THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANDY HOLLINS,

Grievant,

v. **Docket No. 06-DOL-176**

WEST VIRGINIA
DIVISION OF LABOR,

Respondent.

DECISION

Grievant, Andy Hollins, filed a grievance on December 8, 2005, against his employer, West Virginia Division of Labor ("Division"), alleging individuals within his classification are being paid at a higher salary or have received wage increases which have created pay inequities. For relief, Grievant seeks to have his salary brought into "a more equitable relation to others [sic] job classification, work, and years served." This grievance was denied at the lower levels. Grievant is represented by Fred Tucker, WVSEU/UMWA Representative, and Respondent is represented by Elizabeth G. Farber, Assistant Attorney General. After a review of the Level III transcript, Grievant opted to submit this case on the record below. This grievance became mature for decision on September 11, 2006, upon the parties' submissions of findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts he is paid less than other, less senior employees in his classification. He argues some employees were hired at a higher salary or have received raises which has in turn caused a great disparity in the salaries. Respondent first asserts this grievance is untimely. Respondent also argues that, because all employees are paid within their specified pay ranges, it has not violated any

statute, rule, policy, or written agreement.

Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by the Division as a Labor Inspector 2 in its Weights and Measures Section.

2. He was hired as a Labor Inspector 1 on November 23, 1998. He was reallocated on October 1, 2001, to his current title of Labor Inspector 2.

3. In 2004, Grievant began to suspect less senior employees in his classification were making higher salaries than he was. His suspicion was based on various discussions with co-workers.

4. In June, 2004, he discussed his concerns with James R. Lewis, Commissioner of the Division.

5. In November, 2004, he discussed the issue with Fran Cook, Deputy Commissioner of the Division.

6. Grievant also voiced his concerns numerous times with John Junkins, Supervisor over Weights and Measures.

7. Grievant first obtained a copy of the Division's employee payroll list by several months before November, 2005. 8. An across-the-board pay raise was given on November 30, 2005. At that time, Grievant obtained another copy of the Division's payroll list from the State Auditor's office. This copy was dated December 6, 2005.

9. Grievant then filed this grievance on December 8, 2005.

10. Respondent raised the issue of timeliness at the Level II conference.

Discussion

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). A grievance must be filed with the immediate supervisor of the grievant "[w]ithin 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).

Grievant alleges he filed this grievance within two days of receiving the Division's payroll information from the Auditor's Office. He contends that prior to December 6, 2005, he did not have any concrete knowledge that less senior co-workers in his classification were being paid a higher salary.

W. Va. Code § 29-6A-4 contains the same discovery rule found in the education grievance procedure, which has been interpreted to mean that, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts givingrise to the grievance." Syl Pt. 1, *Spahr v. Preston Co. Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990). Because Grievant cannot be expected to proceed on rumors or conjecture, the discovery rule exception is applicable in this case.

To determine timeliness, the question then becomes when Grievant discovered the facts giving rise to this grievance. By Grievant's own testimony, he had a copy of the Division's payroll records several months prior to the November 2005, raise. The salary increase given in November, was across the board, meaning all individuals in the same classification would have been given equal amounts. Therefore, the December 6, payroll list was not the first time Grievant was unequivocally aware of his co-workers' salaries. Instead, he was placed on notice several months before when he first received a copy of the Division's payroll records. Grievant should have filed this grievance when he first became aware of the disparity in pay.

It should also be noted that the Grievance Board has previously held that pay disparity is not a continuing practice. 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 Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000). Therefore, this grievance is untimely.

Conclusions of Law

1. 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).

2. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin 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. *W. Va. Code* § 29-6A-4 contains the same discovery rule found in the education grievance procedure, which has been interpreted to mean that, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl Pt. 1, *Spahr v. Preston Co. Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990).

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, 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 Resources*, Docket No.94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000).

5. Respondent has proven this grievance is untimely. Grievant discovered the salary disparities several months before the November raise, and upon that discovery, the time in which to file a grievance began.

Accordingly, this grievance is **DENIED**.

Any party 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: November 15, 2006

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Wendy A. Campbell

Administrative Law Judge