BURL G. BURNS, et al.,

Grievants,

v. **Docket No. 05-DNR-430**

DIVISION OF NATURAL RESOURCES/

EDRAY TROUT HATCHERY,

Respondent.

DECISION

Grievants (Burl Burns, Ryan Pritt and Tom Provezis) are employed at the Edray Trout Hatchery ("the Hatchery") as technicians. They claim that there is a difference in the salary of Hatchery technicians who live on-site and do not have to pay housing expenses, and they seek compensation for the alleged difference. After denials at the lower levels, Grievants appealed to level four on November 22, 2005. A hearing was held in Westover, West Virginia, on February 1, 2006, at which Grievants were represented by Jerry Sklavounakis, Esquire, and Respondent was represented by Kelly M. Goes, Assistant Attorney General. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on March 7, 2006. (See footnote 1)

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed at the Hatchery as technicians. The Hatchery is a facility owned and operated by the Division of Natural Resources ("DNR") where trout areraised for recreational fishing in state parks and other state facilities. The fish are raised from eggs to adulthood, and then the trout are released.

2. Technicians are responsible for daily routine care of the fish and maintenance of the facility, including feeding, water treatment, and repair and upkeep of equipment.

3. There are seven fish hatcheries around the state, and each one has at least one residence,

so that someone is always present to check on the fish around the clock and take care of any problems that arise. Leaves or ice can clog the water supply, causing fish fatalities. If a hatchery only has one or two residences, the manager is required to live there, along with the assistant manager, if there is a second residence.

4. The Edray Hatchery has three residences. One is occupied by the manager, one by the assistant manager, and one by a technician.

5. In February of 2001, a position was posted for a technician at the Hatchery who would be required to live on the premises. A Mr. Mearns (See footnote 2) was hired to fill this position.

6. All Hatchery technicians are paid within the parameters of the pay grade assigned to their classification, which is pay grade 10--$19,392 to $35,892--whether or not they live on-site.

7. The on-site technician performs some additional duties, which include driving around the facility a couple of times during the night to make sure the equipment is functioning, along with providing a “presence” on the property for security purposes. However, this individual does not pay for any costs associated with the housing, such as rent, utilities, or maintenance.

8. Grievant Burns has been employed at the Hatchery since 1988. He was the on-site technician and lived on the premises from approximately 1990-1995, then voluntarily resigned this position to become a daytime-only technician.

9. Grievant Provesis has been working at the Hatchery since 2001. At one time, he also served as the on-site technician. (See footnote 3)

10. Grievant Pritt has been employed at the Hatchery since 2003.

11. Grievants Burns and Provesis have known that Mr. Mearns was living at the Hatchery and receiving a salary similar to other technicians since Mr. Mearns assumed his duties in 2001. Mr. Pritt has possessed the same knowledge since he began his own employment at the Hatchery.

12. None of the Grievants applied for Mr. Mearns' position or have expressed any desire to live on the Hatchery.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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).

Since level one, Respondent has contended that this grievance was not filed in a timely fashion. 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 of 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:

> 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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievancewithin 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.

Respondent argues that each Grievant has known of the facts giving rise to this grievance since Mr. Mearns' initial hiring in 2001, or, in Mr. Pritt's case, since beginning his own employment at the Hatchery in 2003. Therefore, these claims have been filed several years beyond the statutory filing requirement. However, Grievants contend that Respondent's continued employment of Mr. Mearns under these circumstances, whereby Grievants receive less “compensation” for performing similar

duties, constitutes a continuing practice that is ongoing.

"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). Therefore, it must be determined whether, as Grievants allege, they are the victims of unlawful "salary differences" as a result of not receiving on-site housing, or compensation therefor, and whether this would constitute a continuing practice.

As recently discussed in Blethen v. Dep't of Tax & Revenue, Docket No. 03-T&R- 416R (Sept. 6, 2005), "continuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute. In that case, this Grievance Board held that the employer's decision to place a particularjob classification in a particular pay grade, while continuing to affect grievants' salaries, was "a salary determination that was made in the past, a discrete event with lasting effects," which did not constitute a continuing practice. "[W]hen 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).' Nutter v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-630 (Mar. 23, 1995)." Young v. Div. of Corrections and Div. of Personnel, Docket No. 01-CORR-059 (July 10, 2001).

As stated in Blethen, supra, "[t]here is no evidence . . . Respondent makes a new paygrade determination every pay period, but simply follows a decision made previously." Similarly, in the instant case, DNR has had a long-standing practice of having only one technician live on the premises of the Hatchery, and Grievants have known for years that Mr. Mearns receives a full technician's salary in addition to being provided with housing. The decision which allegedly resulted in harm to Grievants was made at the time Mr. Mearns' position was posted and filled as an on-site technician. This is a decision that was made long ago, and Grievants' claim of "salary differences"

resulting from that decision is merely a claim of continuing damage from a single act.

Similarly, the instant case does not involve “compensation disparity based upon a prohibited factor such as race, gender, national origin, etc.,” which was found to constitute a continuing violation, with “each paycheck at the discriminatory rate [being] a separate link in a chain of violations,” as was the case in Martin, supra. Moreover, unlike the situationpresented in that case, Grievants' claims do not amount to simple pay disparity, as compared to a similarly situated employee. Rather, Grievants are alleging that another employee is receiving a benefit that they do not, which actually saves him money on housing expenses, but there has been no allegation here of disparate paychecks based upon unlawful discrimination. Accordingly, this grievance is untimely. “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).

Conclusions of Law

1. 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 of 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). 2. A grievance must be filed within ten days of the event upon which it is based 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. “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).

4. "[W]hen 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).' Nutter v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-630 (Mar. 23, 1995)." Young v. Div. of Corrections and Div. of Personnel, Docket No. 01-CORR-059 (July 10, 2001).

5. Grievants' allegations of discrimination and favoritism are based upon a discrete event, i.e. Respondent's hiring of an on-site Hatchery technician in 2001, which does not constitute a continuing practice.

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: March 17, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants' counsel did not file a post-hearing brief.

Footnote: 2

Mr. Mearns' first name was never stated in the record.

Footnote: 3

There was no explanation as to Grievant's reason for leaving the on-site position.