JOE WYATT AND ELAINE BAKER,

Grievants,

v. **Docket No. 06-HE-054**

MARSHALL UNIVERSITY,

Respondent.

DISMISSAL ORDER

Grievants filed this grievance on February 7, 2005, stating Respondent had engaged in discrimination and favoritism when Dr. Tom Ellis was hired at a higher salary than others in the department. Their relief sought is to receive salary increases comparable with Dr. Ellis, including back pay to the year 2002-2003. Grievants were denied at all the lower levels. On February 6, 2006, the Grievance Board received a letter from Dr. Wyatt requesting a hearing be held in the matter, and asserting that the case had been held in abeyance since May 24, 2005. Upon receipt of that letter, it was determined that the proper paperwork to appeal the decision to Level IV had not been received by the Grievance Board. Respondent filed a Motion to Dismiss, and a telephone hearing was held on Friday, February 17, 2005. Grievants were represented by Chris Barr of the AFT-WV, and Respondent was represented by Jendonnae Houdyschell, Senior Assistant Attorney General.

Issues and Arguments

After the Level III decision denying relief, Grievants filed paperwork with the Human Resources Department of Marshall University on May 24, 2005. Grievants argue that they believed this was a proper filing to appeal the decision.

Respondent's Motion to Dismiss is based on timeliness. Respondent asserts the initial grievance, filed on February 7, 2005, was not timely filed pursuant to W. Va. Code §29-6A-4(a). Respondent also asserts that the appeal to Level IV is not timely filed pursuant to W. Va. Code §29-6A-4(d). Respondent contends there was no decision entered holding this case in abeyance.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. On May 9, 2002, Grievants drafted and signed a letter to the Dean and Provost requesting them to review the salary inequities that were the result of a recent hire within the Psychology Department.

2. On February 7, 2005, almost three years after discovering the pay inequities, Grievants filed a grievance with the Psychology Department Chair and were denied.[1] They appealed to Level II by filing with Dr. Christina Murphy, Dean of the College of Liberal Arts. Dr. Murphy denied their grievance the same day it was filed. At Level III, a hearing was

[1]It appears as if Grievants filed a grievance on August 9, 2004, which was later dismissed at Grievants' request, and then they re-filed the grievance currently before the Grievance Board.

held where the Respondent asserted the timeliness issue. Respondent's argument was denied, and the merits of the grievance were addressed.

3. A Level III decision was issued on May 16, 2005, denying the grievance. Attached to the decision was a letter that stated the decision may be appealed to Level IV "by following the guidelines set forth in the West Virginia Code."

4. This decision was sent to Dr. Joseph Wyatt[2] via certified mail and was received by him on or about May 18, 2005.[3]

5. Dr. Wyatt has acted as a representative for other grievants in the past and has successfully assisted other grievants in appealing denials to Level IV.

6. On May 24, 2005, Grievants filed paperwork requesting a Level IV hearing with the Human Resources Department of Marshall University.

7. No appeal was sent to the Grievance Board. The Grievance Board was only made aware of this situation from a February 6, 2006, letter sent from Dr. Wyatt claiming that this grievance has been held in abeyance since May 24, 2005. There is nothing in the record of this case to indicate this grievance has been held in abeyance.

Discussion

Grievants assert there was some confusion over where to file the paperwork to appropriately appeal their grievance to Level IV. On May 24, 2005, they filed with the

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[2]Dr. Wyatt was the Grievants' representative through the lower levels. Ms. Barr took over the case in the summer of 2005.

[3]It is unclear as to whether the Level III decision denying the grievance was received by the other Grievant in this matter.

Human Resources Department at Marshall University apparently as an attempt to appeal the grievance to Level IV.

Respondent argues this is not an appropriate filing for appeal to Level IV. Respondent asserts that the letter denying the grievance at Level III clearly reads that an appeal may be made to Level IV "by following the guidelines set forth in the West Virginia Code." Since this was not done within five days from receipt of the Level III decision, Respondent contends this appeal must be dismissed as untimely.

No paperwork was received by the Grievance Board until February 6, 2006, when Dr. Wyatt sent a letter requesting a hearing in this matter, asserting that the case had been held in abeyance since May 24, 2005. After reviewing the file, it is clear that this case has not been held in abeyance, and instead it has been improperly appealed.

W. Va. Code §29-6A-4(d) requires that an appeal to Level IV be submitted to the hearing examiner within five days of the written decision. The Level III decision was issued May 16, 2005, and send to Dr. Wyatt who received it on May 18, 2005. Nothing was filed with the Grievance Board until February 6, 2006, making such appeal untimely. However, even if Grievants had timely filed the appeal to Level IV, the grievance would still be dismissed because the filing at Level I was untimely. In Respondent's Motion to Dismiss it is argued that the February 7, 2005, filing at Level I was untimely pursuant to W. Va. Code § 29-6A-4(a). 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 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).

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).

In this case, it is clear Grievants were aware of the pay inequities on May 9, 2002, when they drafted a letter to Dean Murphy and Provost Denman. However, no grievance was filed and pursued until February 7, 2005, almost three full years after the event became known to Grievants. No sufficient explanation was offered for the filing delay.

Then, on May 24, 2005, paperwork was filed with the Human Resources Department at Marshall University apparently as an attempt to appeal the grievance to Level IV. This is improper filing. No paperwork was received by the Grievance Board until February 6, 2006, when Dr. Wyatt requested a hearing in this matter, asserting this case

had been held in abeyance since May 24, 2005. This case has not been held in abeyance.

W.Va. Code §29-6A-4(d) requires that an appeal to Level IV be submitted to the hearing examiner within five days of the written decision. The Level III decision was issued May 16, 2005, and send to Dr. Wyatt who received it on May 18, 2005. Nothing was filed with the Grievance Board until February 6, 2006, making such filing untimely. Given that the grievance was untimely filed, the merits must remain unaddressed.

The following conclusions of law support this decision.

Conclusions of Law

1. W. Va. Code §29-6A-4(d) requires that an appeal to Level IV must be submitted within five days of the written decision.

2. The appeal to Level IV is untimely.

3. W. Va. Code § 29-6A-4(a) states a grievance must be filed "[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. . . ."

4. 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).

5. The grievance is untimely.

Therefore, Respondent's Motion to Dismiss is hereby **GRANTED**.

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, 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 are 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 15, 2006

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Wendy A. Campbell
Administrative Law Judge