THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GALAN JANEKSELA,
Grievant,

v. **Docket No. 2008-1858-WVUIT**

WEST VIRGINIA UNIVERSITY
INSTITUTE OF TECHNOLOGY,
Respondent.

DECISION

Grievant, Dr. Galan Janeksela, filed a grievance against his employer, West Virginia University Institute of Technology ("WVUIT"), on June 23, 2008. The statement of grievance reads, "Salary reduction as set forth in original grievance see attached."[1] For relief, Grievant seeks, "reversal of the 10/16/08 decision dismissing my grievance as untimely filed and seek a decision on the merits."

A level I conference was held on July 2, 2008. The conference was continued to provide Grievant with an opportunity to present witnesses. On September 4, 2008, Respondent filed a Motion to Dismiss, asserting this grievance was untimely. Grievant filed a response on October 3, 2008, and on October 15, 2008, this grievance was dismissed as untimely.

This grievance was appealed to level II where mediation was unsuccessful. A level III hearing was held at the Grievance Board's Charleston office on June 5, 2009. Grievant was represented by Jerry D. Alford, Esq., and Respondent was represented by James "Jake" Wegman, Assistant Attorney General. This case became mature on July 8, 2009, upon the parties' submissions of findings of fact and conclusions of law.

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[1]The attachment is approximately four pages long.

Synopsis

Initially Grievant was asserting Respondent was incorrect in adjusting his 12-month base salary from $117, 280.00 to $93,300. However, since he was notified of that in 2007, Grievant has conceded it is outside the time frame for that issue. Grievant's issue is that Respondent reduced his salary from $93,300 for 10 ½ months to $61,708.35 for 9 months. He asserts he is a victim of discrimination, as no other professor has been required to take reduction of salary of this magnitude. Grievant also argues that his grievance on this issue is timely as he was first unequivocally notified of his salary reduction by letter dated June 2, 2008, and received on June 4, 2008.

Respondent asserts the grievance is untimely because Grievant had the information needed to determine how his salary would be computed, and therefore, he knew of the new salary of $61,708.35. Respondent further avers Grievant had a change in duties and in the amount of months teaching, both of which warrant the reduction. Respondent lastly asserts Grievant has not been discriminated against. Respondent argues that the WVUIT professors to which Grievant compares himself were in different departments, had different duties and different contract terms. Respondent further avers that the West Virginia University professors to which Grievant refers are teaching on the Morgantown Campus where the mission, along with the duties and requirements, is different.

This grievance is timely. However, Grievant failed to sustain his burden of proof, and therefore this grievance must be denied on the merits.

Findings of Fact

1. Grievant is employed by WVUIT.

2. During the 2006-2007 academic year, Grievant held a twelve month administrative position of Provost and Vice President for Academic and Student Affairs, with a salary of $117,300.

3. Effective July 1, 2007, Grievant was reassigned to a 10 ½ month contract as tenured professor and Assistant Provost. He held these positions during the 2007-2008 academic year.

4. Because the 2007-2008 assignment was split between administrative and faculty teaching duties, Respondent determined Grievant's salary would be $93,300. This amount was arrived at by prorating 50% of his previous administrative salary and adding it to 50% of his future full-time faculty salary. The faculty salary component was determined by referencing Grievant's teaching assignment against the salary of a faculty member with similar rank and experience.

5. On June 22, 2007, Grievant was informed that for the 2008-2009 academic year, he would be employed on a 9 month basis as a tenured professor.

6. On May 19, 2008, Grievant received an offer of a temporary summer position as an adjunct professor for the summer session.

7. Upon receipt of the May 19, 2008, letter, Grievant approached Dean Steve Brown, requesting information regarding the basis for his summer pay. Dean Brown was not aware of how Grievant's salary was calculated and referred him to the Provost.

8. On May 22, 2008, Grievant signed his contract for the summer position writing that, "I reserve the right to appeal the salary designated herein." Grievant forwarded the contract to Provost Charles Bayless and Dean Brown with a letter requesting specific

information regarding the methodology used to determine his salary for the 2008-2009 year.

9. By letter dated June 2, 2008, Associate Campus Provost Scott Hurst informed Grievant of the specific calculation used for determining Grievant's salary. At the bottom of the first page was a chart that listed Grievant's 9 month base salary as $61,708.35.

10. Grievant received this letter on June 4, 2008. This letter was the first time Grievant had been advised that his $93,300 salary for 10 ½ months was being reduced to $61,708.35 for 9 months.

11. On June 23, 2008, Grievant filed a grievance pertaining to his salary.

12. As a general rule, pay for administrators is higher than pay for faculty because the two positions have differing assignments and responsibilities within the institution.

13. WVU and WVUIT have different institutional missions. WVU is a research institution with more rigorous expectations for faculty in their research productivity than WVUIT.

14. Grievant compares himself to 6 other administrators, 4 of whom are at WVUIT, 2 of whom are at WVU.

15. Grievant compares himself to Anne Cavalier, who was formerly employed as an administrator at WVUIT. She was employed as a tenured Associate Professor in the Department of Management Information Systems, a different department than Grievant's. Her employment agreement listed additional assignments, including an allowance that she could supplement her salary if certain conditions were met, including working on a grant.

She also had a performance based salary increase which was not in Grievant's employment agreement.

16. Grievant compares himself to Sandra Elmore, a former administrator who is currently Department Chair and Professor in the Department of Physical Education in the College of Business, Humanities and Social Sciences at WVUIT. She is in a different department than Grievant. She also holds a 10 ½ month employment agreement, which is typical for department chairs.

17. Grievant compares himself to Dr. Sathyamoorthy who is a former administrator. Dr. Sathyamoorthy was employed as a faculty member in the College of Engineering, a different college than the Grievant's. Dr. Sathyamoorthy's appointment letter specifically provides that "if you were to remain as a tenured professor position without the administrative responsibilities at West Virginia University Institute of Technology, your salary would be $10,000 less than your current salary as Dean." Grievant's employment agreement contained no such language.

18. Grievant compares himself to Dr. Frances Snodgrass who was the Department Chair of the School of Nursing at WVUIT. Dr. Snodgrass originally held a 12 month employment agreement that was later reduced to nine month faculty. As Dr. Snodgrass was leaving her administrative position, WVUIT gave an across the board pay raise to the nursing faculty to assist with the recruitment and retention problems.

Discussion

Timeliness

Respondent asked that this grievance be dismissed as untimely. 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 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).

Respondent asserts this grievance is untimely because when Grievant received the May 19, 2008, letter he was able to calculate his salary based on the information provided. The letter says: "Your term of appointment is from 5/19/2008 to 7/27/2008 at a salary of $6170.84 payable in semi-monthly installments. The summer salary schedule is derived from a full-time faculty member's nine-month base salary multiplied by the number of

summer credit hours taught, divided by 30 in most cases. For courses that do not have regularly scheduled lecture-hour components, other means of determining an appropriate salary are applied." The letter continues, discussing the minimum enrollment requirement of 15 students, only to conclude the first page by stating, "The current enrollment in your class is 4 students and, [sic] based on this enrollment the compensation is $1,645.46. It should also be noted that in the body of the letter it specifically states that, "[a]ppointment as an Adjunct or Part-Time Instructor of any rank neither accrues tenure credit nor implies a promise of future employment."

To assert any of the information unequivocally notifies Grievant of the salary reduction is disingenuous. First, the salary listed in the opening paragraph is $6,170.84, while the salary listed at the end of page one is $1,645.46. This difference was left unexplained. Second, the first paragraph states that salaries for courses without regularly scheduled lecture-hour components are calculated differently. Lastly, Grievant went to Dean Brown who was unable to answer Grievant's questions and referred Grievant to the Provost.

The May 19, 2008, letter is very confusing on how Grievant's 9 month salary would be calculated. Only upon a written request for more specific information from the Provost was Grievant unequivocally notified that his salary was $61,708.35, and this was done in a letter dated June 2, 2008, which Grievant received on June 4, 2008.

Grievant had fifteen days from June 4, 2008, to file his grievance. W. VA. CODE § 6C-2-2(c) defines "days" as, "working days, exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided by statute, rule, policy, or

practice." Grievant filed this grievance on June 23, 2008, which is within the 15 day statutory time frame. Therefore, this grievance is timely.

Merits

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Grievant asserts he is a victim of discrimination. W. VA. CODE § 6C-2-2(d) defines discrimination as, "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."

In order to establish a discrimination 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 (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).

Grievant compares himself to other professors at both WVU and WVUIT. First, he compares himself to Dr. Anne Cavalier, who is employed by WVUIT in the Department of Management Information Systems in the College of Business, Humanities and Sciences. Dr. Cavalier was an administrator who then was reassigned as an Associate Professor. Dr. Cavalier's employment agreement contained additional assignments that Grievant's employment contract did not. In particular, her agreement provided that she could supplement her salary if certain conditions were met, this included working on a grant. She also had a performance based salary increase that Grievant's employment agreement did not provide. Grievant is not similarly situated to this employee.

Grievant also compares himself to Sandra Elmore who is a former administrator and is currently Department Chair and Professor in the Department of Physical Education in the College of Business, Humanities and Social Sciences at WVUIT. Dr. Elmore's contract is 10 ½ months which is typical for department chairs. Grievant is not a department chair and Grievant's contract term is for 9 months. Grievant is not similarly situated to this employee.

Dr. M. Sathyamoorthy is a former administrator who was employed as a faculty member in the College of Engineering. Dr. Sathyamoorthy's appointment letter specifically provided that "if you were to remain as a tenured professor position without the administrative responsibilities at West Virginia University Institute of Technology, your salary would be $10,000 less than your current salary as Dean." Grievant's employment agreement did not specify what his base salary would be if he returned to faculty. Once again, Grievant is not similarly situated to this employee.

Dr. Frances Snodgrass was the Department Chair of the School of Nursing at WVUIT with a 12 month employment contract. Dr. Snodgrass was later returned to a 9 month faculty position. During the time Dr. Snodgrass returned to the faculty position, WVUIT was having a hiring issue with the nursing staff because of low salaries. To combat that, WVUIT provided the nursing faculty with an across the board raise. This raise included Dr. Snodgrass and coincidentally resulted in her making more as a 9 month faculty member than she did as an administrator. Grievant is not similarly situated to Dr. Snodgrass.

Grievant went on to compare himself to other professors at the WVU campus. While the undersigned can appreciate Grievant's frustration, unfortunately given that the missions for the two campuses vary, thus resulting in the variance of requirements for faculty, Grievant is not similarly situated the faculty at WVU.

Grievant has not carried his burden of proof in this matter to show he has been discriminated against.

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. 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.

3. 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).

4. W. VA. CODE § 6C-2-2(c) defines "days" as, "working days, exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided by statute, rule, policy, or practice."

5. Grievant was unequivocally notified of his salary adjustment by the letter dated June 4, 2008.

6. Respondent did not meet its burden of proving this grievance was untimely.

7. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his

claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

8. W. VA. CODE § 6C-2-2(d) defines discrimination as, "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."

9. In order to establish a discrimination 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);
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Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (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).

10. Grievant is not similarly situated to any of the professors to which he compares himself.

Accordingly, this grievance is **DENIED**.

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: August 27, 2009

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Wendy A. Campbell Elswick
Administrative Law Judge