she never doubted that other employees were not required to sign a letter accepting a pay cut.

7. On an unspecified date that Grievant maintains was within ten days of the filing of this grievance, she learned that another employee, Michael Horton, recently (sometime in 2005) changed jobs from a Social Service Supervisor to a Youth Service Worker, a job in a lower pay grade, without having to accept a pay cut.

Discussion

If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

There are three “triggers” to the running of the ten-day time limit in which a grievance must be

filed. West Virginia Code section 29-6A-4(a) specifies that a grievance must be filed:

> 1) Within ten days following the occurrence of the event upon which the grievance is based; or
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> 2) Within ten days of the date on which the grievable event unequivocally became known to the grievant; or
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> 3) Within ten days of the most recent occurrence of a grievable continuing practice.*See Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002); *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Spahr v. Preston Co. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Here, Grievant claims she should not have been required to accept a pay cut when she voluntarily accepted a position in a lower paygrade. She does not dispute that she knew she would have to do so immediately upon the occurrence of that event, in 1998. She is therefore indisputably untimely under the first “trigger” cited above. She does not argue that the continuing practice exception applies, so that is not an issue. The only way in which this grievance could be considered timely, therefore, would be if the second “trigger,” the so-called discovery rule, is applicable.

Grievant testified at level three that she learned that another employee, Michael Horton, recently changed jobs from a Social Service Supervisor to a Youth Service Worker, a job in a lower pay grade, without having to accept a pay cut. This allegation, although not expressly stated, amounts to a claim of just-discovered discrimination or favoritism. Respondent points out that Grievant also testified that she suspected, over the years since her demotion, that other employees did not have to accept similar pay cuts, and that although she never knew definitively, she never doubted the fact. The level three Grievance Evaluator dismissed this case on the basis of that admission vis-á-vis the discovery rule. However, that exception has been more broadly construed to mean “The time period for filing a grievance ordinarily begins to run when the employee is <u>unequivocally</u> notified of the decision being challenged. [Emphasis added.]” *Seifert, supra.* Grievant never admitted she unequivocally knew of a difference in treatment, just that she suspected it and was sure of it in her own mind. She expressly denied having anyconcrete evidence to support her belief, other than the office rumor mill. Under those facts, her belief is not sufficient to trigger the discovery provision.

Nevertheless, the discrimination Grievant alleges, is not a continuing practice. The policy under

which Grievant was required to accept a pay cut was deemed to have been discriminatorily applied in 1998, (See footnote 1) and more recently was found to be discriminatory in 2005, (See footnote 2) despite differences in particular classifications. However, “[t]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within [ten] days of the event or occurrence of the practice.” (See footnote 3) Similarly, “[t]he facts that give rise to a claim are not the discovery of a similarly situated party prevailing on their claim, or a legal theory. It is not the discovery of a legal theory which triggers the statute, but the event." *(See footnote 4)*

When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, 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 footnote 5) This is exactly what Grievant is doing: herclaim is that she was, in 1998, discriminatorily required to accept a lower salary. While she is quite possibly correct in her assertion, she waited too long to bring her complaint

The following Conclusions of Law support this decision:

Conclusions of Law

1. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH- 060 (July 16, 1997). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998).

2. West Virginia Code section 29-6A-4(a) specifies that a grievance must be filed:

1) Within ten days following the occurrence of the grievable event; or

2) Within ten days of the date on which the grievable event unequivocally became known to the grievant; or

3) Within ten days of the most recent occurrence of a grievable continuing practice.

See Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002); *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3. The facts that give rise to a claim are not the discovery of a similarly situated party prevailing on their claim, or a legal theory. *Spahr, supra*; *Gragg v. W. Va. Div. of Corr.*, Docket No. 98-CORR-330 (1999); *Pryor v. W. Va. Dep't of Transp.*, Docket No. 97-DOH 341(Oct. 29, 1997). “It is not the discovery of a legal theory which triggers thestatute, but the event.” *Lynch, supra*; *Velez v. Higher Educ. Policy Comm'n*, Docket No. 03- HEPC-320 (June 13, 2005).

4. “The date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within [ten] days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989).” *Lynch, supra*.

5. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, 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)." *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July10, 2001); *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehab. Serv.*, Docket No. 00-RS-046 (June 22, 2000).

6. Respondent met its burden of proving this grievance was not timely filed.

For the foregoing reasons, 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 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.

November 14, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Davis v. Dep't of Health and Human Res., Docket No. 98-HHR-435 (July 30, 1999).

Footnote: 2

See Samples v. Dep't of Health and Human Res., Docket No. 05-HHR-105 (Aug. 26, 2005).

Footnote: 3

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

Footnote: 4

Velez v. Higher Educ. Policy Comm'n, Docket No. 03-HEPC-320 (June 13, 2005).

Footnote: 5

Young v. Div. of Corr., Docket No. 01-CORR-059 (July 10, 2001).