JAMES MOORE,

Grievant,

v. Docket No. 05-HHR-260

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILDREN & FAMILIES,

Respondent.

D E C I S I O N

James Moore ("Grievant"), employed by the Department of Health & Human Resources/Bureau for Children & Families ("DHHR" and "BCF") as a Human Resource Specialist, filed a level one grievance on June 13, 2005, in which he alleged discrimination. For relief, Grievant requested rescission of the 5% salary reduction he incurred in October 2003. The grievance was denied at all lower levels. A level four appeal was filed on July 25, 2005, and a hearing was conducted on October 31, 2005, in the Grievance Board's Westover office. Grievant represented himself, and DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General. The grievance became mature for decision upon receipt of post-hearing submissions filed by the parties on or before November 17, 2005.

The following facts have been derived from a preponderance of the evidence made part of the record at level three and level four.

Findings of Fact

1. Grievant has been employed by DHHR since December 1991, and is presently classified as a Social Service Supervisor, pay grade 14, assigned to BCF Region I Child Care Unit.

2. Prior to October 2003, Grievant held the position of Health and HumanResource Specialist, pay grade 15.

___3. In August 2003, DHHR posted the position vacancy for Regional Social Service Supervisor, pay grade 14, in Marion County.

4. Grievant applied for the Supervisor position, and was advised during the interview

that he would be required to accept a mandatory 5% salary reduction since the change in assignment was a voluntary demotion. This advice was consistent with BCF practice at that time to require the salary reduction, with the exception of employees who were moving into positions that were considered a priority to fill.

5. Nevertheless, upon being offered the Supervisor position, Grievant inquired as to whether he might maintain his pay grade 15 salary.

6. Grievant's salary request was denied, but he accepted the position and the reduction in pay, because he wanted to relocate.

7. In June 2004, BCF Community Service Managers determined the practice of reducing salaries in cases of voluntary demotions would no longer be practiced, since other Bureaus did not routinely lower salaries.

8. On June 3, 2005, Grievant learned that DHHR employees are no longer automatically required to take a salary reduction when they accept a voluntary demotion. Presently, DHHR reviews these situations on a case-by-case basis. One example of when a reduction may still be implemented is when there would be a great disparity in pay grades.

9. Grievant filed a level one grievance on June 13, 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden ofproving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). As a preliminary issue, DHHR argues that Grievant's claim of discrimination was not timely filed. W. Va. Code § 29-6A-3(2) requires that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." In the instant case, the timeliness issue was first addressed by DHHR in the level one decision issued by

Christine Spiker, Region I Child Welfare Consultant, who held the grievance was not timely filed in her decision. The grievance was also denied on the basis of timeliness at levels two and three. Grievant explains the delay in filing was due to his understanding that the salary reduction was mandatory at the time of his transfer, and he did not learn otherwise until he saw the minutes of the 2004 meeting shortly before he filed at level one.

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 o f the evidence. Once the employer has demonstrated 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. Dep't of Transp., Docket No.96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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). W. Va. Code § 29-6A-4(a) provides:

At the request of the grievant or the immediate supervisor, an 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, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

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 v. Dep't of Transp./Div. of Highways, 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 case, Grievant knew when he accepted the Supervisor position in 2003 that he would incur a salaryreduction. He did not file a grievance seeking reinstatement of his salary until June 2005, approximately two years later, and well beyond the ten day time frame.

However, Grievant argues that he filed promptly upon learning that the practice had been revised. This argument appears to be that the delay would fall under the "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Because Grievant knew of the facts giving rise to this grievance in October 2003, the discovery rule exception does not apply in this case. The Grievance Board has previously held that timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket No. 99- CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98- HHR-477(Feb. 24, 1999). Neither does the fact that Grievant erroneously believed the salary reduction was mandatory, and/or not grievable in 2003, delay the time period for filing. In any event, Grievant was not treated in a discriminatory manner. "'Discrimination' means 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 The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals clarified the legal test for discrimination claims raised under the grievance procedure definition. A grievant must establish a case of discrimination by showing: (a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State

College, Docket No. 03-HE-217R (2004). Grievant presented testimony from four DHHR employees who were not required to accept a salary reduction under similar circumstances. However, DHHR provided reasons for the difference in each case. The evidence shows that there has never been a hard and fast rule at DHHR regarding voluntary demotions, and at the time of Grievant's transfer he was treated consistently with others when filling a position for which there was a number of qualified applicants. Grievant is not similarly situated to employees who have maintained their higher salary since the change in practice. Under the circumstances presented here, Grievant has provided insufficient evidence to prove that he was subject to discrimination.

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. A grievance must be initiated within ten days of the event upon which it is based or within ten days of the grievant's discovery of that event. W. Va. Code § 29-6A- 4(a).

2. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 3. Under the discovery rule exception to the statutory time lines, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

4. DHHR has proven that the grievance was not filed within ten days of Grievant's demotion, and because Grievant knew of the facts giving rise to this grievance in October 2003, the discovery rule exception does not apply in this case. Therefore, the grievance was not timely filed.

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.

DATE: DECEMBER 16, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE