**JOE WYATT and ELAINE BAKER,**

**Grievants,**

**v.** **Docket No. 06-HE-127**

**MARSHALL UNIVERSITY,**

**Respondent.**

## DISMISSAL ORDER

Grievants filed this grievance asserting discrimination and favoritism because Dr. Tom Ellis was hired at a higher salary than others in the department. A grievance on this exact issue was originally filed on February 7, 2005, and was dismissed for untimeliness by Order on March 15, 2006. *Wyatt/Baker v. Marshall University*, Docket No. 06-HE-054 (Mar. 15, 2006). Grievants then refiled this grievance on March 24, 2006. It appears as if the grievance was once again denied at Levels I and II. Grievants have requested to bypass Level III.[1]

Respondent filed a Motion to Dismiss based on the doctrine of *res judicata* and the timeliness of appeal to Level II. A telephone hearing was held on April 17, 2005. Grievants were represented by Dr. Joe Wyatt, and Respondents were represented by Jendonnae Houdyschell. The following facts are derived from a preponderance of the evidence.

### Findings of Fact

1. A grievance was filed by the Grievants on February 7, 2005, dealing with the exact same issues asserted here. *Wyatt/Baker v. Marshall University*, Docket No. 06-HE-

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[1]There is no provision in *West Virginia Code* § 29-6A-3 to allow bypassing a level so long as the lower level has the authority to grant relief.

054 (Mar. 15, 2006). That grievance was dismissed for untimeliness by order entered March 15, 2006.

2. Grievants have not appealed the dismissal order from the previous grievance.

3. Grievants refiled alleging the exact same issue on March 24, 2006.

**Discussion**

Grievants assert this grievance has not been heard on the merits, and because it is a continuing practice violation, a grievance can be filed within ten days of the issuance of a pay check. Respondents assert this grievance is barred by *res judicata*. Respondents also assert the appeal to Level II was untimely.

*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. . . ." 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). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

In the Dismissal Order dated March 15, 2006, the undersigned held:

> 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.

Grievants now argue Respondent's hiring Dr. Ellis is a continuing violation, and they could file a grievance within ten days of every paycheck. "This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996)." *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999). Therefore, it must be determined whether hiring Dr. Ellis at a salary greater than Grievants is a continuing violation, as opposed to a continuing damage.

As discussed in *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R-416R (Sept. 6, 2005), "continuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute. In that case, this Grievance Board held that the employer's decision to place a particular job classification in a particular pay grade, while continuing to affect grievants' salaries, was "a salary determination that was made in the past, a discrete event with lasting effects," which did not constitute a continuing practice. "[W]hen a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to *W. Va. Code* §29-6A-4(a). *See, Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).' *Nutter*

*v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995)." *Young v. Div. of Corr. and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001); *Burns v. DNR*, Docket No. 05-DNR-430 (Mar. 17, 2006).

Respondent did not engage in a continuing violation by making the one time decision to hire Dr. Ellis at a higher salary than Grievants receive. Grievants' claim of "salary differences" resulting from that decision is merely a claim of continuing damage from a single act. The decision which allegedly resulted in harm to Grievants was made at the time they learned of Dr. Ellis's salary. In this case, 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. *Wyatt/Baker v. Marshall University*, Docket No. 06-HE-054 (Mar. 15, 2006). This grievance was not timely filed on February 7, 2005, the first filing. It most certainly is not timely with this filing which occurred on March 24, 2006.[2] The following conclusions of law support this decision.

## Conclusions of Law

1. *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. . . ."

2. 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

[2]Because timeliness is jurisdictional, Respondent's *res judicata* argument is moot.

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).

3. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

4. "This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e. the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996)." *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999).

5. As discussed in *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R-416R (Sept. 6, 2005), "continuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute.

6. Respondent did not engage in a continuing violation.

7. Grievants filing at Level I is untimely

Accordingly this 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, 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 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: May 24, 2006**

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**Wendy A. Campbell**
**Administrative Law Judge**