THE EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOYCE WEBB,

Grievant,

v. **Docket No. 06-HE-400**

Sue Keller

Senior Administrative Law Judge

SHEPHERD UNIVERSITY,

Respondent.

D E C I S I O N

Joyce Webb ("Grievant"), employed by Shepherd University ("Shepherd") as an Associate Professor of Communications, filed a grievance on or about September 25, 2006, in which she alleged, "Sylvia Shurbutt had the opportunity to revise her 1st year merit pay application & resubmit it, but I did not. Unfair and unequal treatment regarding merit pay the first year I applied." For relief, Grievant requested the opportunity to revise and resubmit her application to the Merit Pay Committee. The record does not include a level one or level two decision. Shepherd President, Dr. David Dunlop, denied the grievance following a level three hearing. Appeal to level four was made on October 31, 2006. Grievant's representative, Christine Barr of the American Federation of Teachers, and Shepherd counsel K. Alan Perdue, agreed to submit the grievance for decision based upon the record, supplemented with an affadavit of Dr. Shurbutt. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 2, 2007.

The following facts essential to this decision are derived from a preponderance of the credible evidence.

Findings of Fact

1. Grievant has been employed by Shepherd as an Associate Professor of Communications at all times pertinent to this grievance.

2. Effective June 10, 2004, the Shepherd University Board of Governors implemented a Salary Policy (Policy 26) which established a Merit Evaluation Committee as well as guidelines for the application and award of merit increases.

3. Section 3.1.3Ciii of Policy 26 provides:

To apply for merit, each candidate will write a one page, single-spaced letter of intent describing why he or she deserves merit. In addition to the cover letter, the applicant will attach a copy of his or her annual report. At the top of the letter of application, the candidate must state the merit award area for which he or she is applying.

4. On or about April 1, 2004, Grievant delivered an application for merit pay toDr. Ellen Sallee, Chair of the Merit Pay Committee.

5. By letter dated August 19, 2004, Roger Hamood, Chair of the Institutional Performance Subcommittee, notified Grievant that she would not be recommend for a merit increase because she had failed to follow the application procedures as outlined in the Faculty Handbook. Specifically, Grievant had submitted a letter of intent exceeding the one page limitation (it was a page and one-half) and she had failed to state the merit award area for which she was applying.

6. During a Faculty Senate meeting on September 18, 2006, Dr. Shurbutt stated that after she had submitted her merit pay application in 2004, Dr. Sallee returned it advising that she had failed to designate an area of emphasis in the heading, as required.

The error was corrected and Dr. Shurbutt received a merit increase that year.

7. Grievant did not know of Dr. Shurbutt's experience prior to September 18, 2006.

8. At the level three hearing, Shepherd raised the issue of whether the grievance was timely filed.

Discussion

Initially, Shepherd argues that the grievance was untimely filed, some two years after Grievant's application for a merit increase was denied. In response to Grievant's assertion that she only learned of the facts leading to the grievance in September 2006, Shepherd argues that the discovery rule exception to the statutory time lines is limited to facts material to the grievable claim. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ*., Docket

No. 95-29-315 (Jan. 25,1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 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).

As to when a grievance must be filed, *W. Va. Code* § 29-6A-4 provides, in pertinent part:
Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of *W. Va. Code* § 18-29-4, stating "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

If Grievant was simply alleging that she had been improperly denied a merit increase, Shepherd would be correct in asserting untimliness. However, Grievant's complaint arises from the difference in treatment afforded the applicants, *i.e.*, discrimination, which she did not learn of until September 18, 2006. Therefore, the grievance was timely filed.

Grievant alleges that Dr. Sallee acted in a manner constituting discrimination. As in all non-disciplinary matters, Grievant must prove the allegations constituting her grievanceby a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A- 6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17,

1993).

Grievant contends that Dr. Sallee's providing Dr. Shurbutt the opportunity to revise her application, but not giving her the same opportunity constitutes discrimination. "'Discrimination' means 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." *W. Va. Code* § 29-6A-2 (d). A grievant must establish a case of discrimination by showing

(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.

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

Shepherd argues that the situations differ in that Dr. Shurbutt had submitted her application a week prior to the deadline, allowing Dr. Sallee time to review it, whereas Grievant submitted her application on last day. Further, Shepherd asserts that finding friendly advice or counsel given to a faculty member about compliance with written policies to constitute discrimination would establish a horrific standard of precise uniformity onadministrators that is unattainable. Shepherd concludes by asserting that the merit policy was fairly applied as the applications were reviewed on the basis of their content as of close of business on April 1, therefore the information Grievant received in September was not a material fact giving rise to a grievance under the *Spahr* standard.

The affidavit of Dr. Shurbutt unequivocally supports Grievant's claim that another faculty member was given notice of an error in her application, and the opportunity to correct it, prior to consideration by the Merit Evaluation Committee. The "friendly advice" offered by Dr. Sallee resulted in Dr. Shurbutt receiving a merit increase, while Grievant did not. While advice is not to be discouraged, similarly-situated employees must be treated equally, and Grievant should have been given the opportunity to revise her application.

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. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997).

2. The discovery rule exemption to the statutory time lines for filing a grievance, provides that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). 3. The grievance was timely filed under the discovery rule exemption set forth in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

4. "'Discrimination' means 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." *W. Va. Code* § 29-6A-2 (d).

5. A grievant must establish a case of discrimination by showing

(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.

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

6. Grievant has proven that she was subject to discrimination when she was not afforded the same opportunity as another faculty member to correct her merit application. Accordingly, the grievance is **GRANTED**, and Shepherd is ORDERED to provide Grievant the opportunity to revise her merit application for consideration by the Merit Pay Committee. If Grievant's application is found to be similar to that of another faculty member who received a merit increase in 2004, Grievant is to be awarded a similar increase.

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 appealingparty 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: FEBRUARY 28,2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE