THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FRED FOSTER, et al.,	**Docket No. 05-DOH-336(A)**
AARON STROUD, et al.,	**Docket No. 05-DOH-336(C)**
JOHN BINGMAN, et al.,	**Docket No. 05-DOH-336(D)**
PUEBLO BIANCO, et al.,	**Docket No. 05-DOH-336(E)**
DANNY BURNS, et al.,	**Docket No. 05-DOH-336(F)**
BRADFORD JONES, et al.,	**Docket No. 05-DOH-336(G)**
JAMES KINDER, et al.,	**Docket No. 05-DOH-336(H)**
BOYD MYERS, et al.,	**Docket No. 05-DOH-336(I)**
CHRIS BLANKENSHIP, et al.,	**Docket No. 05-DOH-336(J)**
NANCY MINNICK, et al.,	**Docket No. 05-DOH-336(K)**
Grievants,	

v.

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS and
DIVISION OF PERSONNEL,
Respondents.

DISMISSAL ORDER

Grievants filed this action in 2005 following Respondent Division of Highways implementation of a regional pay adjustment to address recruitment and retention difficulties in Morgan, Jefferson, and Berkeley Counties. All of the above-styled grievances were placed in abeyance pending the outcome of the appeal of the Grievance Board decision issued in *Hammond, et al., v. Department of Transportation, et al.*, Docket No. 05-DOH-336(B). On May 9, 2012, the West Virginia Supreme Court of Appeals affirmed the decision of the circuit court, which affirmed the Grievance Board decision. Thereafter, Respondent filed a Motion to Dismiss the above-styled grievances for being untimely filed at level one. Grievants filed responses both *pro se*, and through counsel. Respondent appears by its counsel, Mark C. Dean and Krista D. Black, West Virginia Department of

Transportation/Division of Highways. The only responses filed were by Nancy Minnick[1] (Minnick Group), appearing *pro se*, Douglas Waugh[2] (Waugh Group), appearing *pro se*, and the 322 grievants listed under all Docket Numbers represented by counsel, Andrew J. Katz, The Katz Working Families' Law Firm, L.C. The parties have exchanged pleadings in support and opposition to the motion and the matter is mature for consideration.

Synopsis

The record of this matter demonstrates that Grievants that failed to file their grievance prior to July 18, 2005, are untimely. Grievants in the Minnick group filed their grievances prior to July 18, 2005, and are therefore timely. Accordingly, all of the above-styled grievances, except for Docket No. 05-DOH-336(K), are dismissed.

The following findings of fact are made pursuant to the record of this grievance.

Findings of Fact

1. On July 1, 2005, the Division of Highways implemented a regional pay adjustment to address recruitment and retention difficulties in Morgan, Jefferson, and Berkeley Counties.

2. The implementation of this pay differential led to the statewide filing of grievances with the Public Employees Grievance Board. The filings were consolidated into eleven docket numbers by the Grievance Board.

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[1]Even though Docket Number 05-DOH-336(K) is named Nancy Minnick, et al., when speaking of the Minnick Group in this Order, the undersigned is only directing the statements toward Grievant Nancy Minnick, and the two other Grievants she is representing, William Smallwood and Roberta Michael.

[2]Douglas Waugh is also representing David Secrist, Paul Miller, Randy McPeak and Dennis Neely.

3. The Division of Highways moved the Board to hold ten cases in abeyance pending the final outcome of the appeal of the Grievance Board decision issued in *Hammond, et al., v. Department of Transportation, et al.*, Docket No. 05-DOH-336(B). This request to place the above-styled cases in abeyance was granted by order of this Board.

4. On May 9, 2012, the West Virginia Supreme Court of Appeals affirmed the decision of the Kanawha County Circuit Court, which had affirmed the Grievance Board decision in *Hammond*, *supra*. *See Hammond, et al., v. W. Va. Dep't of Transp., et al.*, 727 S.E.2d 652 (2012).

5. The Grievance Board decision held that the event being grieved occurred on July 1, 2005, and that all grievances filed after July 18, 2005, were not timely filed. The decision also found that the Grievants in District One did not demonstrate that they were similarly situated to the employees in the Eastern Panhandle who had received a pay differential in 2005, due to demonstrated recruitment and retention problems.

6. The Grievance Board issued an order directing the Division of Highways to file a list of all Grievants it asserted to be untimely. Grievants were provided an opportunity to respond as to why they believe their grievances should not be dismissed as untimely filed. Grievants that filed before July 18, 2005, were provided an opportunity to explain how their cases differ from the *Hammond* grievance, and why their grievances should proceed to hearing. The pleadings have been filed and the issues are joined, as well as mature for consideration by the undersigned.

Discussion

Respondent has asked that the above-styled grievances be dismissed as untimely filed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

As to when a grievance must be filed, former W. VA. CODE § 29-6A-4, the provision applicable when these grievances were filed, provided, in pertinent part:

> Before a grievance is filed and 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 shall schedule a conference

with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.[3]

All remaining Grievants, excluding the Minnick Group, Waugh Group, and those represented by Mr. Katz, did not respond to Respondent's Motion to Dismiss. Therefore, they are dismissed pursuant to the previous Order of this Board entered on December 13, 2012.

The record of these grievances reflect that the three Grievants in the Minnick group filed their respective grievances before July 18, 2005, and are therefore timely filed. It also appears from the record that they may be similarly situated as they all appear to work in the Eastern Panhandle. Accordingly, the Division of Highways' motion on the grounds of timeliness is denied as it relates to the Minnick group. For reasons set forth below, the Division of Highways' motion is granted as it relates to the remaining above-styled grievances.

The Grievants represented by Mr. Katz did respond to Respondent's Motion to Dismiss, and argue that any grievances filed after July 18, 2005, are, in fact, timely because the doctrine of "continuing practice" applies to the facts of the case. The undersigned disagrees. The one-time salary increase which was granted to the Eastern

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[3]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 order are to the former statutes, which continue to control the proceedings in this case.

Panhandle employees was a single grievable event, not a continuing practice within the meaning of the statute. As 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, . . . 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 Corr. and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

Grievants represented by Mr. Katz did not address the issue of being similarly situated, but the record reflects that none of these Grievants work within the three counties of the eastern panhandle. The Waugh group also responded to Respondent's Motion to Dismiss and argued that they "live" within the three counties of the eastern panhandle. In any event, the record reflects that this group actually works in Mineral County, and they, therefore, are dismissed for not being similarly situated.

Accordingly, any grievance filed after July 18, 2005, which would include all of the above-styled grievances, except for *Nancy Minnick*, *et al.*, Docket No. 05-DOH-336(K), are dismissed as untimely filed. The record reflects that Grievants who filed by July 18, 2005, have submitted written statements detailing how their grievances differ from the legal conclusions made in *Hammond*, *supra*, and are entitled to a hearing on the issues.

The following conclusions of law support the ruling set forth in this order.

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

2. 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).

3. The time period for filing a grievance ordinarily begins to run 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)*.*

4. "[C]ontinuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute. *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R- 416R (Sept. 6, 2005).

5. Respondent has proven by a preponderance of the evidence that Grievants in the all of the above-styled docket numbers, except for 05-DOH-336(K), were not filed within the ten-day statutory time limit, and Grievants have offered no explanation as to why their late filing should be excused.

Accordingly, it is **ORDERED** that the Motion to Dismiss is granted as it relates to all of the consolidated grievances except for the three Grievants, Nancy Minnick, William Smallwood and Roberta Michael. It is further **ORDERED** that these grievances proceed to a hearing on the issue of why they were not given the pay differential provided to other employees in the Eastern Panhandle.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 27, 2013

Ronald L. Reece
Administrative Law Judge