THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CLIFF WHYTE,

Grievant,

v. **Docket No. 07-DEP-364**

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION, and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, Cliff Whyte, an Engineer 4 employed by the West Virginia Department of Environmental Protection ("DEP"), filed this grievance on May 2, 2007. He asserts improper classification and compensation. His Statement of Grievance reads as follows:

> Please find the attached grievance concerning a Personnel decision made in September of 2006. My reasons for filing this grievance are as follows:
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> I was the Assistant Director of the Division of Water and Waste Management and I became aware in July of 2006 that others in DEP that held equivalent positions were classified as Environmental Resource Program Administrators (ERPA), see Attachment 1. As such, I filed a position description and obtained the approval of the Director supporting this designation in August of 2006, see Attachment 2. My request was denied, and I did not appeal the decision, trusting that the review was thoroughly and correctly completed.
>
> After this decision, I began seeking other opportunities within DEP and effective November 16, 2006, I accepted a position in the AML program as an Engineer 4. I accepted this demotion in title, provided that my salary would remain.
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> It is my understanding that my former position in DWWM is now held by Mr. Yogesh Patel. Today I received Mr. Patel's approved WV-11 indicating that he had been

> reclassified as an ERPA, see Attachment 3. I believe Mr. Patel to be very competent and I am certain that he will do an excellent job in this position.
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> I believe I am aggrieved by these circumstances as I actually administered more programs at the time of my denial, than Mr. Patel did when his requestwas approved. Attachment 4 includes the DWWM organizational chart that directly demonstrates this.
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> In summary, I believe that my salary should have been increased by 5% in September of 2006, and would have continued to be carried forward in to the current position I hold in DEP. I am not asking for compensation prior to my application for reallocation, only that which I should have received after being denied.

As relief, Grievant seeks a 5% increase in salary, effective September 5, 2006, with back pay. This grievance was denied at all lower levels. (See footnote 1) Grievant appealed to Level Four on July 18, 2007. A Level Four hearing was conducted before the undersigned on March 5, 2008, at the Board's Charleston Office. The matter became mature for decision on that date due to the parties electing to not file proposals. Grievant appeared pro se. DEP was represented by Ron Brown, Assistant Attorney General. The Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Assistant Attorney General.

Synopsis

Grievant learned in July of 2006 that other employees in DEP who held positions similar to his were classified as Environmental Resources Program Administrators ("ERPA"). Knowing the duties of these individuals, in August of 2006 Grievant submitted a Position Description Form to the DOP requesting that his position be reallocated to ERPA. After a review by the DOP, on August 30, 2006, Grievant's request for reallocation was denied. DOP made the determination that his position was properly allocated to the Engineer 5 classification. Misclassification is a continuing practice. The grievable event date triggering the ten-day filing period with respect to this matter occured on November 16, 2006, when the Grievant accepted another position in the agency. On that date,Grievant stopped performing the duties outlined in the Position Description Form he claims rendered him misclassified. Grievant did not file his grievance while the practice continued, and was outside the time limit for doing so after it ended. Grievant filed on May 2, 2007, and, therefore, was untimely in his filing.

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

Findings of Fact

1. Grievant was employed by DEP as an Engineer 4 in the Division of Land Restoration until leaving the agency in August 2007.

2. Grievant was previously classified as an Engineer 5 while serving as the Assistant Director of the Division of Water and Waste Management in 2006.

3. That year, Grievant learned of others in DEP who held positions similar to his that were classified as Environment Resources Program Administrators, or ERPA.

4. Knowing the duties of these individuals classified as ERPA, and believing it was appropriate for him to be hold a position in this class, Grievant submitted a Position Description Form to the DOP requesting his position be reallocated.

5. DOP denied this request on August 30, 2006. DOP made the determination that his position was properly allocated to the Engineer 5 classification.

6. On September 5, 2006, Lowell D. Basford, Assistant Director, Classification and Compensation section of the DOP, sent a memorandum to Sandra Kee, Human Resource Manager, DEP, indicating the determination made by DOP. This memorandum sets out the appeal process to challenge the decision in requesting a reconsideration ofthe allocation action. The DOP determination denying his request to be reallocated was communicated to Grievant.

7. Grievant decided not to appeal this determination that he was properly classified as an Engineer 5. Level Three Transcript pages 8, 19.

8. On November 16, 2006, Grievant left his position as Assistant Director of the Division of Water and Waste Management. Grievant accepted another position in the DEP, and was classified as an Engineer 4.

9. It was only after learning of a fellow employee being reallocated to the higher classification that Grievant elected to file this matter.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 2) As a preliminary issue, DOP raised the issue at the Level Four hearing that this grievance was not filed in a timely fashion. (See footnote 3) Customarily, a state employer must raise a timeliness defense at or before Level Two 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 Four, it was not given the opportunity to respond to the grievance before Level Four. DOP can raise the timeliness defense at the first level it had the opportunity to do so, Level Four. *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).

Although DOP argues this claim is untimely, misclassification “is a continuing practice, and thus, a grievance may be initiated at any time during which themisclassification continues.” *Thomas v. Dep't of Health & Human Res.*, Docket No. 01- HHR-385 (Nov. 20, 2001). The normal effect of misclassification claims is to fix the period for which any back pay may be awarded to ten days prior to the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995).

Grievant is claiming he should have been reallocated from an Engineer 5 to an Environmental Resources Program Administrator retroactively to September 2006. However, as of November 16, 2006, Grievant no longer occupied the position for which DOP had determined he was properly allocated to the Engineer 5 classification. This grievance was not filed at level one until May 2, 2007, almost six months after his alleged misclassification ended.

> 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:
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> 1. Within ten days following the occurrence of the event upon which the grievance is based; or
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> 2. Within ten days of the date on which the grievable event unequivocally became known to the grievant; or
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> 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*. *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). Grievant filed after learning that an employee that held his former position at the Division of Water and Waste Management had been reclassified as an ERPA. Grievant asserts that he administered more programs at the time his reallocation request was denied then the employee that was reallocated. Grievant believed he was more qualified for the ERPA position then his fellow employee. This Board has ruled that “the timeliness statute is not triggered by a grievant's discovery of a legal theory to support the claim, or the success of another employee's grievance, but by the event or practice which is the basis of the grievance.” *Pryor, et al. v. W. Va. Dept. of Trans./Div. of Highways*, Docket No. 97-DOH-341 (Oct 29, 1997); *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989).

Grievant's dismay over this series of events is understandable. However, even if Grievant believed that a perceived misclassification could be grieved at any time while it continues, this does not excuse his failure to file a claim after it ended. DOP asserts the grievable event with respect to this case occurred on September 5, 2006, when DOP denied Grievant's request to be reallocated. Taking into consideration this is a continuing practice, the date the alleged misclassification ended is the date the 10-day time period began to run. Accordingly, the undersigned considers November 16,

2006, the effective date which triggers the running of the time period. For a continuing practice, the grievance must be filed within ten days after the practice ends. *Thomas*, *supra*. *Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H-032 (Apr. 12, 1990). When filing this grievance on May 2, 2007, Grievant did not file his grievance while the practice continued. In addition, Grievant was outside the time limit for doing so after the continuing practice ended. The statutory limitations for filing a grievance cannot be ignored. The responsibility of timely filing is on Grievant to protect his interest. *Lynch v. W. Va. Dep't of Trans.*, Docket No. 97-DOH-060 (July 16, 1997). The undersigned concludes that as a matter of law the Statement of Grievance was not filed in a timely manner, and no legal reason was shown why the filing was not timely. The untimely filing defeats the grievance, in which case the merits of the grievance need not be addressed. *Lynch*, *supra*.

The following Conclusions of Law support the decision reached.

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 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-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. For a continuing practice, the grievance must be filed within ten days after the practice ends. *Thomas*, *supra*. *Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H- 032 (Apr. 12, 1990).

5. Grievant did not file his grievance within the required time for doing so, and has not proven a legitimate excuse for his failure to file.

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." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (2006) (repealed, *see* fn. 2 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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: April 3, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

This grievance denied because the lower level grievance evaluators lacked the authority to grant the relief requested.

Footnote: 2

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, which continue to control the proceedings in this case.

Footnote: 3

Division of Personnel filed a Motion to Dismiss two days prior to the Level Four hearing. Grievant reviewed the Motion for the first time at the hearing. The undersigned took the Motion under advisement, and proceeded with the hearing on the merits.