WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN P. DAVID,
Grievant,

v. **Docket No. 2008-1899-CONS**

WEST VIRGINIA UNIVERSITY INSTITUTE OF TECHNOLOGY,
Respondent.

DISMISSAL ORDER

Grievant John P. David is employed by the West Virginia University Institute of Technology ("WVUIT") as a Professor of Economics/Labor in the Department of Social Sciences and Public Administration. Grievant David has been employed by WVUIT since 1972 and has been a full professor since 1983. On May 21, 2008, Dr. David filled a level one grievance alleging that he was improperly denied a salary enhancement. Grievant contends that the denial of the salary enhancement was arbitrary and capricious, based upon inaccurate and incomplete information, and violated public laws, policies and procedures. As relief, Grievant seeks to be paid the salary increase and back pay to the date of his application. The docket number assigned to that grievance was 2008-1606-WVUIT. (Hereinafter, this grievance will be referred to as the "salary enhancement grievance").

On June 18, 2008, Dr. David filed a second level one grievance alleging that the "unsatisfactory" evaluation rating for teaching he received in February 2008, was in violation of public law, policy and procedures, arbitrary and capricious and discriminatory. As relief, Grievant seeks to have the "unsatisfactory" rating for teaching changed to "good" or "excellent." The docket number assigned to that grievance was 2008-1838-WVUIT.

(Hereinafter, this grievance will be referred to as the "evaluation grievance"). Both grievances were heard separately at level one and separate decisions were issued denying each grievance.[1]

The two grievances were appealed to level two and a mediation was held concerning both grievances on September 29, 2008. The mediation was unsuccessful and by agreement of the parties the grievances were consolidated for hearing at level three.

On December 3, 2008, counsel for Respondent filed a Motion to Dismiss both grievances alleging that they were not filed within the mandatory, statutory time limits. A level three hearing was scheduled to be held before the undersigned administrative law judge on December 17, 2008, at the Charleston office of the Public Employees Grievance Board. Grievant was present and represented by Christine Barr, Staff Representative, AFT-West Virginia/AFL-CIO. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. The parties agreed that this hearing would be used to address the Motion to Dismiss and, if necessary, a hearing on the merits would be scheduled at a later date. The parties decided not to submit fact/law proposals and the issue of timeliness of the two grievances became mature on that date.

Synopsis

In the salary enhancement grievance, Respondent's policy prohibited granting a salary enhancement because he had received an "unsatisfactory" rating in teaching within the last five years. Grievant did not question the policy but rather contests the validity of

[1] The decision denying grievance number 2008-1606-WVUIT was rendered June 18, 2008. The decision denying grievance number 2008-1838-WVUIT was rendered July 28, 2008.

the evaluation in which he received the "unsatisfactory" rating. Grievant did not contest the evaluation when it was issued and the salary enhancement review does not create a subsequent, separate event to grieve the evaluation years later. Therefore, the grievance is dismissed as untimely.

In the evaluation grievance, the Cluster Committee informed Grievant of his "unsatisfactory" evaluation in the area of teaching shortly after February 19, 2007. Rather than filing a grievance contesting the evaluation, Grievant wrote a memorandum to the Dean asking him to overturn the evaluation issued by the Committee. A grievance was filed after the Dean responded by stating that the Committee's evaluation would not be changed. Grievant was unequivocally informed that he received an "unsatisfactory" rating in February 2007, and did not file a grievance until June 18, 2007. The grievance was not timely filed and is dismissed.

The following findings of fact are based upon a thorough review of the record.

Findings of Fact

Salary Enhancement Grievance

1. Grievant, Dr. John David, is the Chair of his Department at WVUIT where he has been employed since 1972. Grievant has been a full professor since 1983.

2. WVUIT is a regional campus division of West Virginia University and subject to the rules and policies of that University.

3. Grievant was given a performance evaluation on March 27, 2004, in which he received an "unsatisfactory" performance rating in the area of teaching for 2003. This

rating was made by the evaluation Cluster Committee[2] based upon evaluations completed by students enrolled in Grievant's courses.

4. Grievant disagreed with the "unsatisfactory" rating but did not file a grievance related to this evaluation because he had been a full professor for more than two decades and it did not appear that the "unsatisfactory" rating would make a significant impact on his employment.

5. In 2005, the West Virginia University Board of Governors adopted Policy 30, "Salary Enhancement for Continued Academic Achievement" ("Policy 30") creating a reward and incentive plan for faculty members at the rank of full professor. The policy provides the potential for two salary increases to the faculty member's base salary. Qualifying professors may receive an initial increase of seven and one half percent of their previous year's base salary after a minimum five years as a full professor. Additionally, the professor may be eligible for a second increase of five percent five years after the first increase takes effect. The salary enhancement is based upon performance, and is in addition to any merit-based increases for which the faculty member may be eligible. To qualify for the salary enhancement, the employee must receive a rating of "excellent" or "good" in at least eighty percent of the areas of teaching, research, and service. The policy specifically provides that *"in no instance will an applicant who has received a rating of 'unsatisfactory' in any area in the five full years preceding application be considered."* (Emphasis added) Policy 30 § 6.

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[2] The Cluster Committee is a group of peer professionals assigned the task of performing faculty evaluations.

6. The committee that considers salary enhancement applications does not investigate the basis for ratings given to the employee. Rather they take the ratings as given and apply them to the policy criteria.

7. On December 13, 2007, Grievant submitted an application for salary enhancement pursuant to Policy 30.

8. Because Grievant received an "unsatisfactory" rating for teaching in 2003 his application for salary enhancement was denied in May 2008.

9. On May 19, 2008, Grievant filed a grievance contesting the denial of his salary enhancement application based upon his contention that the 2003 evaluation was flawed.

Evaluation Grievance

10. The Cluster Committee evaluated Grievant's performance for 2007. The evaluation was completed and signed by the Committee members on February 19, 2008.[3] Joint Exhibit 1.

11. Grievant received the following ratings for 2007:

- Service "Excellent";
- Scholarly Activity "Good"
- Teaching "Unsatisfactory"

12. On March 6, 2008, Grievant submitted a rebuttal objecting to the "unsatisfactory" rating to Professor Jacqueline Perry, Chair of the Cluster Committee. Joint Exhibit 2.

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[3] One member of the five member Cluster Committee signed and dated the evaluation on February 18, 2007. The remaining members of the Committee dated their signatures on February 19, 2008.

13. Grievant sent a memorandum to the Dean, Dr. Stephen Brown, appealing the "unsatisfactory" rating given to him by the Cluster Committee on May 1, 2008. Grievant attached the rebuttal he had provided to Professor Perry and the reasons for his objection to the evaluation. Joint Exhibit 3.

14. By memorandum dated May 29, 2008, Dean Brown responded to Grievant as follows:

> The Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure 2007-2008 stipulate that in the event that you disagree with the evaluation of your performance you may file a rebuttal for inclusion in the Faculty Personnel File (FPF).

Dean Brown noted that Grievant's rebuttal of March 4, 2008, would be included in his FPF and the Committee's evaluation would remain as submitted. Joint Exhibit 4.

15. Grievant filed his level one grievance form on June 18, 2008.

Discussion

The hearing in these consolidated grievances was limited to the Respondent's Motion to Dismiss both grievances for not being filed within the statutory time frame. Therefore, the sole issue in both grievances is whether they were timely filed.

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer is asserting an affirmative defense and has the burden of demonstrating such untimely filing by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). 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.

Pisino v. Div. of Corrections/Pruntytown Correctional Ctr., Docket No. 2009-0539-MAPS (Dec. 15, 2008) (citations omitted).

Salary Enhancement Grievance

In this matter, the only basis for the denial of Grievant's salary enhancement was an "unsatisfactory" rating in teaching in 2003. At the level one hearing Grievant argued that the "unsatisfactory" rating was based upon insufficient documentation and should be overturned. His entire grievance is based upon a challenge of the 2003 evaluation and not the policy or procedure utilized for the salary enhancement. Grievant received this evaluation in March 2004, and did not file a grievance contesting its validity until this grievance was filed in 2008.

W. VA. CODE § 29-6A-4(a) was in effect in 2004 and required that a grievance be filed "within ten days of the occurrence of the event upon which the grievance is based." Clearly, the event giving rise to this grievance is Grievant's receipt of an "unsatisfactory" rating in 2004. The committee was prohibited by the specific policy criteria from awarding the salary enhancement if the applicant had an "unsatisfactory" rating within the preceding five years. Policy 30 § 6, Finding of Fact 5 *supra*. But for the "unsatisfactory" rating, the salary enhancement would have been granted. Grievant cannot use the salary enhancement process to create a new grievable event to challenge the past evaluation.

This issue was addressed in *Bowles v. Div. of Corr./Mount Olive Corr. Complex*, Docket No. 03-CORR-271 (Nov. 25, 2003). In that grievance an employee received a reprimand that he did not contest through the grievance process. The Division of Corrections had a policy that rendered an employee ineligible for promotion for two years

from the date of a written reprimand or more serious disciplinary action.[4] Grievant Bowles applied for two promotions and was denied the opportunity to interview for the positions because of the reprimand he had received approximately seven months previously. Bowles filed a grievance, ostensibly to contest the failure to give him an interview, but the only real issue was the legality of the previous reprimand. The administrative law judge noted, "Grievant is not arguing a misapplication of Policy Directive 132.00, or that this policy is invalid." *Id.* p. 3. Instead Bowles was arguing that the reprimand should be overturned. The administrative law judge concluded that the grievance was untimely because "these job denials did not render the reprimand a new grievable event." *Id.* p. 3.

The present grievance is nearly identical to *Bowles.* Grievant David received an "unsatisfactory" rating for 2003, on March 27, 2004. He had ten days from that date to file a grievance to contest that evaluation but chose not to do so. W. VA. CODE § 29-6A-4(a). Four years later he applied for a salary enhancement pursuant to Policy 30. Just like the Department of Corrections policy that prohibited Bowles from receiving a promotion within two years of receiving a reprimand, Policy 30 prohibited Grievant from receiving a salary enhancement within two years of receiving an "unsatisfactory" rating. Also like Bowles, Dr. David is not contesting the validity of Policy 30 or its misapplication, rather he is arguing that the "unsatisfactory" rating was improper and the 2003 evaluation was flawed. Finally, like in Bowles, Grievant failed to file a timely grievance contesting the 2003 evaluation and the denial of the salary enhancement did not constitute a new grievable event. This Grievance was not timely filed and is dismissed.

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[4] Division of Corrections Policy Directive 132.00; *Bowles v. Div. of Corr./Mount Olive Corr. Complex*, Docket No. 03-CORR-271 (Nov. 25, 2003) at Finding of Fact 10.

The Evaluation Grievance

In this grievance, the facts are not in dispute. Grievant received an “unsatisfactory” rating for teaching from the Cluster Committee on February 19, 2008. He filed a rebuttal to the evaluation with the Committee chair on March 6, 2008. Grievant took no other action until May 1, 2008 when he submitted a memorandum to Dean Brown objecting to the evaluation rating. Dean Brown responded on May 29, 2008, that the evaluation would stand and a grievance was filed on June 18, 2008.

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). W. VA. CODE § 6C-2-4(a)(1) establishes the time frame for filing a grievance and states:

> 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.

Grievant was unequivocally notified of the “unsatisfactory” rating by the Cluster Committee shortly after February 19, 2008. The record is unclear as to when Grievant specifically received the evaluation but he filed his rebuttal on March 4, 2008 which is

within the time frame for filing a grievance.[5] Instead of filing a grievance, Grievant chose to seek relief from the Dean. While this is a legitimate path, it does not toll the running of the statutory time limit for filing a grievance.

The *West Virginia University Policies and Procedures for Annual Faculty Evaluations and Tenure 2007-2008* provides:

> 4) A faculty member may include a rebuttal to the departmental evaluations for review at the next level. The rebuttal must be forwarded to the Dean within five (5) working days of receipt of the evaluation.
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> 5) A faculty member may petition the dean for a review of the negative departmental recommendations. . . . The petition should reach the dean within five (5)working days following receipt of notification of the negative recommendations. The dean shall forward the petition to the college evaluation committee as a matter of course for its recommendation.

Id, at § XIII (A) (4 and 5). Grievant argues that his grievance is timely because it was filed within fifteen working days of receiving the response from Dean Brown. However, an appeal to the Dean, while available under the policy, is not a mandatory step in the grievance process. Grievant was required to file a grievance within fifteen days of receiving the evaluation from the Cluster Committee and seeking relief from the Dean did not create a new grievable event. *Branch v. W. Va. Univ.,* Docket No. 05-HE-261 (Oct. 4, 2005); *See Webb v. Hampshire County Bd. of Educ.*, Docket No. 07-14-334 (Apr. 9, 2008). The grievance was filed nearly four months after the decision was made by the Cluster Committee and it is therefore not timely.

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[5] If Grievant received the evaluation on February 19, 2008, the deadline for filing a grievance would have been March 11, 2008, fifteen working days later. W. VA. CODE § 6C-2-4 (a) (1).

Even if the internal process set forth in Respondent's policy could be exhausted prior to utilizing the grievance procedure, Grievant failed to meet the time lines in that procedure. The policy requires that a petition objecting to the evaluation be presented to the dean within five days of receipt of the negative rating. The evaluation was completed on February 19, 2008, and Grievance sent his memorandum to Dean Brown on May 1, 2008, more than two months later. This is clearly outside the policy time line.

Based upon the foregoing both grievances were filed outside the statutory time frame and are dismissed.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer is asserting an affirmative defense and has the burden of demonstrating such untimely filing by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. W. VA. CODE § 29-6A-4(a) was in effect in 2004 and required that a grievance be filed "within ten days of the occurrence of the event upon which the grievance is based." Respondent proved that Grievant did not file a grievance contesting his 2003 "unsatisfactory" rating within ten days of receiving that rating and his salary enhancement grievance is untimely. *See Bowles v. Div. of Corr./Mount Olive Corr. Complex*, Docket No. 03-CORR-271 (Nov. 25, 2003).

3. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." That time limit is "within fifteen days following the occurrence of the event upon which the grievance is based." 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. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); See *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Respondent proved that Grievant did not file a grievance challenging his 2008 evaluation "unsatisfactory" rating within fifteen days of being unequivocally notified of that rating. Consequently, the evaluation grievance is untimely.

Accordingly, both of the grievances consolidated for consideration at level three are DISMISSED.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 2, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE