THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DARRELL KENDRICK,
Grievant,

v. **Docket No. 2009-0042-MU**

MARSHALL UNIVERSITY
Respondent,

and

JEANNE C. ADKINS,
Intervenor.

DISMISSAL ORDER

_____Darrell Kendrick ("Grievant"), employed by Marshall University ("Marshall") as a landscape worker, filed this grievance on June 10, 2008, alleging that while on approved workers' compensation leave he was discriminated against because he was not provided accrued seniority. Grievant contends that during his period of leave he was denied annual leave accrual, service toward increment pay, sick leave accrual, seniority toward retirement, service toward annual leave accrual rate increase, and longevity employment recognition. The relief sought is restoration of seniority and other benefits which Grievant was not credited while off on workers' compensation leave.

A level one hearing was held on June 24, 2008. After denial of the grievance at that level, Grievant appealed. Prior to the scheduling of a level two mediation session, a Motion to Intervene was filed on behalf of Kent Holley on July 18, 2008, and an intervention form was filed on behalf of Jeanne C. Adkins on July 28, 2008. Respondent, by written motion(s), filed opposition to intervention in this grievance. Further, Respondent filed a Motion to Dismiss this grievance on July 21, 2008. A phone conference with the parties

was conducted on August 26, 2008. Intervenor Holley indicated withdraw of intent to participate in the instant matter. Grievant appeared in person and by his representative, Lt. Terrence E. Olson. Intervenor Holley was represented by Christine Barr, AFT-West Virginia. Intervenor Adkins was also represented by Lt. Terrence E. Olson and Respondent appeared by Jendonnae L. Houdyschell, Senior Assistant Attorney General. This matter is mature for ruling on Respondent's Motion to Dismiss.

Synopsis

Grievant elected to receive Workers' Compensation benefits for the period of time he was absent from his employment in 2004. At that time, Marshall followed the West Virginia Division of Personnel Policy which did not permit the accrual of seniority when an individual was on unpaid leave, including for Workers' Compensation injuries. Subsequently, Grievant became aware he had lost seniority and certain accruable benefits for the time he was off work. Grievant relies on *Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel*, 217 W. Va. 340, 617 S.E.2d 887 (2005), in which the West Virginia Supreme Court of Appeals ruled that denial of credit for years of service and annual leave while on Temporary Total Disability (TTD) was not related to a proper government purpose, and violated the equal protection clause of Section 10, Article III, of the West Virginia Constitution.

The *Canfield* issue has been addressed by this Board on several occasions, and the reasoning applied is applicable to this grievance. Absent a specifically directed retrospective application of the changes in *Canfield*, *supra*, the prospective application by Respondent must be upheld, and Grievant's claim from before July 6, 2005, is not covered. In addition, Respondent raises the defense of timeliness. Grievant was advised in 2004,

prior to his election of the "TTD option" that he would not accrue paid leave, would not be paid for holidays, and would not accrue service credit toward the annual experience increment or the salary schedule. This grievance was filed June 10, 2008, more than four years after the occurrence. This grievance is dismissed as untimely filed.

After review of the record, the undersigned Administrative Law Judge makes the following findings of fact.

Findings of Fact

1. Grievant, at the time he filed this grievance, was employed as a Landscape Worker by Marshall. Grievant began employment at Marshall on December 1, 1997.

2. Grievant was placed on Leave of Absence from June 2004 until December 2004 for which he qualified for Workers' Compensation Temporary Total Disability.

3. At the time Grievant returned to work, Marshall followed the West Virginia Division of Personnel Policy which did not permit employees on unpaid leave and receiving TTD benefits to accrue seniority, annual leave, sick leave, or holiday pay. As a consequence, Marshall adjusted downward Grievant's time of service and accrued benefits for the applicable period.

4. In March 2004, prior to Grievant's Leave of Absence, Grievant was advised that if he elected the TTD option during his absence, he would *not* accrue paid leave, service credit and identified seniority-based benefit(s).

5. The "Worker's Compensation Disability Benefit Payment Option Form," signed by Grievant, on March 22, 2004, among other relevant information, specifically provided that;

> I understand that while receiving TTD benefits, I will be in a leave of absence without pay status. During this leave of absence without pay, I understand that . . . I will not accrue paid leave and I will not be paid for holidays during this leave of absence without pay. I understand that I will not accrue service credit toward the annual experience increment or the salary schedule.

Resp. Ex. 4.

6. As a result of the period of time Grievant was on unpaid leave and receiving TTD benefits, Grievant's years of service and other related benefits were downwardly adjusted in December of 2004.

7. Subsequent to *Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel*, 217 W. Va. 340, 617 S.E.2d 887 (2005), Respondent was notified that any changes to related policy included in *Canfield* were to be implemented from July 6, 2005, forward.[1]

8. Grievant made his initial inquiry regarding his length of service as calculated by Marshall after the effective date of *Canfield*. Further, the applicable time during which Grievant was on TTD was before the mandates of *Canfield* became effective.

10. In 2004, the Human Resources Department of Respondent relied on established and applicable procedure to adjust Grievant's seniority dates based on his period of TTD.

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[1] The West Virginia Supreme Court of Appeals ruled in *Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel*, 217 W. Va. 340, 617 S.E.2d 887 (2005), that the denial of credit for years of service and annual leave while on Temporary Total Disability was not related to a proper government purpose, and violated the equal protection clause of Section 10, Article III, of the West Virginia Constitution.

11. Respondent acknowledges the application of the *Canfield* ruling in calculating seniority, and this change in policy is done in a prospective manner.

Discussion

Respondent contends this grievance is untimely filed, as it was not initiated within the time lines contained in applicable West Virginia State Code.[2] When 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 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).

In addition to contending that this grievance is not timely filed, Respondent further asserts this grievance is an exercise in futility. In that the issues presented in this grievance

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[2] In 2007, the Legislature, 2007 Acts ch. 207, amended several West Virginia Statutes relevant to Public Employees Grievances. 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 current statutes and rules. However, it is recognized that in 2004, the statutory period for filing a grievance was ten days from the trigger date. *See* W. VA. CODE § 29-6A-49(a); *also see* W. VA. CODE § 6C-2-4(a) (2007).

are the same as those presented in the case of *Holley v. Marshall University*, Docket No. 07-HE-052, (February 22, 2008), and as correctly stated in that case, the *Canfield* decision is applied prospectively not retroactively.

The first issue to address is whether this grievance is timely filed. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." The running of the relevant time period is ordinarily deemed to begin 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) identifies the time lines for filing a grievance and provides that a grievance must be filed within 15 days of the occurrence of the event upon which the grievance is based, or within 15 days of the date on which the event became known to the grievant, or within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance.

In this case, Grievant was absent from work on Workers' Compensation leave between June 16, 2004 and December 7, 2004. This grievance was filed on June 10, 2008, four years after the occurrence. Respondent further highlights that, in fact, Grievant was advised in 2004, prior to his election of the Temporary Total Disability option, that he would not accrue paid leave, would not be paid for holidays, and would not accrue service credit toward the annual experience increment or the salary schedule. Resp. Ex 4.

Grievant infers an element of this grievance is miscommunication between the parties, asserting that the paperwork for TTD was not fully and/or accurately explained. This assertion, even if true, does not overcome and defeat the clear and specific wording

of the Worker's Compensation Disability Benefit Payment Option Form, which Grievant signed prior to his leave. *See* Finding of Fact 5. Grievant was or should have been aware of the effect of his unpaid leave status and receiving TTD benefits. The calculation adjusting Grievant's seniority was made by Respondent's Human Resource Department shortly after Grievant's return to active employment (December 2004). The filing of this grievance is outside the prescribed time period following the occurrence of the event upon which the grievance is based.

Grievant asserts he was discriminated against because he was not allotted seniority while on Workers' Compensation leave between June 16, 2004 and December 7, 2004. He relies on *Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel*, 217 W. Va. 340, 617 S.E.2d 887 (2005) in filing the instant grievance in June of 2008. "The Grievance Board has repeatedly held that it is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines." *Fincham v. Division of Corrections, et, al.*, Docket No. 05-CORR-400 (December 22, 2005) In fact, the Grievance Board has already addressed the issue of the timeliness of grievances filed in response to the decision in *Canfield. Holley v. Marshall University*, Docket No. 07-HE-052, (February 22, 2008); *Caruthers v. Dept. of Health and Human Resources/Bureau for Children and Families, et. al.*, Docket No 06-HHR-046 (April 5, 2006); and *Cain v. Dept. of Transportation*, Docket No. 05-DOH-402 (February 6, 2006). In all those cases, the grievances were denied as being untimely filed, the "learning of the success of another employee does not toll the time lines under the 'discovery rule' exception." *Caruthers, supra.*

The discrimination concerning the accrual of seniority Grievant alleges is not a continuing practice. The grievance involves a single act which occurred following Grievant's leave which ended in December 2004. For all the reasons stated above, this grievance is untimely.

Although the grievance was not timely filed, some discussion of the merits may assist Grievant in understanding his perceived discrimination regarding his seniority calculation. Grievant argues that it demonstrates discrimination when he was not allotted accrued seniority while on leave. "Discrimination" is defined by statute 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." W. VA. CODE § 6C-2-2(d). 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 (2007);[3] *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). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *White, supra*.

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[3]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

In the instant grievance, all employees at Marshall were treated the same with regard to the application of the West Virginia Division of Personnel policy relating to the accrual of seniority while on Workers' Compensation leave. In other words, no similarly-situated employees to Grievant had the *Canfield* decision applied retrospectively to their seniority calculation. Accordingly, there is no basis for his claim that he was the subject of discrimination.

The *Canfield* issue has been addressed by this Board on several occasions, and the reasoning applied in those decisions is applicable to this grievance. *Holley v. Marshall University*, Docket No. 07-HE-052, (February 22, 2008); *Fincham v. Div. of Corr.*, Docket No. 05-CORR-400 (Dec. 22, 2005); *Cain v. W. Va. Dep't of Transp.* Docket No. 05-DOH-402 (Feb. 6, 2006); *Caruthers v. Dep't of Health and Human Res*, Docket No. 06-HHR-046 (Apr. 5, 2006). Marshall revised its rule regarding the accrual of employee benefits while receiving Workers' Compensation benefits to be effective July 6, 2005, the date of the *Canfield* decision. This included the provision that the changes were to be applied prospectively. This provision is consistent with the holding in *Bradley v. Appalachian Power Company*, 163 W. Va. 332, 256 S.E.2d 879 (1979), that substantial public issues arising from statutory or constitutional interpretations that represent a clear departure from prior precedent will ordinarily favor prospective application. Absent a specifically directed retrospective application of the changes in *Canfield*, *supra*, the prospective application by Marshall must be upheld, and Grievant's claim from before July 6, 2005, is not covered.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. Where the 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 her failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445, (July 28, 1997); *Higgenbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. A grievance must be filed within 15 days of the occurrence of the event upon which the grievance is based, or within 15 days of the date on which the event became known to the grievant, or within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance. W. VA. CODE § 6C-2-4(a)(1)

3. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *See Kessler, supra*; *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. Grievant was aware he would not accrue seniority while he was on Workers' Compensation TTD leave following his leave of absence without pay, but did not file a grievance within applicable time constraint or articulate an exception for such untimeliness W. VA. CODE § 6C-2-4(a)(1).

5. This grievance was untimely filed, and Grievant offered no proper basis to excuse the late filing. In addition, *Canfield*, *supra.*, is applied on a prospective basis, therefore, Grievant's claim from before July 6, 2005, is not covered.

Based upon the foregoing, the "Motion to Dismiss" is **GRANTED** and the above-styled action is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 (eff. July 7, 2008).

Date:_ April 28, 2009

Landon R. Brown
Administrative Law Judge