THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

HEIMO RIEDEL,

Grievant,

v.

DOCKET NO. 07-HE-411

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievant, Heimo Riedel, against his employer, West Virginia University, on November 13, 2006. The statement of grievance is two pages in length, with five numbered sections. Grievant contests the termination of his start-up funds; the failure to receive a merit raise in 2006, which he views as retaliatory and arbitrary and capricious; the method by which his base salary is calculated; and his employer's requirement that he sign the Employee Effort Certification Report. The fifth numbered section repeats and expands upon the claim of retaliation, and adds a claim of discrimination. As relief Grievant seeks:

> 1) Since no warning was given I have not been able to make important purchases for my research program that are normally made at the end of the start-up period to obtain the most up-to-date research materials for future use. I ask spending of my

start-up funds to be restored for a period of at least several months for this purpose. I also ask full university support of my research program to be restored at least until the existing consolidated grievances have been brought to formal conclusion. Additional relief has already been requested in the context of the pending grievances and is not duplicated here.

2) I ask to receive a salary raise of 4% in line with the raise of others in my peer group. This will raise my base salary (75% level) to $103,940.

3) I ask to set my total (100% level) salary consistent with my offer to allow me to supplement the remaining actual 25% in addition to the university- supported (75% level) base salary. This will result in a total salary of $133,256 for the previous fiscal year and of $138,587 for the current fiscal year if a 4% raise is implemented. I ask to be reimbursed for any institutional tax that was deducted in the past from my salary through the application of the reduced total salary levels.

4) I ask the pressure to misrepresent my knowledge on any Employee Effort Certification Report to cease immediately. I ask for copies of detailed account statements throughout my tenure at this institution that allow me to determine the monthly amounts of salary support that were actually deducted from my grant accounts, compared with the amounts that were actually paid to me as salary, and any existing differences. I ask to be reimbursed for any differences. I ask for itemized statements to identify the items charged to any of my research accounts in [order to] allow me to verify the final balance in each account.

5) I am asking for any adverse action to cease immediately. I am asking for disciplinary action to be taken against anyone who has engaged in discriminatory treatment against me or in retaliation to the pending grievances as stipulated in W. Va. Code 29-6A.

I ask to be fully compensated for any damage that has resulted from the actions of the university and/or will result to me personally or to my research program.

This grievance was filed at level two of the grievance procedure. (See footnote 1) Grievant's second level supervisor responded that the grievance had to be filed at level one, and Grievant then appealed to level three. A level three hearing was held on December 4, 2006, anda level three decision was issued on December 11, 2006, dismissing the grievance because it had not been filed at level one. Grievant filed a default claim at level four, which was dismissed, and the grievance was remanded to level three for a hearing on the merits. Two days of hearing were held at level three on March 2 and 16, 2007. When the hearing had not been completed at the end of the second day,

Grievant again filed a default claim at level four. The default was denied, and the grievance was remanded to level three for completion of the hearing. A third day of hearing was held at level three on September 19, 2007, and a decision denying the grievance was issued on September 26, 2007. Grievant appealed to level four on September 28, 2007. Two days of hearing were held at level four before the undersigned Administrative Law Judge on May 14 and 22, 2008, in the Grievance Board's Westover office. (See footnote 2) Grievant represented himself, and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision with the filing of Respondent's Proposed Findings of Fact and Conclusions of Law on June 16, 2008. Grievant was given the option at the conclusion ofthe level four hearing of presenting thirty minutes of oral argument, or written argument, and despite his objections to the time limit set by the undersigned, chose to present oral argument.

Synopsis

This grievance challenges several different decisions and practices. The complaints regarding the termination of Grievant's start-up funding and the requirement that Grievant sign Employee Effort Certification Reports were not filed in a timely manner, as required by statute. The remaining complaints were timely filed.

Grievant's claim that he should have been awarded a 4% merit increase was not proven. When Grievant's performance was compared to that of other faculty whose salary is paid by the Mary Babb Randolph Cancer Center in the areas of publications, active grants, and service to the Cancer Center, his performance was at the lowest level. It was reasonable for Cancer Center personnel to make the determination on merit increases, because the Cancer Center funds 75% of Grievant's salary, and it was reasonable to compare faculty in these three areas. Grievant's complaint regarding the calculation of his base salary amounted to nothing more than Grievant's disagreement with the methodology used to calculate the salary of all faculty who are subject to the Basic Sciences Salary Plan at West Virginia University. Finally, Grievant did not demonstrate that either the decision on merit increases or the calculation of his salary were made in retaliation for filing grievances, or were the result of discrimination.

The following Findings of Fact are made based upon the record developed at levels three and four.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU"), in the Department of Biochemistry (formerly the Department of Biochemistry and Molecular Pharmacology) and the Mary Babb Randolph Cancer Center of the West Virginia University School of Medicine, as a tenured professor. Grievant has a joint appointment with the Department and the Cancer Center. Grievant's offer letter, dated March 18, 2003, stated he was being offered "a full-time position in the Department of Biochemistry and Molecular Pharmacology and the Mary Babb Randolph Cancer Center."

2. Grievant's offer letter stated the position would begin July 1, 2003, and the salary would be $125,000 for a twelve-month appointment, with WVU providing 75% of the salary, and the remaining 25% provided by Grievant from grants "as outlined in the attached Salary Plan for basic scientists."

3. The offer letter stated that "the School of Medicine will provide the following commitments for a three-year period." Among these commitments was start-up funds of $200,000 for the purchase of equipment to continue Grievant's research program, $50,000 for laboratory supplies, and $140,000 in salary support for personnel.

4. Grievant accepted the March 18, 2003 offer of employment.

5. Grievant was placed on the payroll at WVU effective August 18, 2003. This is the date WVU used as the beginning of the three year start-up funding period.

6. Grievant moved his lab to WVU in late October 2003. He had spent some of his start-up funds prior to this.

7. Timothy Palencik, Associate Dean for Finance at the WVU School of Medicine, discovered at the beginning of October 2006, that Grievant was still spendinghis start-up funds. He told Lana Yoho, the Office Manager for the Department of Biochemistry, that the three year period on Grievant's start-up funds had expired, and Grievant would not be allowed to charge any additional purchases to the start-up funds. Associate Dean Palencik allowed all purchases made up to that time to be charged to the start-up funds. Associate Dean Palencik asked Ms. Yoho to relay this information to Grievant, and she did so.

8. Grievant did not receive prior notice that the three year period for his start- up funds was about to expire.

9. Grievant was aware by October 3, 2006, at the latest, that he could no longer access his

start-up funds, and sent an email to Dr. Daniel Flynn, Deputy Director of the Mary Babb Randolph Cancer Center, on that date asking for Dr. Flynn's assistance in keeping the start-up funds active. Grievant had not spent all of his start-up funds.

10. The Mary Babb Randolph Cancer Center has several faculty appointments. Grievant was recruited jointly by the Cancer Center and the Department of Biochemistry and Molecular Pharmacology to fill one of these appointments. Grievant's academic appointment is now in the Department of Biochemistry, but the Cancer Center pays 75% of Grievant's salary, and he does some teaching at the Cancer Center.

11. Dr. Flynn oversees the research mission of the Cancer Center. In 2006, Dr. Flynn reviewed the performance of the twelve WVU faculty whose salaries are funded by the Cancer Center, for the purpose of determining who should be recommended to receivea merit increase. Dr. Flynn had never done such a review before. (See footnote 3) Grievant was one of the twelve faculty members.

12. Dr. Flynn reviewed, charted and compared the performance of each of these twelve individuals in the areas of active grants, number of publications where the faculty member was the communicating author, and service to the Cancer Center. Service included quality of teaching, and service on committees. The Cancer Center is a research center, not an academic home, so research productivity is important to the Cancer Center.

13. In comparing the twelve faculty members, Dr. Flynn did not count as an active grant for any faculty member, a grant for which the initial term had expired, but which had been extended, even if the extension involved extending the time period for expending the grant funds. Grievant did not have any grants whose status was “active” as that term was used by Dr. Flynn in comparing faculty, and he was not credited with any grant funding by Dr. Flynn.

14. In order to determine the number of publications for each of the twelve faculty members, Dr. Flynn relied on a service referred to as “Pub Med.” That service did not have Grievant listed as the communicating author on any publications. When Grievant questioned this, Dr. Flynn reviewed the publication Grievant identified, confirmed that Grievant was, in fact, the communicating author on one publication, and considered this information. Even with this one publication, Grievant's productivity was still at the lowest level among the twelve faculty members. 15. Dr. Flynn did not credit Grievant with service to the Cancer Center, because he believed Grievant's teaching performance was poor. Dr. Flynn based this conclusion upon his discussions with Dr. Scott Weed,

who is in charge of graduate course programs at the Cancer Center. Dr. Weed told Dr. Flynn that Grievant's student evaluations were below average, that students had complained about Grievant, and that he did not want to invite Grievant to teach at the Cancer Center the following year. Grievant did not dispute that his student evaluations were poor.

16. On October 27, 2006, Grievant became aware that he had not received a merit increase. Grievant sent an email to Dr. Flynn on that date stating he did not understand why he did not receive a merit increase, and asking for his assistance in addressing this issue.

17. Dr. Flynn responded to Grievant's inquiry regarding merit increases, and to Interim Chair of the Department of Biochemistry, Jim O'Donnell, by email dated October 27, 2006. Dr. Flynn explained that merit increases were given to faculty who “were maintaining active grant support (does not include no-cost extensions) and had been publishing well. Currently, you have no active grants (other than the no-cost extension of your RO1 (See footnote 4)) and have not published a peer reviewed article as communicating author since 2004. Thus, you did not receive a merit raise this year.” The email went on to explain further that a no-cost extension “does not represent new funding.” The email also pointed out that research is only part of the job, and encouraged Grievant to work hard in the areasof teaching, service, and as a collaborator. Grievant received this email on October 30, 2006.

18. Grievant's offer letter explains that all faculty are reviewed annually, and that these reviews “are intended to provide guidance to faculty members as to their performance in the areas of education, research and service.” There is no requirement that these reviews be used in determining who should receive a merit increase.

19. The Basic Sciences Salary Plan was devised in 2002 or 2003 by the chairmen of the basic science departments, with input from the Dean's Office and the Vice President's Office of the School of Medicine. It is applied to all tenured or tenure track basic sciences faculty at the Health Sciences Center who have grant funding. This Plan sets the base salary for faculty to which it applies, using the annual salary survey of the American Association of Medical Colleges. WVU's contribution to the faculty member's salary is at least 75% of the 50th percentile from the survey, increased by 3%. The individual's rank, discipline and degree are also a part of the calculation. If a faculty member's salary at some point exceeds the 50th percentile, as did Grievant's when he was hired in 2003, that person's salary is not reduced. The faculty member may earn more than the 50th percentile, but any amount

earned above the 50th percentile is subject to an assessment, or tax, by the Department Chair.

20. Because Grievant's salary exceeded the 50th percentile, in 2006 WVU paid more than 75% of Grievant's salary, and the remainder of his salary paid through grant funding which was not subject to assessment by the Department Chair, was less than 25% of his total salary. Other faculty members also have more than 75% of their salary paid by WVU for this same reason, or because of their years of service with WVU. 21. Sometime prior to August 1, 2006, Grievant was provided with his notice of appointment for the year, which set forth his salary for the year. On August 1, 2006, he met with Associate Dean Palencik regarding his salary. Associate Dean Palencik explained the formula which is used to calculate salaries under the Basic Sciences Salary Plan, and its application to Grievant's salary.

22. Grievant obtained a list of all faculty salaries shortly before this grievance was filed. The list shows some faculty members earn more money than Grievant. It does not show the discipline or degree of any faculty member, or whether they are faculty in the Health Sciences Center subject to the Basic Sciences Salary Plan.

23. All faculty members who receive grant funding are required to sign an Employee Effort Certification Report. This report is prepared by WVU's Controller's Office, and lists the accounts from which the faculty member's salary is funded. This report must be sent by WVU to those providing grants to prevent these sources from cutting off their funding. The certification the faculty member signs states, “I certify that I have suitable knowledge of all effort expended and the distribution of effort reasonably reflects the actual effort expended.”

24. The Employee Effort Certification Report which is prepared for Grievant's signature lists various accounts within the Mary Babb Randolph Cancer Center as the source of his salary. Grievant is not familiar with these accounts. The Report also divides his time by percentage among these accounts. It lists the percentage of time he has spent working on projects funded by grants.

25. Associate Dean Palencik met with Grievant in April 2006, because he had not signed the report presented to him in August of 2005. Associate Dean Palencikexplained the purpose of the Employee Effort Certification Report to Grievant, what was on the Report, and why Grievant's signature was needed. After discussing this with Grievant, Associate Dean Palencik wrote on the bottom of the form the percentage of time (“effort”) Grievant had spent on his two grants, per Grievant's representations, and Grievant then signed the Report. This is all WVU needs from

Grievant on this Report.

26. Grievant received the most recent Employee Effort Certification Report on September 28, 2006.

27. This grievance was filed on November 13, 2006.

28. Grievant had filed four grievances prior to filing the instant grievance. These grievances were filed in 2004, but were still pending at level three when this grievance was filed. Dr. Flynn was generally aware of the problems and complaints involved in these grievances.

Discussion

I. Burden of Proof

Respondent raised a timeliness defense to Grievant's claims. 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).

W. Va. Code § 29-6A-4(a) 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).

A continuing practice may be grieved with each new occurrence. 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 5) 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). However, "when 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 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 Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases)." *Young v. Div. of Corrections*, Docket No. 01- CORR-059 (July 10, 2001).

Grievant argued Respondent waived its right to assert a timeliness defense, because it did not raise this argument at or before level two. Grievant cannot prevail on this argument for two reasons. First, there were never any level one or level two proceedings on the merits in this case, at which such a defense could have been raised. Even if there had been such proceedings, however, the Grievance Board has analyzed the statutory language which requires the respondent to raise the issue of timeliness at or before the level two "hearing." W. Va. Code § 29-6A-3. "W. Va. Code § 29-6A-4(b) requires that the employer's administrator or his designee hold a 'conference' at level two, not a 'hearing.' This Grievance Board has previously reviewed this statutory inconsistency and determined, 'applying principles of statutory construction, that, in cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at orbefore the Level III hearing.' *Greathouse v. Dep't of Transp.*, Docket No. 99-DOH-413 (Aug. 21, 2000)." *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001). Respondent timely raised this defense for the first time at the level three hearing.

The question of whether this grievance was timely filed must be separately evaluated with regard to each issue raised by Grievant, and will be addressed in the individual sections below. Should the grievance be found to be timely filed, Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "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).

II. Credibility

Grievant called into question the credibility of Dr. Flynn. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999*)*. Grievant alleged that Dr. Flynn repeatedly lied in his testimony. Grievant went so far as to assert that “the institution” had used Dr. Flynn to attack the Grievant, selecting Dr. Flynn for this purpose because he was aggressive enough to take action against him, and was someone who was willing to make false statements. He stated that Dr. Flynn was playing a game with him. The undersigned found Dr. Flynn to be a credible witness.

In particular, Grievant asserted that Dr. Flynn provided false testimony regarding whether Grievant had continued to teach at the Cancer Center. Grievant asserted Dr. Flynn lied when he stated Grievant had not been asked to teach again because his teaching was so bad, when he had in fact taught, and that he lied when he said someone had observed Grievant's classroom instruction. Grievant's perception of false testimony is irrational. Even without analyzing exactly what Dr. Flynn said, it would be ridiculous for him to lie about whether Grievant had continued to teach at the Cancer Center. Clearly, Grievant would know whether he had taught or not, and WVU would surely have records that he had taught.

What Dr. Flynn stated was that he had been told by Dr. Weed that he did not want to invite Grievant to teach again, because Grievant was a bad teacher, and he accepted that this is what had transpired. Dr. Flynn never stated that he actually knew whether Grievant had taught again, or that he had tried to verify this. He made it clear in his testimony that this was his understanding. In fact, when Grievant pointed out to Dr. Flynn that he had taught the next year, Dr. Flynn acknowledged that his understanding on this point was incorrect. Level three transcript, September 19, 2007, pages 87-88. This is not false testimony, nor does it call Dr. Flynn's credibility into question. It only calls into question the information used by Dr. Flynn to evaluate whether Grievant should havereceived a merit increase. Likewise, Dr. Flynn's testimony that it was his understanding that someone associated with the Cancer Center actually observed Grievant's classroom instruction was based upon what he had been told, which he made clear in his testimony.

Grievant also pointed to Dr. Flynn's statement in an email to Grievant that one of his grants was a no-cost extension, when it was a cost extension. Dr. Flynn admitted that this was a mistake in the email. Dr. Flynn acknowledged that he does make mistakes, and he is obviously willing to admit to his mistakes, which actually tends to show that he is an honest person.

Grievant stated in his argument that Dr. Flynn lied when he said Grievant had no active grants. Dr. Flynn testified that when he was evaluating the performance of faculty for purposes of determining who should receive a merit increase, he did not consider grants whose original terms had expired to be active grants, because any extension of these grants was not new money. This is not a lie. This was Dr. Flynn's rationale for not considering certain grants in his evaluation. Dr. Flynn acknowledged that the National Institute of Health might consider extensions of grants to be active grants. Level three transcript, September 19, 2007, page 96. Even if one were to come to the conclusion that Dr. Flynn is wrong, it might call the accuracy of his testimony into question, but that still would not make this a lie. It would just make Dr. Flynn wrong. This issue will be further addressed in the merit increase section of this decision. **III. Merits of the Grievance**

A. Termination of Start-Up Funds

Grievant's complaint about the termination of his start-up funds was not timely filed. Grievant contended that he was not sure his start-up funds had been terminated until he received written confirmation of this from Dr. Flynn, in his October 27, 2006 email, and the grievance was filed within 10 days of reading this email.

Grievant knew in 2003 that his start-up funds were available for only three years. It should have come as no surprise to Grievant that his start-up funds would no longer be available after the beginning of October 2006. It is clear from the email sent by Grievant to Dr. Flynn on October 3, 2006, that Grievant knew on that date, if not earlier, that his start-up funds were no longer available. This grievance was not filed until November 13, 2006, well beyond the ten day statutory time period for filing a grievance.

In the alternative, Grievant argued he did not have to file a grievance until he had made an informal effort to resolve the issue. Grievant has not demonstrated that his factual situation falls within the excuses for timely filing a grievance.

In *Steele v. Wayne County Board of Education*, Docket No. 50-87-062-1 (September 29, 1987), it was held that, "An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be rectified will not be barred from pursuing the grievance pursuant to *W.Va. Code* §18-29-1, *et seq*., upon denial thereof." The Supreme Court of Appeals of West Virginia, in *Naylor v. West Virginia Human Rights Commission*, 180 W. Va. 634, 378 S.E.2d 843 (1989), defined the types of representations made byemployers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

There is no evidence that any WVU official ever made any type of representation to Grievant which would have caused him to delay filing the grievance. The delay in filing the grievance cannot be excused.

Even if this complaint were timely filed, Grievant did not demonstrate entitlement to restoration of his start-up funds. WVU offered Grievant $390,000 to assist him in moving his lab from Wayne State University to WVU. The offer letter is unambiguous in its statement that the start-up funds will be provided for a three year period. The three year period expired in 2006, and the remaining funds were withdrawn. Grievant argued that the three year period should not have begun to run until he moved his lab in “late” October 2006. No specific date in October was placed into the record, however, the record does reflect that Grievant had accessed his start-up funds prior to the time he moved his lab; although, again no specific date was placed into the record. It can be inferred from the

testimony that the start-up funds were made available to Grievant at least as early as the time he was placed on the payroll, and no evidence was presented to dispute this. Respondent reasonably began the three year time period of the start-up funding on August 18, 2003. It was only through an oversight that Grievant was allowed to continue expending funds into October 2006.

Grievant also argued he should have been provided notice that the funding period was expiring. However, he pointed to no such notice requirement. He relied instead uponthe testimony of other faculty members that they had received notice that their grant money was about to expire. Grievant acknowledged, however, that grant money is different from start-up funding, which comes to the faculty member and WVU from an outside source, stating in his oral argument at the conclusion of the level three hearing:

> I mean there could have been a mechanism to give notification, advance notification such as it is discussed in my - - in the research grants where you get typically seven notifications that a grant is about to expire to take steps to balance the account and that's common practice. It - - there's every reason to expect this in this case again unless the University had a different motivation.

Level three transcript, September 19, 2007, page 133. Grievant has not demonstrated that WVU was required to notify him when the three year start-up funding period was nearing its end.

Finally, Grievant argued that the funding period should have been extended because WVU never provided him with the lab space it promised him. The argument is that he could not use the start-up funds to buy the equipment he wanted, because there was no room for the equipment. Whether this is true is of no relevance. The start-up funding was provided for a three year period. Grievant did not demonstrate that WVU was required to extend this funding beyond the three year period.

B. Salary Increase

Respondent argued this complaint was not timely filed, because faculty members know merit increases are awarded in early October, and Grievant would have known early in October 2006, that he had not received a merit increase. The only evidence of when Grievant knew he did not receive a merit increase is his email dated October 27, 2006. Respondent did not demonstrate Grievant knew he did not receive a merit increase beforethis date. Grievant asserted he was not required to file a grievance immediately, because he thought it must have been an error that he did not receive a merit increase, and sought clarification. Dr. Flynn responded to Grievant's inquiry, and explained why no merit increase was awarded, by email dated late on Friday, October 27, 2006. Grievant did not view

this email until, at the earliest, Monday, October 30. He filed this grievance within ten days of that date. The brief delay in filing the grievance was caused by Grievant's “efforts to obtain information regarding the evaluation process.” *Thomas v. Bd. of Directors,* Docket No. 98-BOD-407 (April 30, 1999). This issue was timely grieved. *Id.*

An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly- established policies or directives. *Little v. W. Va. Dep't of Health & Human Resources*, Docket No. 98-HHR-092 (July 27, 1998); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Terry v. W. Va. Div. of Highways*, Docket No. 91-DOH-186 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehabilitation Serv.*, Docket No. 89-RS-051 (May 16, 1989). “'A grievant must demonstrate more than a flaw in the merit increase process. . . . a grievant must also demonstrate that, had the process been properly conducted, [he] would have received a merit increase. *Stone v. W. Va. Alcohol Beverage Control Comm'n*, Docket No. 97-ABCA-151 (Aug. 21, 1997). *Karr v. W. Va. Bureau of Employment Programs*, Docket No. 98-BEP-145 (Aug. 28, 1998).” *Wade, supra.*

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that itcannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*. *See Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999).

Dr. Flynn compared the performance of the twelve faculty whose salaries are funded by the

Cancer Center, and made a recommendation on merit increases for these faculty members. Grievant contended first, that his association with the Cancer Center was somehow unclear to him, and he compared himself to other professors in the Department of Biochemistry for purposes of determining whether he should have received a merit increase.

Grievant was told in his offer letter that his appointment would be in the Department of Biochemistry and Molecular Pharmacology and the Mary Babb Randolph Cancer Center. Grievant is not a brand new professor with a limited understanding of the process. He himself pointed out that he has been employed at other institutions, and he was hired at WVU as a tenured professor. The appointment letter did not hide the affiliation with the Cancer Center in several pages of legalistic language, in small print, or in a footnote. It is on the first page of the offer letter, in the same print as the rest of the letter. It is crystal clear that Grievant knew he had a joint appointment with the Department of Biochemistry and Molecular Pharmacology and the Mary Babb Randolph Cancer Center.

Dr. Flynn testified that it was reasonable for the unit which pays the faculty member's salary to make the decision on merit raises, and that unit was the Cancer Center. It is somewhat telling that Grievant does not want to be compared to others whose salary is funded by the Cancer Center. Regardless, Grievant has only demonstrated that he disagrees with Cancer Center personnel making salary determinations. It is not unreasonable for Cancer Center personnel to compare the performance of those whose salaries the Cancer Center funds, to determine who should receive more money from the Cancer Center. (See footnote 6) As to the decision itself, Dr. Flynn testified he compared the twelve Cancer Center faculty in the areas of active grants, publications as the communicating author, and service to the Cancer Center, which included quality of teaching and service on committees. He responded to Grievant's inquiry regarding his lack of a merit increase by telling Grievant he did not receive a merit increase because he had no active grants, and had not published. “Thus, you did not receive a merit raise this year.” The response further stated that research is only part of job, and encouraged Grievant to work hard in the areas of teaching, service, and as a collaborator. Grievant argued that this evidences arbitrary and capricious action, because Dr. Flynn did not say anything about teaching or service to the Cancer Center being a merit increase consideration in his initial response to Grievant, but only added these as reasons for the decision after Grievant pointed out that he had active grants and one publication.

It is clear from the entire record that the primary basis for Dr. Flynn not recommending Grievant for a merit increase was the low level of production in the areas of grants and publications, and that is what Dr. Flynn pointed out in his initial written response to Grievant. Dr. Flynn was not required to give Grievant a “statement of reasons,” and he was not strictly bound to only what he specifically said to Grievant in this written response. He was simply trying to provide basic information, and was not required to give Grievant the detail of his considerations. The fact that this response does not specifically state that he also considered service and teaching, does not automatically lead to a conclusion that Dr. Flynn made up these other reasons later. The undersigned concludes that Dr. Flynn compared the faculty members in the areas of teaching andservice when he was making his recommendations on merit increases, but these were not the main focus of his interest.

Grievant argued Dr. Flynn was incorrect in his determination that he had no active grants. When reviewing active grants for each individual, Dr. Flynn did not consider a cost or no-cost extension of any grant for any individual to be an active grant, because this is not new money. Grievant presented testimony that his two grants, which had both been extended, were still “active” grants, as that term is generally defined, to dispute the accuracy of Dr. Flynn's review. While it appears from the limited testimony on this issue that the Grievant is, in fact, correct that these two grants are considered by the research community to be active grants, the Grievant has missed the point, and whether this is technically correct is of no significance to this case. Dr. Flynn decided what criteria he would use, and he decided that he would not consider a grant which had been extended for the purposes of deciding who should be recommended for a merit increase. Dr. Flynn evaluated all twelve faculty using the same criteria. There was no requirement that he consider grants which had been extended. He was only interested in what new money had been acquired, which seems reasonable.

Grievant pointed out that Dr. Flynn's conclusion that he had no publications as communicating author was incorrect. Dr. Flynn explained with regard to publications, that the internet site he had relied upon for information in evaluating faculty, did not have Grievant as the communicating author on any publications for the evaluation period. When Grievant brought to his attention that he was the communicating author on one publication, he verified this by actually looking at the article himself, and reconsidered his recommendation. Even with this one publication, however, Grievant's performance wasstill at the lowest level among the twelve faculty, and Dr. Flynn did not believe Grievant should be recommended for a merit increase. Respondent placed into evidence a document

(level three Exhibit 17) which showed the performance of the twelve faculty members compared by Dr. Flynn, in the areas of publications, grant funding, and service. (See footnote 7) Eight of these faculty members only had one publication as the communicating (or corresponding) author, and four of those eight received a merit increase; however, those four who received a merit increase had between two and four grants, and service to the Cancer Center. Three faculty members had no active grants, and none of those faculty received a merit increase. One of these three was credited with service to the Cancer Center, while Grievant was not credited with such service. One faculty member who did not receive a merit increase had three active grants, one publication as a communicating author, and service to the Cancer Center.

Grievant did not attempt to demonstrate that the student evaluations of his teaching at the Cancer Center were positive, or that students had not complained about him.

Finally, Grievant argued any consideration of merit increases should have been based upon the annual review by the Department of Biochemistry Promotion and Tenure Committee. Grievant testified at level three that, “[t]he basis for promotion, tenure, andraise considerations is the official annual review.” Level three transcript, March 2, 2007, page 68. Grievant did not state how he arrived at this conclusion. He opined that the departmental annual review provides the “only criteria open and defendable criteria available for - - for comparison of my performance,” and it should have been used in awarding merit increases. Level three transcript, March 2, 2007, page 71. Associate Professor William Wonderlin has worked at WVU for many years, is in the Department of Biochemistry, and has served on the Promotion and Tenure Committee. He testified that the Department Chair makes merit increase decisions for faculty in the Department, and he did not know what the Chair relies upon in making these decisions. He stated the Department of Biochemistry does not have a merit evaluation system like other departments at WVU, and he was not aware of any requirement that the Department Chair use the annual review to make merit increase decisions.

Notwithstanding Grievant's opinions about how merit increases should be awarded in the Department, Grievant presented no evidence which would support a finding regarding how merit increases are actually awarded, or that anyone making the merit increase decision was required to use the annual review. Grievant did not demonstrate that the criteria Dr. Flynn used to compare the twelve faculty for merit increase purposes was unreasonable, or that Dr. Flynn's determination that Grievant should not receive a merit increase was otherwise arbitrary and capricious.

C. Base Salary

Grievant contended that WVU could not preclude him from charging up to 25% of his salary to his grant funding, without assessment by the Department Chair. Respondent raised a timeliness defense. Grievant's complaint is with the Basic Sciences Salary Plan. Grievant has known from the moment he was offered a position at WVU in 2003 that he would be subject to the Basic Sciences Salary Plan. While he may not have understood initially that its application to his situation could result in a limitation on the recovery of a portion of his base salary through grant funding without taxation by the Department Chair, he became aware of this on August 1, 2006, if not before. Grievant met with Associate Dean Palencik on August 1, 2006, about the Plan, and how that Plan affected Grievant's salary for the coming year, was explained to Grievant. This grievance was not filed for more than three months after that meeting. This part of the grievance challenges a salary determination which was made in the past, which the grievant alleges should have been greater, which is continuing damage arising from the alleged wrongful act which occurred, not a continuing practice.

However, Grievant asserted in his statement of grievance that this complaint was timely filed, because he had “just received the published salary information of other fa[c]ulty that convinces me that I am treated clearly differently at the level of salary raises when compared to other faculty.” He stated he was previously unaware of the difference in treatment. The record does not reflect when Grievant first looked at this information, which appears to have been public information for a long time. When Grievant submitted the list of faculty salaries into evidence, he argued at level four that it demonstrated the Basic Sciences Salary Plan was not being applied to all faculty. This claim of pay disparity is timely filed. This list of salaries, nonetheless, does not demonstrate anything other than that some faculty are paid more than Grievant. The Basic Sciences Salary Plan is applied to each individual based upon rank, discipline and degree. No evidence was presented regarding the discipline or degree of any individual faculty member on this list, when theybegan their employment with WVU, or whether they are subject to the Basic Sciences Salary Plan. The salary list does not support Grievant's claims.

Further, Grievant has not demonstrated that his interpretation of the Basic Sciences Salary Plan is correct. Grievant argued that WVU could not adjust the percentage of his salary he could recover through grant funding to less than 25%, because his offer letter sets forth this percentage recovery. Grievant's offer letter stated that the offered $125,000 salary was for a twelve-month appointment,

with WVU providing 75% of the salary, and the remaining 25% provided by Grievant from grants “as outlined in the attached Salary Plan for basic scientists.” It did not address Grievant's salary at the end of the twelve-month appointment, and each year faculty receive a new notice of appointment stating the new salary. Grievant has had no problem with WVU increasing his salary above the $125,000 stated in the offer letter.

Grievant is subject to the Basic Sciences Salary Plan. This Plan sets the base salary for faculty to which it applies, using the annual salary survey of the American Association of Medical Colleges. WVU's contribution to the faculty member's salary is at least 75% of the 50th percentile from the survey, increased by 3%. The individual's rank, discipline and degree are also a part of the calculation. If a faculty member's salary at some point exceeds the 50th percentile, as did Grievant's when he was hired in 2003, that person's salary is not reduced. The faculty member may earn more than the 50th percentile, but any amount earned above the 50th percentile is subject to an assessment by the Department Chair. Grievant simply disagrees with the Plan. Grievant admitted that the “exact meaning” of the 50th percentile of the AMC level for rank, discipline, and degree“has always eluded” him. Level three transcript, March 16, 2007, page 205. Grievant did not demonstrate that WVU is required to calculate his salary his way.

D. Employee Effort Certification Reports

Grievant's complaint regarding the Employee Effort Certification Reports was not timely filed. Grievant has known since shortly after he began his employment with WVU that he would be presented with these Reports, but he did not grieve this requirement for several years. If this were considered a continuing practice, the grievance still was not timely filed, as Grievant waited almost two months from the time he received the last Report to file this grievance. Grievant asserted he was being pressured to sign these reports. If such pressure occurred on a particular date, it is possible this might trigger the time period for filing a grievance. However, no evidence was presented that Grievant had been pressured in any way to sign this particular report. Grievant presented no excuse for his failure to timely file his complaint regarding this issue.

Had this complaint been timely filed, Grievant would not prevail. Employee Effort Certification Reports show where the funding for the faculty member's salary comes from. All faculty who have grant funding must sign these reports, and all those who testified about these reports stated they just sign them and don't worry about what the WVU accounts listed on the reports are, or whether their

salary actually comes from these accounts. Grievant, however, has refused to sign these reports for several years, because he does not understand what the various WVU or Mary Babb Randolph Cancer Center accounts are that appear on the reports, nor does he have any knowledge regarding what accounts fund his salary. WVU has accepted Grievant's signature on these reports with a qualifying statement about his lack of knowledge, and contrary to Grievant's testimony,attempts have been made to explain the accounts to Grievant. Grievant also testified that he objected to signing one report, and this was not pursued.

Grievant did not demonstrate he is being harmed in any way by the requirement that he sign the Employee Effort Certification Reports. He has not been punished for not signing the reports, rather, he just wants any pressure to sign these reports to cease. Grievant referred to this as “punitive,” and stated he is being given a hard time because he is reading the statements carefully. Grievant did not clearly state how he believes he is being pressured or given a hard time, except to say that he believed his salary had been held once, in the spring of 2006, because Associate Dean Palencik did not think he had signed a Report.

Grievant's belief that requiring his signature is somehow punitive is not supported by the evidence. All faculty with grant funding must sign these reports. Further, the record supports a finding that WVU has not, in fact, required Grievant to make any false statements, or sign a report verifying the accuracy of the information when he does not understand the document.

E. Retaliation and Discrimination

Grievant made allegations that Dr. Flynn had engaged in retaliation (reprisal) and discrimination against him. (See footnote 8) Reprisal is defined in West Virginia Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, *e.g*., filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
>
> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*.

Grievant asserted that Dr. Flynn was aware he had filed grievances. Dr. Flynn denied that he knew Grievant had filed other grievances, although he was generally awareof the problems and complaints which had resulted in the grievances being filed. Grievant asserted that Dr. Flynn had denied him a merit increase because of his prior grievances. Grievant also argued, however, that this action was part of the continuing effort by “the institution” to get rid of him, which began shortly after he was hired, and prior to the time he filed any grievances.

Grievant has demonstrated a *prima facie* case of reprisal. Although the previous grievances were filed some time ago, they were still pending at level three when Dr. Flynn made his recommendations on merit increases, and Dr. Flynn was generally aware of Grievant's complaints which had been formalized as grievances. However, Respondent presented evidence that all twelve faculty members evaluated by Dr. Flynn were funded by the Cancer Center, that all twelve were evaluated using the same criteria, that the criteria used provided a reasonable comparison of the research and service efforts of the faculty, and that Grievant's research efforts in particular, when compared to these faculty members, was not outstanding. Respondent offered legitimate, non-retaliatory reasons for the adverse action, and Grievant did not demonstrate the offered reasons were merely pretextual.

West Virginia Code § 29-6A-2(d) defines “'discrimination'” as “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." "The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm., [655 S.E.2d 52, 221 W. Va. 306 (2007)]; *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005)." *Harvey-Gallup v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(J) (Feb. 21, 2008).

Grievant's claim of discrimination with regard to the calculation of his salary has already been addressed. As to the merit raise issue, Grievant attempted to compare himself to other faculty in the Department of Biochemistry whose salaries are not funded by the Mary Babb Randolph Cancer Center. These faculty members are not similarly situated to Grievant for purposes of merit increases, because they are not funded by the Cancer Center. Grievant's performance was compared to other faculty funded by the Cancer Center, which, as previously addressed, was reasonable. Grievant did not demonstrate he was similarly situated to any other employee who was treated differently.

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 heshould 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. "W. Va. Code § 29-6A-4(b) requires that the employer's administrator or his designee hold a 'conference' at level two, not a 'hearing.' This Grievance Board has previously reviewed this statutory inconsistency and determined, 'applying principles of statutory construction, that, in cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing.' *Greathouse v. Dep't of Transp.*, Docket No. 99-DOH-413 (Aug. 21, 2000)." *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001).

4. Respondent met the statutory requirements when it raised a timeliness defense for the first time at the level three hearing.

5. The complaints regarding Grievant's start-up funding and the Employee Effort Certification Reports were not timely filed, and Grievant presented no excuse for his failure to timely file these grievances. 6. Grievant's complaints regarding his base salary and the failure to receive a merit increase in 2006 were timely filed.

7. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "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).

8. An employer's decision on merit increases will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly- established policies or directives. *Little v. W. Va. Dep't of Health & Human Resources*, Docket No. 98-HHR-092 (July 27, 1998); *Salmons v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-555 (Mar. 20, 1995); *Terry v. W. Va.*

Div. of Highways, Docket No. 91-DOH-186 (Dec. 30, 1991); *Osborne v. W. Va. Div. of Rehabilitation Serv.*, Docket No. 89-RS-051 (May 16, 1989).

9. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't ofHealth and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*. *See Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999).

10. "'A grievant must demonstrate more than a flaw in the merit increase process. . . . a grievant must also demonstrate that, had the process been properly conducted, she would have received a merit increase. *Stone v. W. Va. Alcohol Beverage Control Comm'n*, Docket No. 97-ABCA-151 (Aug. 21, 1997). *Karr v. W. Va. Bureau of Employment Programs*, Docket No. 98-BEP-145 (Aug. 28, 1998)." *Wade, supra.*

11. Grievant did not demonstrate that the decision that he not be awarded a merit increase in 2006, was arbitrary and capricious.

12. Grievant did not demonstrate that the Basic Sciences Salary Plan was improperly applied to his salary.

13. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedureeither for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, *e.g*., filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

14. If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*. 15. Respondent offered legitimate, non-retaliatory reasons for Dr. Flynn's decision not to recommend Grievant for a merit increase, and Grievant did not demonstrate the offered reasons were merely pretextual.

16. West Virginia Code § 29-6A-2(d) defines "'discrimination'" as "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." "The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(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.

Frymier v. Higher Education Policy Comm., [655 S.E.2d 52, 221 W. Va. 306 (2007)]; *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005)." *Harvey-Gallup v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149(J) (Feb. 21, 2008).

17. Grievant did not demonstrate he was similarly situated to any other employee who was treated differently.

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* 1). Neither the West Virginia 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: August 5, 2008

Footnote: 1

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 in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Respondent requested permission to submit into evidence the transcripts of certain testimony from the level three hearing in Riedel v. West Virginia University, Docket No. 07-HE-026 (at level four). The testimony is that of Dr. Diana Beattie, former Chairman of the Department of Biochemistry and Molecular Pharmacology, and Dr. Fred Butcher, Senior Associate Vice President of the Health Sciences Center. The purpose of submitting the transcripts, rather than calling these individuals, was to save hearing time. Also, Dr. Beattie was not available to testify, because she is in Oman. The reason Respondent wished to submit this testimony was to respond to statements made by Grievant about the promise of laboratory space, and the proposed termination of his employment in 2003, shortly after he was placed on the payroll. Grievant objected to this testimony being placed in the record, because some of the testimony had been allowed at level three over his objections. Grievant declined to withdraw from the record statements he had made at the level four hearing in this grievance regarding Dr. Beattie's actions and character.

The transcripts and exhibits submitted by Respondent after the May 22, 2008 hearing in this matter, of the testimony of Dr. Beattie and Dr. Butcher will be marked as Respondent's Exhibit 4, and Respondent's Exhibit 4 is ORDERED admitted into evidence.

Footnote: 3

Dr. Flynn performed this review because the Director of the Cancer Center had resigned. The record does not reflect whether the Director of the Cancer Center had evaluated the performance of these faculty members, and awarded merit increases, in previous years.

Footnote: 4

RO1 refers to Grievant's grant from the National Institute of Health/National Cancer Institute.

Footnote: 5

The education grievance procedure, which is not applicable to higher education employees, allowed county board of education employees fifteen days to file a grievance.

Footnote: 6

Even if Grievant were evaluated in the Department of Biochemistry, he did not demonstrate he was entitled to the 4% raise he requested. One of the faculty members in the Department of Biochemistry who received a substantial raise in 2006, was Larry Harris. When Mr. Harris testified at the level four hearing on May 14, 2008, he had been a professor at WVU for 30 years. In 2007, Mr. Harris was making a base salary of $103, 351. In 2003, Grievant was hired at a base

salary of $125,000, while Mr. Harris' base salary was $79,483. Aside from the fact that Mr. Harris' salary is not financed by the Cancer Center, Mr. Harris and Grievant are obviously not in the same situation, and if anyone should be complaining about their salary, it should be Mr. Harris. Steve Graber, a faculty member in the Department of Biochemistry, who has been at WVU since 1993, testified that some years his raise has been less than $100.

Footnote: 7

Grievant contended that this document was false and flawed, because it contained errors. Grievant pointed out on the record that two of the columns had the information reversed for two of the faculty members. These errors were corrected through testimony on the record, and corrections were made to the exhibit. Level three transcript, September 19, 2007, pages 42 and 43. Grievant did not demonstrate that the document, as corrected, did not accurately reflect the information relied upon by Dr. Flynn in making recommendations on merit increases. It should be noted that those faculty members identified as number six and number seven did not receive a merit increase because they were promoted, and received a raise with their promotion, even though number seven had four publications as communicating author, four grants, and service to the Cancer Center.

Footnote: 8

Grievant also claimed that Associate Dean Palencik had retaliated against him when he stopped his start-up funding. That claim, however, was not timely filed.