**DAVID RIDPATH,**

**Grievant,**

**v. Docket No. 03-HE-361**

**MARSHALL UNIVERSITY,**

**Respondent.**

## D E C I S I O N

**Dr. David Ridpath ("Grievant"), employed by Marshall University ("Respondent") as Director of Judicial Programs, filed a level one grievance on August 22, 2003, when he was not appointed as an adjunct faculty member for the Fall 2003 semester. For relief, Grievant requests the compensation he was to be paid for teaching the class. The grievance was denied at levels one, two and three, and appeal was made to level four on November 24, 2003. An evidentiary hearing was conducted in the Grievance Board's Charleston office on April 7, 2004, at which time Grievant was represented by Jason E. Huber, Esq. of Forman & Huber, and Respondent was represented by Jendonnae L. Houdyschell, Assistant Attorney General. The grievance became mature for decision upon receipt of final post-hearing submissions on July 26, 2004.**

**The following facts are derived from a preponderance of the evidence made part of the record at levels three and four.**

## Findings of Fact

**1. Grievant was first employed by MU in November 1997, as Assistant Athletic Director for Compliance. Grievant was, additionally, intermittently employed as an adjunct instructor during his tenure.** (See footnote 1)

**2. In July 1999, Grievant became aware that a copy of a physical education test had been provided to some football players prior to taking the test. Grievant self-reported this incident to the National Collegiate Athletic Association (NCAA).**

**3. During the investigation of the alleged academic fraud, MU discovered and self-reported improper employment assistance was being provided to non-qualified student**

**athletes. A hearing on the infractions was held by the NCAA on September 22, 2001.**

**4. On or about October 1, 2001, Grievant accepted reassignment to the position of Director of Judicial Programs. Grievant lacks any formal education and training to qualify him for the position, but was given a salary approximately $15,000.00 greater than that paid to his predecessor to accept the position. The reassignment was presented to the NCAA as a "corrective action" taken by MU as a result of the rule violations.**

**5. On or about August 4, 2003, Grievant filed a civil action in federal court against the MU Board of Governors, Dan Angel (President of MU), Bob Pruett (Head Football Coach), F. Layton Cottrill, Esq. (Vice-President for Executive Affairs and General Counsel), K. Edward Grose (Senior Vice-President for Operations), and Richard Hilliard, Esq. (Independent Counsel), alleging, in part, that he was used as a scapegoat during the NCAA investigation, causing him to suffer permanent damage to his reputation, making itimpossible for him to procure employment as a compliance director, or any other intercollegiate athletic administrative position for which he is qualified.**

**6. Sometime in the Spring of 2003, John Kiger, Director of the Sports and Recreation Programs, arranged for Grievant to teach a Physical Education course, "Special Topics: Intercollegiate Athletics," during the Fall 2003 semester. Grievant verbally agreed to accept the assignment as adjunct instructor, for which he was to be compensated $1800.00. Grievant had last taught this class in Spring 2002.**

**7. On July 14, 2003, Dr. Jeffrey Chandler, Chair of ESSR, verbally advised Grievant that he would not be teaching the course in Fall 2003. The reasons for the decision were Grievant's improper use of a telephone code and commuter code of another employee, student complaints regarding his teaching style, including negative comments about MU during the last class he taught, and his use of a final exam question which was related to his legal case with MU. Dr. Chandler directed Grievant to Dean Tony Williams when he requested the reasons for his non-hiring in writing. Dean Williams subsequently advised Grievant that the decision had been Dr. Chandler's.**

**8. By letter to Dr. Chandler dated July 29, 2003, Grievant "confirm[ed] the reasons" given during their meeting of July 14 for not appointing him as an adjunct faculty member. Those reasons were that he spoke negatively about MU during his classes, spoke of his legal**

**case during his classes, students had made negative comments regarding his teaching style, and his final exam question for the Spring 2002 course. Grievant requested that Dr. Chandler advise him if he had misunderstood the reasons or missed any other specifics. 9. By letter dated August 1, 2003, Grievant advised Dr. Chandler that he wished to file a level one grievance contesting the decision not to hire him as an adjunct instructor, under the provisions of the West Virginia Board of Trustees Policy 36. Grievant noted that he would be on vacation until August 18, 2003, but would like to meet with Dr. Chandler shortly thereafter.**

**10. Dr. Chandler responded by letter of August 5, 2003, that while he had received indirect reports that Grievant used his class to distribute inappropriate information, the more important reason for not hiring him was the use of another employee's phone and computer code. He stated that the incidents had "caused feeling of mistrust in our division." Dr. Chandler continued that another factor which had not been discussed, but one which they were both aware, was budgetary reductions, and that "there is a possibility the class will be cancelled." Finally, Dr. Chandler notified Grievant that the Board of Trustees grievance procedure is no longer in effect, and provided him a current grievance form to complete and return to Human Resource Services.**

**11. Although efforts were being made to secure an instructor for the class Grievant had initially been secured to fill, Dr. Chandler later determined the class would simply not be taught the Fall 2003 semester.**

**12. Grievant filed a level one grievance form on August 22, 2003.**

## Discussion

**Grievant asserts that MU improperly eliminated the adjunct assignment for the Fall 2003 semester, in violation of his First Amendment Constitutional rights, which not only includes free speech, but also freedom from retaliation for the exercise of that right. MUargues that the class was not taught due to marginal enrollment and budgetary concerns, and that the grievance was not timely filed.**

**When 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26- 394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Res., Docket No. 98-HHR-010 (July 7, 1998);**

**Harvey v. Bureau of Employment Programs, Docket No. 96- BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL- 490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR- 501 (Sept. 30, 1997).**

**Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate 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).**

**A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234(Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). 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 was notified that he would not be employed as an adjunct instructor on July 14, 2003, he did not file a level one grievance until August 22, 2003 clearly past the statutory time lines.**

**In this case, the grievable event was the decision not to hire Grievant to teach a physical education class. Grievant was advised that he was not going to be hired as an adjunct instructor on July 14, 2003, as he states in the July 29, 2003, letter to Dr. Chandler. The fact that Grievant wanted the reasons for the decision to be placed in writing is not the grievable event. To be in compliance with the statutory time lines, the grievance should have been file on or before July 28, 2003. Grievant did attempt to initiate grievance proceedings on August 1, 2003; however, he did so under a procedure which had been eliminated approximately two years earlier. Even if Grievant is credited for this filing, it was not timely.**

**Grievant next explains that he was on vacation from early August to the 18th of that month, and that he promptly filed the grievance upon his receipt of Dr. Chandler's letter advising him of the correct procedure. Again, this advice was not the grievable event, and while W. Va.**

**Code § 29-6A-3 provides "[t]hat the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment," absence due to vacation is not included as a cause for extension. In any event, Grievant could not prevail even if the grievance had been timely filed. Grievant was tentatively offered an adjunct assignment, as contracts would not be issued until it was determined the enrollment would be sufficient to schedule the class. While MU's motives were not altruistic from Grievant's perspective, the bottom line is simply that Grievant had no entitlement to the position until a contract was signed.** **(See footnote 2)** **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. When 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't of Health and Human Res., Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL- 490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR- 501 (Sept. 30, 1997).**

**2. Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate 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. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a).**

**4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-**

**DOH-445 (July 28,1997). 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).**

**5. Grievant failed to timely file this grievance, or to demonstrate a proper basis to excuse his failure to file in a timely manner.**

**Accordingly, the 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 (1998). Neither the West Virginia Education and State 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 record can be prepared and properly transmitted to the appropriate circuit court. DATE: August 31, 2004** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1***

***.Adjunct faculty are employed on an as-needed basis to teach one or two classes a semester. The employment period for these assignments is limited to the duration of the class.***

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***Footnote: 2***

***.MU filed a "Motion to Strike" two exhibits attached to Grievant's proposed findings of fact and conclusions of law, specifically, a copy of the amended complaint filed with the federal court, and a court order granting in part, and denying in part, motions to dismiss the claim. MU asserts the attachment was improper because the record was closed, and on the basis of relevancy. These documents did not influence the outcome of this decision, but did provide some factual information not found elsewhere in the record. Because of this limited use, the Motion is denied.***