THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AUBREY MILLER,
Grievant,

v. **Docket No. 08-HE-005**

FAIRMONT STATE UNIVERSITY,
Respondent.

DISMISSAL ORDER

Grievant, Aubrey Miller, is currently employed at Fairmont State University ("FSU"). His Statement of Grievance reads:

> Grievant was denied tenure and promotion to associate professor. Grievant's tenure and promotion denial was discriminatory, clearly wrong, and arbitrary and capricious, and violation of university and other policies. Additionally, other applicants were shown favoritism when compared to Grievant.

The Relief Sought is, "Grievant seeks to be awarded tenure and promoted to associate professor with all applicable benefits and compensation retroactive to the applicable period; to be made whole; and any other relief that the hearing examiner deems appropriate."

At the time this grievance reached the Grievance Board at Level IV, the only issue before the undersigned Administrative Law Judge was whether the grievance was timely filed.[1] Grievant was represented by Chris Barr of the AFT-West Virginia, and Respondent was represented by Kristi McWhirter, Assistant Attorney General. The timely filing issue became mature for decision on June 10, 2008, the submission date for Findings of Facts

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[1]This grievance was filed under the old grievance procedure.

and Conclusions of Law. This grievance was assigned to the undersigned Administrative Law Judge on August 28, 2008.

Synopsis

Grievant asserts this grievance was timely filed, as he filed it within ten days of receiving a letter from the president of FSU. Respondent avers Grievant was aware of FSU's final decision verbally on April 4, 2007, and in writing on April 6, 2007. In the alternative, Respondent asserts Grievant did not receive a subsequent, notification letter because he failed to pick up his certified mail. Additionally, Respondent avers Grievant did not timely file to Level III. As demonstrated by the discussion below, this grievance must be Dismissed.

By agreement of the partes, there was no testimony at the Level II hearing, only the submission of documents and arguments. The parties agreed the Level IV record would consist of the submitted documents, and two stipulations noted below in the Findings of Fact. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by FSU as an Assistant Professor.

2. When Grievant met with then Provost and Vice President for Academic Affairs Anne Patterson on April 4, 2007, he was informed his application for promotion and tenure was denied, and he would soon receive written notice of this decision from President Daniel Bradley. Parties' stipulation Level III Transcript at 12.

3. On April 5, 2007, President Bradley sent Grievant a certified letter stating "your request for tenure and promotion to the rank of Associate Professor at Fairmont State

University is not approved. You will receive a contract for academic year 2007-08. This will be a terminal contract, and you should expect no further employment at Fairmont State University when the 2007-08 contract is concluded." Exh. 7. Grievant received this certified letter on April 6, 2007. Exh. 7.

4. After Grievant received this letter, he requested to meet with President Bradley, and a meeting was scheduled for April 19, 2007.

5. After the April 19, 2007, meeting, President Bradley wrote Grievant on April 24, 2007, to restate the results of the discussion. This letter stated, "[a]s a result of that meeting, we agreed that you would receive a contract for academic year 2007-08 and 2008-09. The contract for 2008-09 will be a terminal contract, and you should expect no further employment at Fairmont State University when the 2008-09 contract is concluded." Exh. 8. This letter was sent by certified mail and regular mail on April 24, 2007. Exh. 8.

6. Grievant received notices for this certified letter on April 25, 2007, and May 3, 2007. Grievant never picked up the certified letter, and on May 16, 2007, the post office determined the letter was unclaimed and returned it to FSU on May 21, 2007. The letter sent by regular mail was not returned.

7. On May 24, 2007, FSU resent the April 24, 2007, letter by certified mail and regular mail. Grievant received this certified mail on May 25, 2007.

8. Grievant filed this grievance on June 8, 2007.

9. Grievant received his Level II Decision on December 5, 2007. Exhs. 3 and 4. This Decision was not sent to Grievant's representative until she requested it on December 16, 2007.

10. Grievant filed a Level III appeal on December 18, 2007.

11. Working days for FSU prior to commencement, May 12, 2007, were Monday through Friday, and after commencement they were Monday through Thursday. Parties' stipulation Level II Transcript at 13.

Discussion

Respondent contends this grievance was untimely filed as it was not initiated within the timelines contained in W. VA. CODE § 29-6A-4(a).[2] Where an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Similie v. W. Va. Univ./Inst. of Tech.*, Docket No. 05-HE-1187 (Sept. 28, 2005); *Ball v. Kanawha County Bd. of Educ*., Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College,* Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

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[2]In 2007, the Legislature, 2007 Acts ch. 207, 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 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. References in this decision are to the former statutes, which continue to control the proceedings in this case.

The timeliness issue is governed by the timelines set out in former W. VA. CODE § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. *See Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Rose v. Raleigh County Bd. of Educ.*, Docket Nos. 94-41-246/314 (Nov. 29, 1994), *aff'd*, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Respondent avers that by examining the dates in the Findings of Fact, it is clear this grievance was not timely filed, as Grievant was repeatedly notified that he would not receive promotion and tenure, and he failed to file this grievance until June 8, 2007. Grievant asserts the only date that should be used to determine when he was required to file this grievance is the date he received the resent, certified letter on May 25, 2007. Respondent's assertions are correct, and there are multiple reasons why Grievant's argument is without merit. These reasons are discussed below.

First, Grievant ignores that fact that he was notified verbally on April 4, 2007, that his request for promotion and tenure was denied, and he would receive a terminal contract. This verbal denial was closely followed by a written, unequivocal denial in a certified letter dated April 5, 2007, and received by Grievant on April 6, 2007. Grievant did not file this grievance until two months later on June 8, 2007.

Second, even if the undersigned Administrative Law Judge were to count the time to file from the April 19, 2008, meeting, the results of that meeting are contained in the April

24, 2008, letter from President Bradley which states "[a]s a result of that meeting, we agreed that you would receive a contract for academic year 2007-08 and 2008-09. The contract for 2008-09 will be a terminal contract, and you should expect no further employment at Fairmont State University when the 2008-09 contract is concluded." (Emphasis added). So again, Grievant was verbally, unequivocally informed on April 19, 2007, that the promotion and tenure decision had not been changed.

Third, this meeting was followed by the April 24, 2007, letter sent to Grievant by certified and regular mail. Grievant did not pick up the certified letter after two notices, but since the regular letter was not returned, it is assumed Grievant received this letter.[3]

As frequently noted by this Grievance Board, a party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g., State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)("Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences."); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

Although not required, but certainly good practice, Respondent sent the April 24, 2007, letter to reflect the results of the meeting. For reasons unknown, Grievant did not

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[3]As noted earlier, no testimony was taken.

pick up his certified letter, even after two notices, and it was returned to FSU. Grievant had picked up certified mail in the past and was familiar with this process. FSU could not force Grievant to pick up his mail, and it was Grievant's responsibility to do so. Grievant cannot now use his failure to pick up his certified mail to extend the timelines, and FSU cannot be penalized for Grievant's failure. *Ross v. Div. of Juvenile Serv./North Cent. Juvenile Det. Ctr.*, 03-DJS-296D (Jan. 29, 2004).

Fourth, in regards to the resending of the April 24, 2007, letter on May 15, 2007, this was an action FSU was not required to take. But again, Grievant cannot use this action to change the timelines for filing, and FSU should not be penalized for taking this action.

Accordingly, Respondent has demonstrated this grievance was not timely filed. Thus, Grievant has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Since Grievant did not testify, there was no rationale given to excuse his failure to pick up his mail or his delay in filing. Further, Grievant did not cite any deliberate conduct or actions by the employer that would cause him to delay filing his claim. *Naylor v. W. Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989); *Pryor v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-341 (Oct. 29, 1997); *Lilly v. Raleigh County Bd. of Educ.*, Docket No. 94-41-195 (Nov. 28, 1994).

Accordingly, Grievant has not provided a proper excuse to explain his untimely filing. Since Grievant had knowledge of the grievable event in April 2007, did not file his grievance until June 8, 2007, and offered no rationale to excuse this untimely filing, this grievance must be dismissed. *See Adkins v. W. Va. Dep't of Educ.*, Docket No. 95- DOE-507 (Apr. 26, 1996) at 7. *See also Gragg v. W. Va. Div. of Corr.*, Docket No. 98-CORR-330 (Mar. 26, 1999); *Pryor, supra; Floren v. Kanawha County Bd. of Educ.*, Docket No. 93-20-327

(May 31, 1994); *Chambers-Cooper v. Roane County Bd. of Educ.*, Docket No. 90-44-385 (Jan. 15, 1991); *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989).

As the grievance is found to be untimely filed at Level I, the issue of timely filing at Level III will not be addressed. It should be noted that if a respondent is aware a grievant is represented, the best action is to send the decision to both the grievant and the representative/attorney. While this action is not clearly required by the statute, the failure to do so could extend time a grievant has to file to the next level.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ*., Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College,* Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. W. VA. CODE § 29-6A-4(a) states a grievance must be filed "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant. . . ."

3. The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. *See Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989); *Rose v. Raleigh County Bd. of Educ.*, Docket Nos. 94-41-246/314 (Nov. 29, 1994), *aff'd*, 199 W. Va. 220, 483 S.E.2d 566 (1997).

4. This grievance was untimely filed as Grievant was unequivocally notified of the decision in April 2007, and did not file until June 8, 2007.

5. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Ross v. Div. of Juvenile Serv./North Cent. Juvenile Det. Ctr.*, 03-DJS-296D (Jan. 29, 2004); Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g., State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993).

6. Grievant's failure to pick the certified letter informing him, in writing, of the agreement reached in the April 19, 2007, meeting cannot be used to extend the time frame for filing his grievance.

7. Grievant offered no rational to excuse his untimely filing, and failed to demonstrate conduct on the part of Respondent that caused Grievant to delay the filing of this grievance. *Naylor v. W. Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989); *Pryor v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-341 (Oct. 29, 1997); *Lilly v. Raleigh County Bd. of Educ.*, Docket No. 94-41-195 (Nov. 28, 1994).

Accordingly, the Motion to Dismiss is GRANTED, and this grievance is DISMISSED from the Grievance Board's docket.

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 (2006) (repealed, see note 2 *supra*). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) (2006) 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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JANIS I. REYNOLDS
ADMINISTRATIVE LAW JUDGE

Dated: January 8, 2009