WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RAYMOND RADER,

Grievant,

v.

Docket No. 06-DEP-468

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION/DIVISION

OF AIR QUALITY, and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Raymond Rader, an Engineer 3 at the West Virginia Department of Environmental Protection ("DEP"), Division of Air Quality ("DAQ"), filed this grievance on August 2, 2006. The Statement of Grievance reads:

> In approximately spring 2003 I became of aware of DEP policy of awarding 15% pay raise to those individuals classified as Engineer-In-Training or Engineer who
>
> > became registered as Professional Engineer. I had previously obtained PE registration in response to notice that failure to do so would result in reclassification
> >
> > to lower pay grade. The automatic pay raises awarded to DAQ staff at that time resulted in at least two individuals classed as Engineer 1 having a pay rate 14 -15% more than mine classed as Engineer 3. I approached both my supervisor, Jesse Adkins, Assistant Director, and John Benedict, Director regarding this inequity. Both agreed this situation was unfair and Mr. Adkins felt it was beyond his power to rectify. Mr. Benedict indicated that under then current policies he could not rectify the situations but was looking into alternatives. I have discussed this situation with him a number of times in the interim regarding different ideas for addressing the inequity.

Until last Monday (July 24) he seemed hopeful of finding a resolution. On that date he advised me he felt he was unable to offer a resolution.

The policy of providing a mandatary [sic] raise of that magnitude to some individuals

for obtaining PE registration while denying like treatment for other individuals for the same achievement is unfair and discriminatory and further interferes with the agency's ability to give raises that are appropriate and equitable. The timing the policy also serves to penalize those who were proactive in obtaining registration and rewards those who procrastinated which seems conterproductive [sic].

RELIEF SOUGHT: The 15% pay raise afforded to other DAQ staff for obtaining PE

registration. I am entitled to the increase retroactive to the date of the policy (November 1, 2000) including the incremental increases due to all raises received from that date to present. I have calculated that to be $61,438 for current salary and $41895.60 in back wages.

This grievance was denied at all lower levels. (See footnote 1) Grievant appealed to Level IV on December 15, 2006. The Division of Personnel ("DOP") was joined as a party respondent by Order entered on January 26, 2007. A Level IV hearing was held on April 13, 2007, before Chief Administrative Law Judge M. Paul Marteney, at the Grievance Board Office in Charleston. This case became mature for decision on June 6, 2007, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Fred Tucker, West Virginia State Employees Union, DEP was represented by Heather A. Connolly, Esq., and DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. For administrative reasons, the matter was reassigned to the undersigned on October 24, 2007.

Synopsis

This grievance has its beginning in a DOP policy that mandated a 15% pay raise for employees in the Engineer-In-Training ("EIT") classification who were reclassified to an Engineer classification upon becoming registered as a Professional Engineer. This policy came about due to DEP's concerns with recruitment and retention issues in the Engineering class series. Grievant became registered as a Professional Engineer in 1994. The policy implementing the automatic 15% pay raise went into effect in 2000, therefore, it did not benefit Grievant. Grievant asserts that the automatic pay raise policy extended to employees that became registered as a Professional Engineer after 2000 has shown discrimination and favoritism. DOP asserts the grievance is not timely. In addition,

Respondents assert the principle that state agencies may properly offer higher salaries to newly hired employees without raising the pay of incumbent employees performing the same jobs, and that such discrepancy does not violate the equal pay mandate. For reasons more fully set forth below, the undersigned finds that this grievance is untimely.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by DEP in its Division of Air Quality Office for 28 years and has been classified as an Engineer 3 since 1994. 2. The State Code for the West Virginia State Board of Registration for Professional Engineers (Professional Engineers Board) addresses who can identify themselves professionally as Engineers. In late 1993, the Professional Engineers Board notified the DOP that "the standard of Registered Professional Engineer should apply for the Engineer series and the Certified Engineer Intern for the EIT series is in keeping with code requirements for the practice of engineering in West Virginia." (See footnote 2) 3. As a result of this clarification, engineers working for DEP were advised that in order to remain in an Engineer classification it would be necessary to become registered as a Professional Engineer within a two year period. Any employee who failed to pursue such registration through the prescribed examination process would be reclassified at the end of that period. (See footnote 3) If an engineer chose not to pursue the Professional Engineer Registration, they would be moved laterally into the Technical Analyst classification series. At that time, the pay grades for the Engineer classification series and the Technical Analyst classification series were comparable. In addition, the DOP established the EIT 1 and 2 classifications in late 1993.

4. Grievant obtained his registration as a Professional Engineer in February 1994 and retained his classification within the Engineer series, this registration did not lead to a pay raise. Grievant did receive a 20% pay raise in 1994 when he was reclassified from an Engineer 1 to an Engineer 3.

5. On September 21, 2000, DOP received approval from the State Personnel Board for a 15% pay differential for employees in the EIT 1 and 2 classifications who obtained their registration as a Professional Engineer from the Board of Professional Engineers. (See footnote 4) This action was taken by the State Personnel Board to address recruitment and retention issues for engineers in

State government. (See footnote 5)

6. During a September 2000 State Personnel meeting, revisions were approved to alleviate problems in recruitment and retention in the Engineer class series. As a result, Grievant received a 5% pay increase.

7. Subsequent to this pay raise, the pay grade for the Engineer class series was increased by one pay grade in 2003, due to recruitment and retention issues.

8. Grievant was not required to have his registration as a Professional Engineer at the time he was hired, and he was an Engineer 3 at the time he took and passed his Professional Engineer exam.

9. Grievant filed this grievance on August 2, 2006, five years past the date the State Personnel Board action became effective. The filing of this grievance is more than three years after the Spring of 2003. The date Grievant became aware of the 15% pay raise policy.

10. After becoming aware of the policy in 2003, Grievant addressed the perceived pay raise favoritism with both his supervisor, Jesse Adkins, Assistant Director, and John Benedict, Director of DEP. Mr. Benedict indicated to Grievant that he could not rectify the perceived favoritism, however, he was looking into alternative resolutions. Notwithstanding this representation from his supervisor, Grievant did not file this grievance until 2006.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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). (See footnote 6)

As a preliminary issue, DOP raised the issue at the Level IV hearing that this grievance was not filed in a timely fashion. Customarily, a state employer must raise a timeliness defense at or before Level III in order to preserve the right to assert this defense. W. Va. Code . 29-6A-3(a)(2). However,

as DOP was not a party to the grievance until Level IV, it was not given the opportunity to respond to the grievance before Level IV. DOP can raise the timeliness defense at the first level it had the opportunity todo so, Level IV. *Delbart v. Dep't of Health & Human Res.*, Docket No. 99-HHR-458 (Apr. 21, 2000).

Accordingly, the first issue to address is whether this grievance is timely filed. Where Respondent seeks to have a grievance dismissed on the basis that it was not timely filed, Respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once Respondent has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse the 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 Pub. Safety*, Docket No. 97- DPS-018 (Mar. 31, 1997); *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).

There are three “triggers” to the running of the ten-day limit in which a grievance must be filed. W. Va. Code . 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

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); *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 799 (1990).

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *Kessler, supra*. *SeeRose 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).

Grievant asserts he waited until August 2, 2006, to file his grievance because it was not until July 24, 2006, that he was informed by his supervisor that he was unable to offer a resolution to Grievant's perceived favoritism. This assertion is contrary to the facts, especially in light of Grievant's testimony that in 2003 that although Mr. Benedict felt the situation was unfair, he could not rectify the situation under current policies.

Grievant does not dispute that the DEP policy of awarding a 15% pay raise to those employees

classified as EIT or Engineer who became registered as a Professional Engineer went into effect in 2000. The filing of this grievance is outside the ten day time period following the occurrence of the event upon which the grievance is based. Grievant is, therefore, untimely under the first “trigger” cited above.

Grievant concedes that he learned of the DEP policy of awarding a 15% pay raise to those employees classified as EIT or Engineer who became registered as a Professional Engineer in the spring of 2003. Grievant knew he would not receive the 15% pay raise as a registered Professional Engineer, but he did not file a grievance until 2006. This claim arose from a policy that went into effect in 2000, and unequivocally became known to the Grievant in 2003, both of which occurred years prior to the filing. “The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged.” *Seifert, supra*. Grievant was informed in 2003 by his supervisor, Mr. Benedict, that he could not rectify Grievant's perceived discrimination under the current policies of the DEP. While Grievant was hopeful of finding a resolution in hisdiscussions with Mr. Benedict, this does not toll the time lines. Grievant is, therefore, untimely under the second “trigger” cited above.

The favoritism/discrimination Grievant alleges is not a continuing practice. Grievant made comparisons at Level III to fellow Engineers who obtained their registration as a Professional Engineer in 2001, 2002, and 2003, respectfully. At that time, the employees received the 15% pay raise following registration as a Professional Engineer. Under the Grievant's interpretation of relief, each new raise in accordance with this policy would constitute “the most recent occurrence of a continuing practice,” and would permit the Grievant to obtain an indefinite accrual of back pay by delaying the filing.

The current grievance, however, involves a single act that occurred in 2000. The 15% pay rise that went into effect after employees obtained their registration as a Professional Engineer caused continuing damage. This Board has ruled that 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).” *Young V. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001). This is exactly what Grievant is doing; his claim is in 2000, a policy went into effect that denied him

the opportunity to obtain a 15% pay raise his fellow employees received. Once Grievant learned about the pay discrepancy, he had an obligation to initiate the grievance procedure. Grievant is, therefore, untimely under the third “trigger” cited above. For all the reasons state above, this grievance is untimely. Although the grievance was not timely filed, some discussion of the merits may assist Grievant in understanding his perceived favoritism/discrimination regarding the pay raise policy. This grievance presents an unfortunate set of circumstances. Grievant, an employee with many years of experience, is now being paid less than newly hired employees. It is regrettable that this has happened, but unfortunately this is a fairly frequent occurrence within state government, especially in positions that have recruitment problems. *See Hartley v. Bd. of Trustees*, Docket No. 96-BOT-347 (Mar. 31, 1997).

Grievant argues that it demonstrates discrimination and favoritism when employees with less seniority and experience are awarded salaries in excess of his when his salary has not been similarly increased. “'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.” W. Va. Code . 29-6A-2(d). “'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code . 29-6A-2(h). The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(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.

Frymier v. Higher Education Policy Comm., Slip Opinions Nos. 32163 and 33296 (W. Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR- 144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-

50-281 (Jan. 28, 1990). “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *White, supra*.

The holding of the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994), is instructive in examining the issue raised by Grievant. The West Virginia Supreme Court of Appeals held that “employees who are performing the same tasks with the same responsibilities should be placed within the same job classification,” but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. Additionally, 128 C.S.R. 62, . 19.4 states any classified employee “whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . . ” As noted by the West Virginia Supreme Court of Appeals in *Largent*, pay differences may be “based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer.” *Id.* at 246. A state employee's salary is theresult of many factors, especially when the employee has worked for the state for many years. *See White, et al. v. W. Va. State Police and Div. of Personnel*, Docket No. 05-DPS- 168 (July 28, 2005). Consistent with *Largent, supra.*, Grievant and the new hires are being paid in accordance with the pay scale for their employment classification, Engineer 3.

Grievant attained his registration as a Professional Engineer in 1994. The 15% raise policy did not take effect until 2000. Accordingly, Grievant failed to establish that he is similarly situated to the new hires classified as Engineers 3, each of whom were registered as a Professional Engineer after the mandatory pay raise took effect. Because of Grievant's hire date and classification at that time, it was not discriminatory when DEP established the 15% pay increase for EIT's taking and passing the Professional Engineer registration exam. Likewise, it was not discriminatory when Grievant failed to receive the benefits given to the new hires. The following conclusions of law support this decision:

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 her failure to file in a timely manner.

Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445, (July 28, 1997); *Higgenbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. A grievance must be initiated 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 eventbecame 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-49(a).

3. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *See Kessler, supra*; *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).

4. Grievant became aware of the 15% pay raise based upon passing the exam to be registered as a Professional Engineer in the spring of 2003. In addition, and as Grievant conceded, he was unequivocally notified of the decision of his supervisor being challenged shortly after becoming aware of the event upon which the grievance is based.

5. This grievance was untimely, and Grievant offered no proper basis to excuse the late filing.

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. *See* W. Va. Code . 29-6A-7 (repealed) (*but see* Executive Order No. 2-07, May 8, 2007). 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 16, 2007

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

This grievance was waived to Level III because the lower level grievance evaluators lacked the authority to grant the relief requested.

Footnote: 2

October 10, 1993 correspondence from Patrick R. Esposito, Board President to Robert L. Stephens, Jr., Director, Division of Personnel. Grievant's Exhibit 2.

Footnote: 3

Memorandum from Steve Keen to Director Callaghan addressing engineering classification and information obtained from the State Board of Registration for Professional Engineers. Grievant's Exhibit 3.

Footnote: 4

Grievant introduced exhibits at Level III that reflected the 15% pay rise for new hires at the EIT series that obtained the Professional Engineer Registration and were reclassified to the Engineer class series.

Footnote: 5

This policy became effective on November 1, 2000. At the time this policy was implemented, Grievant was not an EIT and had obtained his Professional Engineer registration.

Footnote: 6

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and Stat e Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.