WEST VIRGINIA EDUCATION AND

STATE EMPLOYEES GRIEVANCE BOARD

CONNIE SPRADLING,

Grievant,

v.

Docket No. 07-TD-348

STATE TAX DEPARTMENT,

DEPARTMENT OF REVENUE,

Respondent.

DISMISSAL ORDER

Grievant, Connie Spradling, filed this grievance against the State Tax Department, Department of Revenue on April 19, 2007, alleging that she was promised a raise which never materialized. Her grievance reads:

> In the latter part of 1993 all employees in my section except one was either promoted or reclassified to a higher position grade. The one exception was later given an experience merit raise. These actions resulted in salary increases for everyone but me. Because my tenure put my then current salary over the minimum for my new classification, I did not receive an increase in salary.
>
> To compensate for that circumstance, I was told I would receive an increase in salary when a new budget system for our section was put into place in 1994. I did not receive the promised raise.
>
> On April 6, 2007 I learned that my Tax Unit Manager now acknowledges the

> commitment made concerning the salary increase. Before this time, it would only have been myself stating the facts, without any corroboration. Therefore, I am grieving the failure of the Director to follow up on the promise of a salary increase.
>
> Considering the long delay and emotional distress involved in this situation I am requesting that I be given the maximum merit increase of 10% in salary (effective July 16, 1994). This would include back pay plus interest.

Grievant received a Level I decision on April 25, 2007, from her supervisor Mark Burgess stating he lacked the authority to grant the relief requested. On May 11, 2007,Grievant received a Level II decision from Wade Thompson, Director of the Property Tax Division, denying the Grievance. A Level III hearing was held on June 12, 2007, and a decision adverse to Grievant was rendered by Hearing Examiner Davis Stiles on June 19, 2007. Grievant initiated a Default action. This Grievance Board (See footnote 1) denied Grievant's Motion for Default on May 12, 2008, and Grievant timely sought a Level IV hearing.

A telephonic status conference was conducted on August 18, 2008, where Grievant appeared pro se and Respondent was represented by Scott E. Johnson, Assistant Attorney General. During the telephonic conference, the parties agreed that the Level IV hearing set for August 20, 2008, would address Respondent's outstanding Motions to Dismiss. (See footnote 2) On August 20, 2008, a hearing was convened in the Public Employees Grievance Board's Charleston office to hear argument regarding Respondent's position that the grievance should be dismissed because it was (1) untimely filed and (2) any alleged promise to Grievant was ultra vires and, hence, unenforceable. This matter became mature for decision on September 8, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant maintains that she was promised in 1993 that she would receive a pay raise to become effective sometime in the fiscal year 1994. Respondent asserts that the grievance was untimely and that, in any event, any promise made was ultra vires and did not vest Grievant with an enforceable right. For reasons more fully set forth below, the undersigned finds that the grievance was untimely filed and that the alleged ultra vires promise does not entitle Grievant to a pay raise.

Grievance DENIED.

The following Findings of Fact are made based upon the record developed and are appropriate for the issue currently being decided.

Findings of Fact

1. Grievant has been employed by the State Tax Department as a Senior Tax Audit Clerk since October 1993.

2. Grievant's elevation to Tax Audit Clerk resulted from a department wide reclassification in 1993.

3. Grievant's salary in 1993 exceeded the minimum entry level salary for Tax Audit Clerk. Grievant did not receive a raise when she was reclassified.

4. Jerry Knight was an employee of Respondent in the early 1990's and a superior of the Grievant. Grievant alleges that in 1993 Mr. Knight, Director of the Property Tax Division at that time, promised her a pay raise to begin in Fiscal Year 1994.

5. Grievant did not receive a merit raise in fiscal year 1994. Grievant did not file a grievance in 1994 nor 1995 regarding this issue. 6. The agency individual duly authorized to give raises to employees of the State Tax Department is the State Tax Commissioner.

7. Between 1993 and 2007 Grievant received numerous salary increases.

8. In April 2007, Donald Hebb, Manager of the Special Properties Section of the Property Tax Division, during a conversation with an unidentified employee, made reference to Director Knight, Grievant, and the issue of an allegedly promised raise.

9. Subsequently, Grievant filed the instant grievance proclaiming she was promised a raised in 1993 which she never received.

Discussion

The matters currently before the Board are Respondent's Motions to Dismiss. 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)

From 1993 until 2007, W. Va. Code § 29-6A-4(a) provided that "Within ten days following the occurrence of the event upon which the grievance is based, or within ten daysof 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." This "time begins to run when the employee becomes aware of the facts that give rise to the claim[,]" *Lohr v. West Virginia Division of Corrections*, Docket No. 99-CORR-191 (Aug. 31, 1999), and that time is "ordinarily deemed to begin when the employee is unequivocally notified of the decision." *Wyatt v. Marshall Univ*., Docket No. 06-HE-054 (Mar. 15, 2006).

Grievant had to be aware in 1994 that her alleged promise of a raise did not occur. The latest date which would trigger the filing obligation would be 1995 since "the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase[.]" *Velez v. Higher Ed. Policy Comm'n*, Docket No. 03-HEPC-320 (Apr. 13, 2004) (citing *Jones v. Div. of Rehab. Serv.*, Docket No. 00-RS-046 (June 22, 2000)).

Grievant appears to claims two reasons to avoid her extremely late filing: (1) this was a continuing practice; and (2) she had no corroboration to bring her grievance until April 6, 2007, when Donald Hebb made his comments referencing Director Knights' alleged promise of a raise. Neither of these reasons justifies the late filing.

First, there is a distinction between a continuing violation and continuing damages and the consequences of each. This issue has been addressed by this Board on a number of occasions. *Burns v. Division of Nat. Res.*, Docket No. 05-DNR-430 (Mar. 17, 2006) provided:

> 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 pastdecision 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 particular job 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).

Thus this issue as it relates to the instant case is not convoluted. The denial of a one time pay increase is not a continuing violation. This alleged continuing damage case is subject to the applicable statutory time period for filing a grievance.

Second, Grievant attempts to avoid the ten day limitations period by alleging that she did not bring her grievance until 2007 because it was only at that time that she had corroborative evidence of the alleged promise. The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. *See Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Rose v. Raleigh County Bd. of Educ.*, Docket Nos. 94-41-246/314 (Nov. 29, 1994), *aff'd*, 199 W. Va. 220, 483 S.E.2d 566 (1997). In this case, it is clear Grievant knew in 1994 and 1995 that she did not receive a merit raise. Grievant has not provided sufficient explanation to excuse her filing delay. This grievance as filed in 2007 is untimely.

Additionally, Respondent has a filed a Motion to Dismiss claiming that Grievant has not raised a claim upon which the Board can grant her relief. The Procedural Rules of theGrievance Board state, "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 6.11. This is the case here.

Grievant alleges she was promised a raise. "[S]uch promise (perceived or fact) is not enforceable." *Brown v. Department of Transp.*, Docket No. 07-DOH-384 (Mar. 26, 2008). *Black's Law Dictionary* (7th ed. 1999) defines *ultra vires* as "[u]nauthorized; beyond the scope of power allowed . . . law . . . ." A promise made by one without authority to make the promise *vel non* is unenforceable as it does not confer enforceable rights on the employee. "It is well settled that a supervisor's promises cannot be binding against an agency when the supervisor does not possess the authority to actually make the determination." *Brown*, *supra*. Here, the evidence at the Level III hearing was that only the Tax Commissioner had the authority to authorize a pay raise. Level III Tr. 40-41. "To the extent anything a mid-management employee said . . . could be construed by Grievant as a promise of a salary increase, it was unauthorized and of no legal effect. Unauthorized or *ultra vires* promises to an employee do not confer any enforceable rights on that employee." *Brown*, *supra*.

Consistent with the foregoing discussion, the following Conclusions of Law support and are appropriate in this matter.

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 filingby 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).

2. West Virginia Code § 29-6A-4(a) provided that "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." This "time begins to run when the employee becomes aware of the facts that give rise to the claim[,]" *Lohr v. West Virginia Div. of Corr.*, Docket No. 99- CORR-191 (Aug. 31, 1999),and that time is "ordinarily deemed to begin when the employee is unequivocally notified of the decision." *Wyatt v. Marshall Univ*., Docket No. 06-HE-054 (Mar. 15, 2006).

3. "The grievable event in merit increase grievances is ordinarily the failure to receive a merit increase[.]" *Velez v. Higher Ed. Policy Comm'n*, Docket No. 03-HEPC-320 (Apr. 13, 2004).

4. There is a distinction between a continuing violation and continuing damages and the consequences of each:

> 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 particular job 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).

Burns v. Division of Nat. Res., Docket No. 05-DNR-430 (Mar. 17, 2006).

5. This grievance is untimely.

6. Grievant failed to demonstrate a sufficient explanation for the untimely filing of this grievance.

Accordingly, Respondent's Motion to Dismiss is **GRANTED** and this case is **DISMISSED** from the docket of the Grievance Board **.**

Any party, or the 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 (s*ee* footnote 1). Neither the West Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be sonamed. 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: September 17, 2008

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Landon R. Brown

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State 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, which continue to control the proceedings in this case.

Footnote: 2

Respondent filed a "Motion to Dismiss Grievance as Untimely," on July 31, 2008, and a "Motion to Dismiss for Failure to State an Enforceable Claim," on August 18, 2008.