WILLIAM I. TORRY,

Grievant,

v. Docket No. 05-HE-045

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Dr. William I. Torry ("Grievant"), employed by West Virginia University ("WVU") as an Associate Professor in the Department of Sociology and Anthropology, filed a level four grievance appeal on February 9, 2005, upon receipt of a level three decision which denied his claims that: (1) he was entitled to additional compensation for the number of classes taught; (2) he had been improperly denied appointments to division and school faculty committees for two academic years; and, (3) he had been improperly relieved of undergraduate advising duties for two academic years. In addition to the compensation, Grievant requests assurance that he will be placed on a committee, and reinstated as an undergraduate advisor. A level four hearing was conducted on May 12, 2005, at which time Grievant represented himself, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The grievance became mature for decision upon receipt of WVU's proposed findings of fact and conclusions of law on June 13, 2005. Grievant elected not to file a post-hearing summary.

The following facts have been derived from a preponderance of the evidence made part of the record at level three and level four.

Findings of Fact

1. Grievant has been employed by WVU as an Associate Professor in the Eberly College of Arts and Sciences, School of Applied Social Sciences, Division of Sociology and Anthropology, at all times pertinent to this grievance.

2. Grievant was assigned to teach a six course class load (three classes each semester) during the 2003-2004 and 2004-2005 academic years.

3. WVU has no policy that defines a full teaching load; however, guidelines are developed by each department or division to meet its individual needs.

4, The teaching loads formula guidelines used by the College of Arts and Sciences consist of five categories, which provide for course loads of two to four per semester, depending on the faculty member's qualifications. The document further states:
The categories listed below have been developed as a basis for course load assignments. They do not take into consideration administrative or other assignments that would be a basis for a specific course adjustment.

5. Category 2, which carries a course load of two classes one semester and three classes the remaining semester, requires the faculty member meet the following:
1. Regular Member of Graduate Faculty.
2. Demonstrably active and "good" research and publication record.
3. Move to Category 1 only with Externally funded research, or demonstrable, ongoing and continued record of "excellence" in both research and publication.
4. Move to Category 3 if no publication in past three years.

6. Category 3, which carries a course load of three classes per semester requires the faculty member to meet the following:
1. Regular Member of Graduate Faculty.
2. "Satisfactory" research and publication record.
3. Move to Category 2 upon attainment of "good" research and publication record.4. Move to Category 4 if no research publication in the past three years.

7. In Fall 2003, Dr. Lawrence Nichols, Interim Chair of the Department of Sociology and Anthropology, relieved Grievant of duties advising undergraduate students. The basis for this decision was a higher than average number of student complaints regarding Grievant's lack of availability and effort to place students in required writing classes. Grievant filed a grievance regarding this action; however, this grievance was ruled untimely at a lower level, and was never appealed to level four.

8. Grievant has not been assigned to a divisional committee for two years. Faculty are evaluated in the areas of research, teaching, and service. Committee work is one option to fulfill the "service" category.

9. There are three divisional committees open to faculty membership. The

Promotion/Tenure committee consists of members who are elected by their colleagues. The remaining committees are the Graduate and Undergraduate committees. Grievant does not teach graduate level classes, limiting him to the Undergraduate committee.

10. Dr. Nichols has declined to appoint Grievant to the Undergraduate committee due to the fact that several faculty members have expressed fear of Grievant, and believe that there is a potential for violence. The conflict has been such that one individual called security during a faculty meeting on October 21, 2004, and security was arranged for the November 2004, meeting.

11. Dr. Nichols offered Grievant an individual committee assignment as division representative to the WVU library; however, Grievant declined that offer. 12. Grievant did not file a grievance regarding his non-placement on a committee during the 2003-2004 academic year.

13. Grievant filed a level one grievance on August 26, 2004, requesting additional compensation for teaching a sixth class in Spring 2004 and Spring 2005. The grievance was denied at levels one and two.

14. Grievant filed a level one grievance on October 5, 2004, challenging his exclusion from faculty committee assignments, and the removal of his advising duties. The grievance was denied at levels one and two.

15. The grievances were consolidated, and denied, at level three.

Discussion

Initially, WVU argues that Grievant did not timely file the grievance relating to his Spring 2004 teaching load, and, had actually already grieved the matter in December 2003. WVU further argues that Grievant failed to timely file the grievance regarding the removal of his advisory duties. Grievant characterizes both issues as ongoing acts of discrimination and violations of guidelines/policies.

Where an employer seeks to have a grievance dismissed on the basis 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 StateCollege, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). The timeliness issue is governed by the time lines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

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 relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94- 41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997). WVU has demonstrated Grievant did not file the grievance regarding his Spring 2004 course load until August 26, 2004, long past the required ten-day time period. Grievant offered no excuse for his failure to file in a timely manner. Grievant's attempt to validate the Spring 2004 claim under the characterization that it is part of an ongoing practice, is not accepted. Assignments are made on a semester-by-semester basis, and may vary to meet the department's needs. Grievant knew the facts of the grievance prior to the beginning of the Spring semester, and had a responsibility to file a grievance at that time.

In fact, it appears that Grievant did file a grievance on this very issue in December 2003. That being the case, Grievant is additionally barred from pursuing this issue under the doctrine of *res judicata*, which serves to prevent the "relitigation of matters about whichthe parties have already had a full and fair opportunity to litigate and which were in fact litigated." Vance v. Jefferson County Bd. of Educ., Docket No. 03-19-018 (May 27, 2003).

While Grievant did not elect to continue with the grievance filed in December 2003, he had a full and fair opportunity to pursue the matter, which was determined to be untimely filed. Therefore, the claim for additional compensation for Spring 2003 will not be considered.

WVU has also proven that Grievant failed to timely file the grievance relating to the

removal of his advising duties. Grievant was notified by letter dated September 2, 2004, that he would be assigned no advising duties for the 2004-2005 school year, and did not file a grievance until October 5, 2004. Grievant offered no reason for his failure to file within the statutory time lines.

Grievant requests $7,556.00 for the third class he was assigned in Spring 2005, based upon an argument that it was contrary to division guidelines and policies. Guidelines by their very nature are not binding, but function as informal suggestions on how any given matter might be handled. The guidelines relevant here specifically state that other factors should be considered when assigning course loads. There are no formal WVU policies on this subject.

Grievant next asserts that the failure to appoint him to a committee resulted in discrimination. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

To establish a case of discrimination raised under the grievance procedure statutes the Grievant must show: (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). Dr. Nichols testified that he offered Grievant an individual assignment in lieu of a committee assignment based upon his belief that a committee could not function with Grievant's presence. Dr. Nichols explained that a number of Grievant's colleagues had expressed a fear of him, or that he might become violent. This fear was demonstrated during a faculty meeting on October 21, 2004, when a member called for security out of concern regarding Grievant's behavior. Security was again called for the November meeting; however, when Grievant noted the presence, he decided not to attend the meeting. Grievant testified in response that he is simply passionate about issues

regarding Anthropology, and expresses his opinion.

Grievant expresses his belief that he is "blackballed,", "blacklisted," and "isolated." Dr. Nichols observes that Grievant has attended only one faculty meeting in three years, did not attend a divisional retreat, and did not attend meetings when he was appointed to the Graduate committee a few years ago. Dr. Nichols summarizes Grievant's behavior as his standing apart, but complaining that he is left out. WVU has established that any difference in treatment has been based upon Grievant's demonstrated a lack of ability tosuccessfully fulfill the responsibilities of membership on a divisional committee. Thus, WVU has not engaged in discrimination.

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. Where an employer seeks to have a grievance dismissed on the basis 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).

2. A grievance must be filed under the provisions of W. Va. Code § 29-6A- 4(a), "[w]ithin 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 . . . ."

3. WVU has proven by a preponderance of the evidence that Grievant's claim for compensation for Spring 2004 was not filed within the statutory time lines.

4. Because Grievant had previously filed a grievance regarding the Spring 2004 issue, he is barred from again raising the matter under the doctrine of *res judicata*, which serves to prevent the "relitigation of matters about which the parties have already had afull and fair opportunity to litigate and which were in fact litigated." Vance v. Jefferson County Bd. of Educ., Docket No. 03-19-018 (May 27, 2003).

5. WVU has proven that Grievant did not file a grievance regarding the removal of his

student advising duties within the statutory time lines, and Grievant offered no reason for the delay.

6. Grievant has failed to prove that the assignment of six classes per academic year was in violation of any rule, regulation, or policy, or was otherwise prohibited.

7. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

8. To establish a case of discrimination raised under the grievance procedure statutes the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). 9. WVU has established that any difference in treatment regarding committeeassignments has been related to ability of the Grievant to perform the actual job responsibilities, and Grievant has not been subject to discrimination.

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: JUNE 30, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE