**THE WEST VIRGINIA PUBLIC EMPLOYEES**

**GRIEVANCE BOARD**

**GLEN BLON/WILL EXLINE,**

**Grievants,**

**v.**

**DOCKET NO. 07-HE-152**

**WEST VIRGINIA UNIVERSITY,**

**Respondent.**

**DECISION**

This grievance was filed by Grievants, Glen Blon and Will Exline on January 27, 2006, against their employer, West Virginia University. The statement of grievance reads: "WVU does not compensate us properly when we work on holidays. This is a violation of WVU-HR-31 and 29-6a-2(d) (See footnote 1) ." The relief sought by Grievants is "to be properly compensated for Christmas, New Years, [Martin Luther] King Day and all future holidays. We are seeking interest on all monetary awards."

The grievance was denied at level one on February 2, 2006, because Grievants' supervisor was without authority to resolve the grievance. Grievants appealed the level one decision to level two on

February 3, 2006. A conference was held on March 21, 2006, and a level two decision was issued on March 27, 2006, denying the grievance. Grievants appealed to level three on March 27, 2006. A level three hearing was held on May 11,2006, February 8, 2007, and April 11, 2007. A decision denying the grievance at level three was issued on April 27, 2007. Grievants appealed to level four on May 3, 2007. The parties agreed to submit this grievance for decision based upon the record developed at level three, supplemented by proposed findings of fact and conclusions of law. Grievants were represented by Mary Snelson, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' written arguments on May 1, 2008.

## Synopsis

When Grievants work holidays they may elect to receive pay at time and a half for the actual hours worked, in addition to their regular rate of pay for that day, or they can take substitute time off for the hours worked, times 1 ½. Grievants contend that Respondent should pay them time and a half when they work holidays, and also give them substitute time off work for every holiday they work. It appears that Grievants are also arguing that the calculation of substitute time off is in error, and that when they elect to receive substitute time off, they should get a day off comparable to the holiday, plus the hours they actually worked on the holiday, times 1 ½. Respondent raised a timeliness defense. Respondent's interpretation of its holiday pay policy is a continuing practice, which recurs each time Grievants must work a holiday. Any relief, however, would be limited to the holiday immediately preceding the filing of the grievance. As to the merits of this grievance, the applicable policy clearly provides that, in addition to his regular pay for the holiday, an employee who works on a holiday may elect to receive either time off in place of the holiday, or additional pay for the holiday at time and a half. The employee does not get both substitute time off work and pay at time and a half. Further, it is clearthat if the employee elects to take substitute time off, he is allowed no more than the actual hours worked, times 1 ½.

The following Findings of Fact are properly made from the record developed at level three.

## Findings of Fact

1. Grievants are employed by West Virginia University (“WVU”).

2. WVU employees are paid for 12 holidays each year. Due to the nature of their jobs, Grievants are required to work every holiday.

3. Grievants are non-exempt employees. When Grievants work a holiday they are paid by WVU at their regular rate for that day, and in addition, they have the option of being paid time and a half for the actual hours worked that day, or taking time off work with pay some other day at the rate of the actual hours worked on the holiday, plus half the number of hours worked. For example, if Grievants work eight actual hours on a holiday, they get paid at their regular rate of pay for a seven and one-half hour work day, and then they may elect to receive pay at time and a half for the actual hours worked on the holiday, or they can take twelve hours off work on other days with pay.

**Discussion**

Respondent raised a timeliness defense, arguing Grievants could not contest the application of the holiday policy to any period before ten days preceding the filing of the grievance. 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 therespondent 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).

Former W. Va. Code § 29-6A-4(a) (See footnote 2) 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 upon 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 time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Grievants did not address Respondent's timeliness argument, and Respondent did not contend that Grievants could not grieve the issue at all; rather Respondent argued Grievants could not go back in time, for example to the New Year's and Christmas holidays, in requesting relief. Respondent

seems to concede that its interpretation of the holiday pay policy constitutes a continuing practice, which may be grieved with each newoccurrence. Misclassification, for example, is a continuing practice, however, it is well- settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*, Docket No. 98-HHR-344 (June 24, 1999). In addition, the "'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), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen (See footnote 3) 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)." *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

Whether the dispute here constitutes a continuing practice is difficult to discern. Certainly, Grievants have known how the holiday pay policy is applied for some time, but it is also easy to see this as a continuing practice, recurring each time Grievants must work a holiday. The undersigned concludes that Respondent's interpretation of its holiday pay policy is a continuing practice, which recurs each time Grievants must work a holiday. The most recent occurrence of the practice preceding the filing of the grievance, would have been on January 16, 2006, the Martin Luther King holiday. Any relief, however, would be limited to this holiday. The Procedural Rules of the Higher Education Policy Commission, Title 133, Series 8, at Section 5, address Compensatory And Holiday Premium Time Off. Section 5.2 states:

> When a full-time or part-time classified non-exempt employee is required to work on any designated board or institution holiday, that employee at his/her option shall receive regular pay for that holiday plus substitute time off <u>or</u> additional pay at the rate of one and one-half (1 ½) times the number of hours actually worked. The time off must be used within a six-month period following the holiday.

(Emphasis added.) Respondent has incorporated this rule into Policy WVU-HR-55, which provides, in pertinent part: "If the employee is non-exempt, compensation in the form of substitute time off (STO) or additional pay at the rate of one-and-one half (1 ½) for <u>actual hours worked</u> on the holiday will be granted." (Emphasis in original.)

Although the statement of grievance refers to WVU-HR-31, which is the overtime policy, Grievants' complaint is with the calculation of substitute time off for holidays worked, not overtime. Grievants contend Respondent has misinterpreted the procedural rule and Policy 55, and that they should be paid time and a half when they work holidays, and also get substitute time off work for every holiday they work. It appears that Grievants are also arguing that the calculation of substitute time off is in error, and that when they elect to receive substitute time off, they should get a day off comparable to the holiday, plus the hours they actually worked on the holiday, times 1 ½. So, if Grievants worked 8 hours on a holiday and elected to take substitute time off, they believe they should get to take 7 ½ hours for the holiday, plus 12 hours for the actual time worked, for a total of 19 ½ hours.

Neither the procedural rule cited above, or Policy 55, require any interpretation on these points. Both are clear, and have been properly applied by WVU. The employeemay, in addition to his regular pay for the holiday, elect to receive time off in place of the holiday, or additional pay for the holiday at time and a half. The employee does not get both substitute time off work and pay at time and a half. Further, it is clear that if the employee elects to take substitute time off, he is allowed no more than the actual hours worked times 1 ½. The only other interpretation which is readily apparent, is that the time and a half calculation only applies when the employee elects to be paid for the hours worked on the holiday, and that it does not apply to the calculation of substitute time off, which would be a stricter interpretation than Respondent's, and not to Grievant's benefit.

Grievants argued in their level four written argument that “the intent of the legislature when dealing with overtime calculations was to pay employees eight hours of straight time plus time and a half for each holiday worked. Additionally, Grievants believe that the legislature intended for WVU employees to receive an additional day off when required to work on holidays.” Grievants did not cite any statutory provision to support this argument. Grievants are mixing concepts, and have been from the inception of this grievance when they cited to WVU-HR-31 in the statement of grievance, which is the overtime policy. Overtime is not the same as holiday pay, and as was pointed out at the level three hearing, it is calculated separately based upon a 40 hour work week. WVU-HR-31 does not address compensation for work on a holiday, because when an employee works on a holiday, this is not overtime. It is overtime only if the employee works more than 40 actual hours. The testimony offered at level three was that, if the employee works more than 40 hours during a week which

includes a holiday, not only does the employee get holiday pay in accordance with the holiday pay policy, but he also gets paid overtime for actual hoursworked more than 40 hours, or gets compensatory time off, at time and a half. Grievants have not demonstrated that Respondent's holiday pay policy is unlawful.

The following Conclusions of Law support the Decision reached.

**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. Grievances must be filed within ten days of the occurrence of the event giving rise to the substantive claim of the grievance, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96- BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

3. This grievance was timely filed within ten days of the most recent occurrence of a continuing practice, which would have been on January 16, 2006, the Martin Luther King holiday. Any relief, however, would be limited to this holiday.

4. Respondent's interpretation of its holiday pay policy is consistent with the clear language of the policy.

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." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (*See Footnote 2)*. Neither the West Public 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.

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**BRENDA L. GOULD**

**Administrative Law Judge**

**Date: June 16, 2008**

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Footnote: 1

*This statutory provision (which was repealed in 2007, see footnote 2) provides the definition of discrimination for purposes of the grievance procedure. Grievants, however, did not argue they had been discriminated against in any way. They stated they believed they should get extra time off because other employees were able to spend holidays with their families, but this does not amount to a claim of discrimination.*

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Footnote: 2

*In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references which may appear later in this decision are to the former statutes, which continue to control the proceedings in this case.*

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Footnote: 3

*The education grievance procedure allowed education employees 15 days to file a grievance.*