THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBERT CLARK, JR., et al.,
Grievants,

v. **DOCKET NO. 2009-1066-CONS**

DIVISION OF NATURAL RESOURCES
and DIVISION OF PERSONNEL,
Respondents.

DISMISSAL ORDER

Grievants, 24 employees of the Division of Natural Resources,[1] filed this grievance against their employer on February 10, 2009, claiming they were entitled to the same salary increase awarded by the Division of Natural Resources in 2000 to other employees who were Regional Training Officers. As relief, Grievants sought the same salary increase awarded to the Regional Training Officers, and to other Division of Natural Resources employees as a result of a grievance, back pay, interest, and compensation for legal fees.[2]

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[1] The Grievants are Robert A. Clark, Jr., Jerry Jenkins, Bradford C. Debord, Roy E. Cool, Gary A. Johnson, Clyde D. Shriner, Samuel A. Brick, Jr., Thomas R. Stuckey, Gregg M. Willenborg, William A. Persinger, Jr., Douglas A. Benson, John J. Lane, Curt H. Tonkin, Woodrow Wilson Brogan, III, Barry A. Kaizer, Jerry E. Payne, Terry A. Ballard, Thomas D. Tolley, Joseph A. Ward, Harry E. Shaver, Charles R. Johnson, James C. Armstead, Jr., Stanley K. Hickman, and Michael A. Waugh.

[2] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." *Cosner v. Div. of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

Respondent waived consideration at level one on February 27, 2009, noting that it was without authority to grant the relief requested, and asserting that the grievance was not timely filed. A mediation session was held at level two on August 13, 2009. Grievants appealed to level three on September 4, 2009. After a level three hearing was scheduled, the parties agreed to submit this matter for decision based upon agreed stipulations of fact, the last of which were submitted on September 20, 2010. Grievants Thomas D. Tolley and Joseph A. Ward appeared *pro se*, and the remainder of the Grievants were represented by J. Michael Ranson, Esq., and George B. Morrone, III, Esq., Ranson Law Offices, and G. Patrick Jacobs, Esq., Jacobs Law Offices. Respondent Division of Natural Resources was represented by William R. Valentino, Assistant Attorney General, and Respondent Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' written arguments on December 8, 2010.

Synopsis

In August of 2000, Respondent granted a salary advancement to six Conservation Officers ranked as Sergeants, who were Regional Training Officers. Four employees of Respondent filed a grievance, and received a decision from the Grievance Board, which was appealed to the Circuit Court of Kanawha County. In May 2008, those grievants were awarded the same salary advancement by Order of the Circuit Court of Kanawha County. That Order was appealed to the Supreme Court of Appeals of West Virginia, and in January 2009, the Court denied the petition for appeal. It was after this, nearly nine years after the triggering event, that Grievants filed this grievance, claiming they were entitled to

the same salary advancement awarded to Regional Training Officers in 2000. This grievance was not timely filed.

The undersigned adopts the Stipulations of Fact agreed to by the parties as the following Findings of Fact.

Findings of Fact

1. On or about August 1, 2000, a group of six Conservation Officers ranked as Sergeant, and commonly referred to as Regional Training Officers ("RTOs"), were given salary advancements of $1,767.12 per year, as recommended by former Col. Jim Fields and approved by former Division of Natural Resources ("DNR") Director Ed Hamrick.

2. On or about August 1, 2000, Grievant Michael A. Waugh was given an identical salary advancement of $1,767.12 per year as recommended by former Col. Fields and former Director Hamrick.[3]

3. On April 9, 2002, three Conservation Officers of the rank of Sergeant, Steven Antolini, Mickey Sylvester, and Roger McClanahan ("Antolini, et al."), filed a grievance alleging discrimination and favoritism as a result of the RTO raises.

4. Antolini, et al., as a group, did not grieve the salary advancement granted to Michael A. Waugh.

5. Steven Antolini was promoted to Sergeant on September 16, 2000, approximately 6 weeks after the RTO salary advancement was first implemented, and approximately 17 months prior to the filing of the Antolini, et al., grievance.

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[3] Grievant Waugh did not clarify how he would be entitled to any relief given that it appears he had already received the salary advancement at issue.

6. No objection was raised regarding Steven Antolini's status, and Steven Antolini made no reference that he did not hold the rank of Sergeant at all times relevant to the issue grieved.

7. The basic facts establishing the positions of the various parties were exhaustively litigated and documented in both *Antolini, et al., v. Division of Natural Resources,* Docket No. 03-DNR-94 (October 29, 2003), and *Antolini, et al., Petitioners v. West Virginia Division of Natural Resources, Respondent*, Civil Action No. 03-AA-193.[4]

8. On October 29, 2003, the Grievance Board entered a Decision finding that the grieved salary advancements were discriminatory and a result of favoritism, but ordered the same rescinded as they were not based upon recorded indicators of performance. Antolini, et al., appealed to the Circuit Court of Kanawha County.

9. On May 28, 2008, the Circuit Court of Kanawha County entered a Final Order ("the Zakaib final order"), and ruled in favor of Antolini, et al., that the raises were a result of favoritism and/or discrimination, but rather than ordering the rescission of the raises, ordered the same ostensibly improper raise be granted to Antolini, et al. Respondent timely appealed this Order to the Supreme Court of Appeals of West Virginia.

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[4] The stipulations submitted by the parties incorporated these files by reference herein, including the Division of Natural Resources' final brief to the West Virginia Supreme Court of Appeals. However, the parties did not attach to the stipulations the record developed at the Circuit Court level, or the referenced brief filed with the Supreme Court of Appeals. Except for the final order of the Circuit Court, and the record supplied by the Grievance Board from the Antolini, et al., grievance, the Grievance Board does not have these documents. While the undersigned does not find these documents to be relevant to the timeliness issue, should either party appeal this Dismissal Order, the parties will be responsible for providing to the Court on appeal the documents which were incorporated by reference into the stipulations of fact, but which were not attached to the stipulations.

10. On January 22, 2009, the Supreme Court of Appeals of West Virginia entered an Order denying Respondent's petition for appeal of the Zakaib final order.

11. Following the final ruling of the Supreme Court effectively upholding the Zakaib final order, on February 10, 2009, this grievance was filed requesting the same salary advancement awarded by the Zakaib final order to the Antolini grievants. The Grievants herein are all of the rank of Sergeant or above.

12. All of the Grievants in this case have held the rank of Sergeant at some time during their careers. Not all of the Grievants were Sergeants at the time of the original grievable event. Some of the Grievants were Sergeants at the time of the original RTO salary advancement, and have since been promoted beyond the rank of Sergeant. Others were promoted to Sergeant after the raise was granted and either remain Sergeants or have been promoted beyond the rank of Sergeant.

13. Grievants Cool, Jenkins, Kaizer, Payne, Shaver, and Waugh held the rank of Sergeant on August 1, 2000.

14. Grievants Armstead, Ballard, Benson, Brick, Brogan, Clark, DeBord, Hickman, Charles Johnson, Gary Johnson, Lane, Persinger, Shriner, Stuckey, Tolley, Tonkin, Ward, and Willenborg were promoted to the rank of Sergeant after August 1, 2000.

15. None of the Grievants was an RTO on August 1, 2000.

16. All of the Grievants knew, or had reason to know, of the Antolini, et al., grievance, either at the time it was filed, upon their accepting employment as Conservation Officers or promotion to the rank of Sergeant, or at a time sufficient to have intervened in the Antolini, et al., grievance. No motions to intervene or otherwise become a part of that

action were filed by any of the Grievants, and no Grievant in this matter was a party to the Antolini, et al., grievance.

17. None of the Grievants has grieved the salary advancement granted to Michael Waugh.

The undersigned makes the following additional finding of fact, based upon the record:

18. Respondent asserted a timeliness defense at level one.

Discussion

Respondent asserts that the grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4, and therefore it must be dismissed. When an 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. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *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). "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)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Grievants argue that "[t]he decision being challenged in this case did not mature until after the West Virginia Supreme Court of Appeals denied the last and final effort by the Respondents to avoid payment of the salary advancement," in January 2009. "Clearly, the Grievants could not have been 'unequivocally notified' of the decision they sought to challenge until the Respondents were legally forced to make the salary advancement."

Grievants appear to be asserting that the delay in filing, from the 2000 salary advancement, the grievable event, until 2009, would fall under the "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Under this exception, the time in which to invoke the grievance procedure does

not begin to run until the grievant knows of the facts giving rise to a grievance. "However, the discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an 'event' giving rise to a grievance within the intent of *W. Va. Code* § 18-29-4 as interpreted in *Spahr*. *Parkins v. W. Va. Dep't of Envtl. Protection*, Docket No. 03-DEP-156 (Sept. 17, 2003); *Adkins v. W. Va. Dep't of Educ.*, Docket No. 95- DOE-507 (Apr. 26, 1996)." *Cain, et al., v. Dep't of Transp.*, Docket No. 05-DOH-402 (Feb. 6, 2006). "'[T]he date a Grievant finds out an event or continuing practice was <u>illegal</u> is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice.' *Lynch v. Dep't of Trans./Div. of Highways,* Docket No. 97-DOH-060 (July 16, 1997); *Harris v. Lincoln County Bd. of Educ.,* Docket No. 89-22-49 (Mar. 23, 1989)." *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011)(Emphasis in original).

The salary advancement which is the basis of this grievance was awarded in August of 2000. That was the triggering event for the purposes of the grievance procedure, not the affirmation of the final decision in another grievance. In April 2002, three DNR employees filed a grievance contending that they too should be awarded this same salary advancement. Grievants knew about the Antolini, et al., grievance, but took no steps to become parties to that grievance. Grievants waited nine years to file this grievance, filing only after they learned that the salary advancement awarded to the Antolini, et al., grievants had been upheld by the Supreme Court of Appeals of West Virginia. This

discovery of the success of another employee's grievance does not fall within the discovery exception.

Grievants also assert that their claim falls within the continuing practice exception, and that each time they receive a paycheck, "the discriminatory rate is a separate link in a chain of violations." The Grievance Board has addressed this very same argument on many occasions, concluding that what we have here is one discrete event which gives rise to continuing damage. This is not the same as a continuing practice.

> As to whether this grievance falls within the continuing practice exception, Grievant is challenging a decision that was made on or before September 11, 2001, which he knew about at that time, and which continues to affect his status. "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). However, 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 . . .. *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 Resources,* Docket No. 94-HHR-630 (Mar. 23, 1995). Likewise, Grievant's claim is that an alleged specific wrongful act which occurred in the past continues to inflict damage upon him. This does not fall within the continuing practice exception.

Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002), *aff'd* Circuit Court of Kanawha County, Civil Action No. 02-AA-64 (Aug. 12, 2003), *petition for appeal denied,* No. 032838, (Apr. 1, 2004). *See also, Jones v. Div. of Rehabilitation Services,* Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances

is ordinarily the failure to receive a merit increase, not learning that others have received merit increases). This situation likewise does not fall within the continuing practice exception.

Grievants assert that they may pursue this otherwise untimely claim as a "disparate-treatment employment discrimination complaint," citing *Redden v. Bureau of Employment Programs*, Docket No. 05-BEP-395 (August 22, 2006). *Redden* does indeed stand for this proposition, noting that, "[u]nlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a 'continuing violation,' . . ." However, there is no claim here of pay disparity, in general, based upon a prohibited factor. Further, *Redden* made clear that when, as is the case here, "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. . . .' *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July10, 2001)." *Id.* *Redden* does not support Grievants' argument that the grievance was timely filed.

Finally, Grievants contend that the Circuit Court of Kanawha County ordered that all Sergeants employed by DNR be granted the salary advancement at issue, and that it is binding and must be followed in this decision. First, the undersigned does not read the Circuit Court Order to authorize salary advancements for all Sergeants. The ordering paragraph orders the Respondent to "pay the *petitioners* the same compensation being paid the [Regional Training Officers] . . .." (Emphasis added.) Grievants were not petitioners in that case. More importantly, if Grievants believe the Circuit Court's Order has

not been carried out by Respondent, the Order "is enforceable in the circuit court of Kanawha County." W. VA. CODE § 6C-2-5.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. When an 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. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *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). "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)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

2. Respondent must assert a timeliness defense at or before level two of the grievance procedure. W. VA. CODE § 6C-2-3(c)(1). Respondent timely asserted this affirmative defense.

3. An employee is required to file his grievance within fifteen days following the grievable event, or "within fifteen days of the date upon which the event became known to

the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. W. VA. CODE §§ 6C-2-3(a)(1), 6C-2-4(a)(1).

4. Under the "discovery rule exception," as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. "However, the discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an 'event' giving rise to a grievance within the intent of *W. Va. Code* § 18-29-4 as interpreted in *Spahr*. *Parkins v. W. Va. Dep't of Envtl. Protection*, Docket No. 03-DEP-156 (Sept. 17, 2003); *Adkins v. W. Va. Dep't of Educ.*, Docket No. 95- DOE-507 (Apr. 26, 1996)." *Cain, et al., v. Dep't of Transp.*, Docket No. 05-DOH-402 (Feb. 6, 2006).

5. As to whether this grievance falls within the continuing practice exception, Grievant is challenging a decision that was made on or before September 11, 2001, which he knew about at that time, and which continues to affect his status. "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). However, 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 . . .. *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 Resources,* Docket No. 94-HHR-630 (Mar. 23, 1995). Likewise, Grievant's claim is that an alleged specific wrongful act which occurred in the past continues to inflict damage upon him. This does not fall within the continuing practice exception.

Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002), *aff'd* Civil Action No. 02-AA-64 (Aug. 12, 2003), *ref'd* Apr. 1, 2004.

6. The grievance was not timely filed.

7. Grievants did not demonstrate an excuse for the untimely filing, or that this set of facts falls within either the discovery rule exception or the continuing practice exception.

Accordingly, this grievance is **ORDERED DISMISSED** from the Docket of the Grievance Board at level three.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: May 6, 2011