CAROL DOWNS,

Grievant,

v. Docket No. 05-HE-458

FAIRMONT STATE UNIVERSITY,

Respondent.

D E C I S I O N

Carol Downs ("Grievant"), employed by Fairmont State University ("FSU") as a Food Service Assistant, filed a level one grievance on September 19, 2005, in which she alleged that the reduction of twelve month employees to nine month employees and the subsequent outsourcing of services for three months was improper. For relief, Grievant requested reinstatement of her twelve month contract, and back pay for 2005. Grievant's immediate supervisor lacked authority to grant the relief at level one. The parties agreed to bypass level two. Following an evidentiary hearing, the grievance was denied at level three, and appeal was made to level four on December 20, 2005. At level four, Grievant, represented by John D. Grossklaus, Business Manager of Laborers Local 814, and FSU representative Elaine L. Skorich, Assistant Attorney General, agreed to submit the grievance for decision based on the level three record. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 15, 2006.

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

Findings of Fact

1. Grievant was first employed by FSU as a part-time employee in 1995. She became a full-time employee in 2000, and has been classified as a Food Service Assistant I assigned to the Falcon Center snack bar at all times pertinent to this grievance.

2. By letter dated October 29, 2003, all twelve-month food service employees, including Grievant, were notified by Rick Porto, FSU Vice President for Administrative and Academic Affairs, that their twelve month employment contracts would be reduced to a nine month contracts, effective July 1, 2005. The reason for the reduction was "to assure financial

stability."

3. In a letter to Grievant dated June 1, 2005, Stephen Leach, FSU Human Resources Administrator, confirmed the change in her appointment effective July 1, 2005. Thus, Grievant's term of employment for the 2005-2006 academic year would be from August 16, 2005, until May 16, 2006.

4. Grievant did not initiate these proceedings until September 19, 2005.

5. FSU raised the issue of timeliness at level one.

Discussion

Initially, FSU asserts the grievance was not timely filed. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28,1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). Once the employer hasdemonstrated 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). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra.*

***W. Va. Code* § 29-6A-4(a) provides:**

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. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

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).

Grievants was notified in October 2003 that her employment term would be reduced. She was again put on notice of the change in her employment by letter of June 1, 2005. Grievant took no action following either of these notices. Grievant does not claim the letters were not received, or that anyone hindered her filing of this grievance. In fact, Grievant offers no response at all to the assertion the grievance was not timely filed. Therefore, FSU has proven the grievance was not filed within the statutory time frame,

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); *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. A grievance must be initiated 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. *W. Va. Code* § 29-6A-4(a).

3. 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, 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. Grievant knew that her employment term would be reduced in October 2003,and the action was confirmed on June 1, 2005, but she did not file a grievance within ten days of either of those notices.

6. The grievance was untimely filed, and Grievants offered no proper basis to excuse the late

filing.

Accordingly, the grievance is DENIED.

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. 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: MARCH 30, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE