MANUEL VELEZ, DDS,

Grievant,

v. **Docket No. 03-HEPC-202**

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Manuel Velez ("Grievant"), employed by West Liberty State College (WLSC) as a Professor of Oral Medicine and Clinical Supervising Dentist, filed a grievance directly to level two on May 8, 2003, in which he alleged President Richard H. Owens violated school policies by making statements which did not "foster an environment of mutual respect and sensitivity, free from verbal discriminatory conduct of an anti-Semitic nature, which would constitute offensive behavior and a hostile work environment." Grievant requested as relief the termination of President Owens' employment at WLSC, with two letters of reprimand in his permanent employment file for incidents of February 14, 2003, and March 21, 2003. After the grievance was denied at levels two and three, appeal was made to level four on July 11, 2003. WLSC filed a "Motion to Dismiss" on August 26, 2003. A conference call was conducted on August 29, 2003, at which time Grievant, representing himself, and WLSC counsel, Assistant Attorney General Samuel R. Spatafore addressed the "Motion." Grievant additionally filed a written response on August 30, 2003.

The following findings of fact are derived from the lower-level record submitted by WLSC, along with the level four oral and written arguments of the parties.

Findings of Fact

1. Grievant has been employed by WLSC for approximately fifteen years and holds the position of Full Professor of Oral Medicine. Grievant additionally serves as theClinical Supervising Dentist.

2. Dr. Richard H. Owens has served as President of WLSC since December 31, 2001.

3. A faculty and staff meeting was conducted on February 14, 2003, to discuss employee concerns regarding staff reductions. After responding to a number of questions, President Owens commented, "this is the part of the job that sucks."

4. A follow-up meeting was conducted on March 21, 2002. During a discussion regarding what appeared to be contradictory information provided by the Director of Development, Grievant stated that “something isn't kosher here,” to which President Owens responded, “[s]he's not Jewish so it must be true.”

5. Grievant expressed his concerns relating to the two statements in a letter to President Owens dated April 16, 2003. In this letter, Grievant opined that letters of reprimand would not be contrary to law or policy, or be considered arbitrary or capricious. Grievant further noted that Higher Education Policy Commission Administrative Rule 133 C.S.R. 9 allows dismissal for actions of personal conduct which impairs the individual's ability to fulfill his responsibilities, including verified instances of discriminatory practices.

6. The issues and circumstances raised in Grievant's letter were presented to, and addressed by, the WLSC Board of Governors at its April 2003, meeting. The Board issued a letter dated May 20, 2003, in which the members noted that Grievant had leveled serious charges against President Owens, and chose to “express our most strident disagreement with these appalling accusations.” The letter stated the members had “strong support” for President Owens, and labeled the charges as “grossly unfair, inappropriate and misguided.” 7. Grievant filed this matter directly to level two on May 8, 2003. Dr. Donna Lukich, Interim Dean of the School of Sciences, issued a level two decision dated May 20, 2003, in which she found the grievance was not timely filed.

Discussion

Respondent argues that the instant grievance must be dismissed because it was not timely filed pursuant to W. Va. Code § 29-6A-4(a), and because the Grievance Board is not empowered to grant the relief requested. Pursuant to W. Va. Code § 29-6A-3, WLSC raised the issue of timeliness at level two, and the matter may be properly considered at level four. 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Once the employer has demonstrated that 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 29, 1997); 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).

A grievance must be filed within ten working days following the occurrence of the event upon which the grievance is based. W. Va. Code 29-6A-4(a). The running of therelevant 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). Because Grievant was in attendance at both the February 14 and March 21, 2003, meetings, but did not file a grievance until May 8, 2003, well beyond the ten days permitted by statute, WLSC has proven the grievance was untimely filed.

Grievant asserts that the matter falls within the discovery rule exception to the statutory time lines, set forth in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Grievant stated he did not know any relief was available to him until early May, and upon obtaining that information, he promptly filed the grievance.

The discovery rule exception upon which Grievant relies is set forth in Syllabus Point 1 of Spahr, and states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Grievant knew of the facts giving rise to the grievance on February 14 and March 21, 2003. By his own admission, what he discovered in May 2003, was a legal theory to support his grievance. "It is not the discovery of a legal theory which triggers the statute, but the event . . . ." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997). The facts in this matter do not fall within the discovery rule exception.

Regarding the second issue, Grievant has amended his requested relief to ask that the matter be remanded to the Board of Governors with direction to make a decision on President Owen's continued employment. Since the Board has considered the matter, andissued a statement in support of the President, remanding the grievance would serve no purpose.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 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 29, 1997).

2. The grievance process must be started within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4a.

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). An exception to the statutory time lines is the discovery rule discussed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

4. "It is not the discovery of a legal theory which triggers the statute, but the event . . . ." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993).

5. The grievance was not timely filed, as Grievant knew of the events giving rise to the grievance in February and March 2003, but did not file a grievance until May 2003.

6. No facts were shown which would excuse Grievant's late filing.

Accordingly, this grievance is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

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, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal andshould 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: SEPTEMBER 9, 2003 _____

SUE KELLER **SENIOR ADMINISTRATIVE LAW JUDGE**