HAROLD WHITE and WYATT SINE,

Grievants,

v. **Docket No. 05-HE-162**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Harold White and Wyatt Sine ("Grievants"), employed by West Virginia University ("WVU") at the Physical Plant, filed a level one grievance on January 21, 2005, alleging a violation of W. Va. Code § 56-6-31 when interest was not included in a back pay award. (See footnote 1) For relief, Grievants request the interest. Administrators lacked authority to grant the requested relief at levels one and two. The grievance was denied following an evidentiary hearing at level three, and appeal to level four was made on May 20, 2005. Grievants' representative, Mary Snelson of the West Virginia Education Association, and Assistant Attorney General Samuel R. Spatafore, agreed to submit the grievance for decision based on the level three record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on September 7, 2005.

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

Findings of Fact

1. Grievants have been employed by WVU and assigned to the Physical Plant at all times pertinent to this grievance.

2. Along with many other Physical Plant employees, Grievants filed a grievance in 2001 challenging their compensation.

3. Grievants prevailed in their claim which had been consolidated into Nelson, et al. v. Higher Education Interim Governing Board/West Virginia University, Docket No. 01-HE-064 (Apr. 6, 2004).

4. Grievants received monetary compensation for back pay, but no interest was awarded.

5. Grievants did not appeal the level four decision for review by a circuit court.

6. On January 20, 2005, a coworker shared a document with Grievants which referenced W.

Va. Code § 56-6-31, which they interpreted to mean that they were entitled to interest on the back pay.

7. WVU raised the issue of whether the grievance was timely filed at level two.

Discussion

Grievants argue that they are entitled to interest on the back pay award, consistent with that received by a co-worker, and as required by W. Va. Code § 56-6-31. WVU asserts that Grievants did not request interest, and are not entitled to it under the cited statutory provision. WVU further distinguishes Grievants' case from that of a co-worker, and argues that the grievance was not timely filed. Because the timeliness assertion, if proven, would defeat the grievance without addressing its merits, it will be addressed first. 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 apreponderance 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. Kessler v. W. Va. Dep't of Transp., Docket No. 96- DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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). W. Va. Code § 29-6A- 4(a) provides in pertinent part:

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, or both, may file a written grievance with the immediate supervisor of the grievant.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, 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).

In this case, Grievants were notified of their award of back pay, with no interest, by decision dated April 6, 2004. They did not file a grievance seeking interest until January 21, 2005, more than nine

months later, and well beyond the ten day time frame. However, Grievants argue that they filed promptly upon learning of the statutory provision. This argument appears to be that the delay would fall under the “discovery rule exception” tothe statutory time lines. 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." Syl. Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). However, "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) at 8.

Grievants unequivocally state that they were not aware of any right to interest until a coworker brought it to their attention. This is the discovery of a legal theory, and timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket Nos. 99-CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98-HHR-477(Feb. 24, 1999). Because Grievants knew of the facts giving rise to this grievance in April 2004, the discovery rule exception does not apply in this case. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. 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. 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. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). 2. An employee filing a grievance under the provisions of W. Va. Code §§ 29- 6A-1, et seq., must do so 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. 3. WVU has proven that Grievants failed to file their level one grievances within ten days of learning they would not receive interest on back pay awarded in an earlier grievance. 4. An exception to the statutory time lines is the “discovery rule exception” set forth 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."

5. Timeliness is not triggered by the discovery of a legal theory to support a claim, or the discovery of the success of another employee's grievance, but by the event which is the basis of the grievance. Cole/Knight v. Div. of Corrections, Docket Nos. 99- CORR-187/183 (July 23, 1999); Childers v. Dep't of Health & Human Res., Docket No. 98- HHR-477(Feb. 24, 1999).

6. Grievants' claim that they filed this grievance upon learning of the success of a co-worker, does not fall within the discovery rule exception. 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: SEPTEMBER 27, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.W. Va. Code § 56-6-31, states in part,"[e]xcept where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not."