THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANIEL DELLA-GIUSTINA,
Grievant,

v. **DOCKET NO. 2008-1693-CONS**[1]

WEST VIRGINIA UNIVERSITY,
Respondent.

DISMISSAL ORDER

Grievant, Daniel Della-Giustina, a faculty member, filed two grievances against his employer, West Virginia University, one on April 5, 2004, and the other on April 14, 2004. Both grievances complained about his 2003 evaluation.

Separate conferences were held at level one, and both grievances were denied at level one on April 14 and April 21, 2004, respectively. The level one decisions also noted that the grievances were not timely filed. Grievant appealed to level two, and after separate conferences were held, both grievances were denied on May 4 and May 12, 2004, respectively, with both decisions noting the grievances were not timely filed. Grievant appealed both grievances to level three on May 10 and May 19, 2004, respectively. The parties agreed to extend the statutory time period for holding the level three hearings. Respondent requested dates for hearing from Grievant's representative

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[1] The Notice setting the January 6, 2009 pre-hearing conference and the identification by the undersigned of the Docket Number at the beginning of the pre-hearing conference and the hearing on the matter were both in error. The Docket Number stated both by the undersigned and on the Notice was 2008-0335-WVU, which was the Docket Number of one of the grievances before the two were consolidated.

at that time, but no further action was taken on this grievance until September 2007, when both grievances were transferred to the new grievance procedure, which was effective July 1, 2007.[2] The grievances were dismissed at level one of the new grievance procedure on April 4, 2008, as untimely filed. Grievant appealed to level two on April 9, 2008, where the grievances were consolidated, and a mediation was held on October 10, 2008. The parties were unable to reach a settlement of the issues, and Grievant appealed to level three on October 20, 2008. Respondent filed a Motion to Dismiss this grievance as untimely filed, and a telephone conference was held on January 6, 2009, on this Motion, at which time it was decided that the only issue to be addressed at the level three hearing would be whether the grievance was timely filed. A level three hearing was held before the undersigned Administrative Law Judge on January 29, 2009, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's written argument on February 12, 2009. Grievant declined to submit written argument.

Synopsis

Respondent argued these grievances should be dismissed as untimely filed. Respondent demonstrated that the first grievance was filed more than 24 days after

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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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

Grievant became aware of his 2003 evaluation, which was the subject of the grievance, and the second grievance was filed almost two weeks later. The grievances were not timely filed. Grievant offered no excuse for his failure to timely file these grievances.

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

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU") as a Professor in the Department of Industrial and Management Systems Engineering.

2. Grievant received his 2003 evaluation on February 26, 2004. On March 2, 2004, Grievant met with his Department Chair, Dr. Wafik Iskander, and the Chair of the Department Promotion and Tenure Committee, Dr. Gary Winn, for three hours to discuss his evaluation.

3. By Memorandum dated March 9, 2004, Grievant advised the Department Chair, the Chair of the Department Promotion and Tenure Committee, and the Dean of the College of Engineering and Mineral Resources, Dr. Eugene Cilento, that he still had a number of questions about his evaluation. The only questions he asked in this Memorandum, however, were related to identifying the student comments referred to by the Promotion and Tenure Committee in its evaluation. Grievant asked that his unanswered questions be answered, in writing, by March 23, 2004.

4. On April 5, 2004, Grievant filed a grievance challenging certain points on his 2003 evaluation. On April 14, 2004, he filed a second grievance challenging other aspects of his 2003 evaluation.

5. Respondent raised a timeliness defense at level one of the grievance procedure.

Discussion

Respondent asked that this consolidated grievance be dismissed as untimely filed. 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 § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

The statutory provisions in effect at the time this grievance was filed contained nearly identical provisions requiring the grievance be filed within *ten* days under the former state grievance procedure applicable to higher education employees, W. VA. CODE §§ 29-6A-1, *et seq.*, in particular W. VA. CODE § 29-6A-4(a), and fifteen days under the former

education employees grievance procedure, W. VA. CODE §§ 18-29-1, *et seq.* 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).

Grievant received his evaluation February 26, 2004, and discussed it with his Chair on March 2, 2004. The first grievance was filed 24 working days after this meeting, and 27 working days after Grievant became aware of the contents of the evaluation, both well beyond the statutory time period for filing a grievance, under both the new and old grievance procedure. The second grievance was filed almost two weeks later.

It should be pointed out that the Grievance Board has determined that, in certain circumstances, the time period for filing a grievance does not begin to run until the Grievant knows the basis for his evaluation. *Thomas v. Bd. of Directors*, Docket No. 98-BOD-407 (Apr. 30, 1999). In *Thomas*, the evaluation involved a point allocation, and the grievant could not determine "the points allocated to each of the three categories, or the basis for the point allocation" until he received some further clarification. *Id.* There is no such issue in this case. However, to the extent that Grievant needed more information about how his evaluation was determined, the March 2, 2004 meeting provided Grievant with the opportunity to discuss this issue, and Grievant did not argue otherwise. Respondent demonstrated that the grievance was not timely filed.

Grievant stated that he knew he timely filed the grievances because he was always on top of deadlines, but he did not dispute that he received his 2003 evaluation on

February 26, 2004, met with his Department Chair on March 2, and did not file either grievance until April 2004. Grievant also offered as an excuse to untimely filing that he was under a lot of stress at the time the grievances were filed, as both of his sons were on active duty, one in Iraq and one in Afghanistan. Grievant offered no further explanation for his actions. While it is understandable that Grievant would be under stress in these circumstances, this does not provide an explanation for the significant delay in the filing of either grievance.

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* by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). 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. These grievances were not filed within the statutory time lines for filing a grievance.

4. Grievant offered no excuse for his failure to timely file his grievances.

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: June 8, 2009