THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JACK E. RIGGS,
Grievant,

v. **DOCKET NO. 2009-1416-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

This grievance was filed by Grievant, Jack E. Riggs, on March 27, 2009, against his employer, West Virginia University ("WVU"). Grievant did not submit a grievance form at level one, but rather sent a three page letter to C. Peter Magrath, who was at that time President of WVU. The statement of grievance on the grievance form filed at level two reads: "Please see attached [11 page] appeal of adverse Level One Grievance Decision. Grievance is for denial of paid military leave, inappropriate removal of earned annual leave, and failure to comply with most favored military leave and denial of employee benefits in violation of federal law (USERRA)." The relief sought by Grievant, as stated on that grievance form is: "Compensation days of annual leave that were inappropriately removed and compensation for underpayment of bonuses and salary increases as a result of military service in violation of federal law (USERRA). See attached appeal and enclosures for detailed explanation of grievance and relief." In the attachment to the level two appeal Grievant stated his relief sought as:

> 1. Payment of 3 days pay for loss of 3 earned annual leave days in 2006 that should have been authorized paid military leave.

2. Payment of 13 days pay for loss of 13 earned annual leave days in 2007 that should have been authorized paid military leave.
3. Payment of 20 days for loss of 20 earned annual leave days in 2008 that should have been authorized paid military leave.[1]
4. Payment for all underpayment of bonuses for each year from 1994 to the present as compared to the average bonus paid to **all** Department of Neurology faculty members for each year from 1994 to the present.
5. Payment for all underpayment of salary increases for each year from 1994 to the present as compared to the average salary increase paid to **all** Department of Neurology faculty members for each year from 1994 to the present.

A conference was held at level one and a decision denying the grievance at that level was issued on April 24, 2009. Grievant appealed to level two on April 29, 2009, and a mediation was held on June 18, 2009. Grievant appealed to level three on June 28, 2009. A level three hearing was held before the undersigned Administrative Law Judge on October 1, 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 the last of the parties' written arguments on November 4, 2009.

Synopsis

Grievant is a professor at West Virginia University, and at the time of this grievance was in the Navy Reserves. During 2008, Grievant was on paid military leave for 30 days, and was gone from the workplace for an additional 20 days on active duty for training orders, and was placed on annual leave for these days. Grievant argued that he was eligible for up to an additional 30 days of paid military leave, citing the Division of

[1] Grievant was already paid for these annual leave days, so it is unclear how he would be entitled to payment a second time for these very same days. In his post-hearing written argument Grievant sought as an alternate remedy reinstatement of his annual leave.

Personnel's Rules. The Division of Personnel's Rules are not applicable to higher education employees. Grievant did not demonstrate that Respondent's determination that his orders were not the type which would make him eligible for an additional 30 days of paid military leave was erroneous. Grievant's complaints about his salary, bonuses, military leave, and productivity goals for prior years were not timely filed. Grievant's complaint that he was discriminated against was subject to analysis using the definition of discrimination found in the grievance procedure. Grievant presented no evidence regarding the position of any other employee to whom he was similarly-situated who was treated differently.

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 Neurology of the School of Medicine.

2. At the time this grievance was filed, Grievant was in the United States Navy Reserves.

3. During the calendar year 2008, Grievant was placed on paid military leave by WVU for 30 days. He had active duty for training orders for an additional 20 days during 2008, and was required to use annual leave for these 20 days. Grievant was not called to active duty by the President, nor were his orders federal call-up orders.

4. Grievant was also required to use annual leave for military duty after the first 30 days in 2006 and 2007, and he knew of this at the time it occurred.

5. During 2006 and 2007 Grievant's productivity goals were not adjusted for the time he was off work on annual leave for military duty, and Grievant knew this in 2006 and 2007 when it occurred. Grievant knew in 2006 and 2007 that failure to meet productivity goals would affect his salary.

6. In 2008, Grievant received a pay increase of $4,385.73 in his state salary, and a pay increase of $5,106.44 in 2009.[2] Grievant also receives a salary from University Health Associates.

7. The record does not reflect the salaries of any of Grievant's co-workers, or the pay increase received by any other WVU employee during any year.

8. Grievant's productivity goals are adjusted for the period of time he is on military leave, but not for any period of time that he is on annual leave.

Discussion

Respondent asked that Grievant's claims with regard to his leave and productivity requirements for the calendar years 2006 and 2007 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

[2] Grievant argued that he is a state employee and the Division of Personnel's rules apply to him. Were Grievant just like any other state employee, and subject to the Division of Personnel's Rules, he would not have been eligible to receive any pay increase in 2008 or 2009, other than across board increases, as "discretionary increases are clearly prohibited by the Governor's moratorium, which remains in effect." *Harris v. Dep't of Transp.*, Docket No. 2008-1549-DOT (Dec. 15, 2008).

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.[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).

Grievant knew at some point during 2006 and then during 2007 that he was required to use annual leave for some portion of the time he was performing military service, and he knew during those years what his productivity requirements were, and what his salary was. He did not grieve these issues until 2009, well past the statutory time period for filing a grievance. Grievant's excuse for not timely filing his grievances with regard to these issues for the years 2006 and 2007 appears to be that he was not aware that the Division of Personnel's Rules state that an additional 30 days of paid military leave are available

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[3] These statutory provisions were effective July 1, 2007. The predecessor to this statute, W. VA. CODE § 29-6A-4(a), required the grievance to be filed within 10 days.

under certain circumstances. Grievant knew all of the facts which gave rise to the grievance at some point during 2006 and 2007. What he did not know was the law. "'[I]gnorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule.' *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *See also Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001)." *Pisino v. Div. of Corr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008). Grievant did not demonstrate an excuse to his failure to timely file his grievances related to military leave, salary, bonuses, or productivity goals for the years 2006 and 2007.

Finally, Grievant argued there is no statute of limitations for claims of discrimination against reservists under the federal law known as the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), and that this federal law supercedes state law. It appears that Grievant is arguing that USERRA essentially eliminates the statutory timelines for filing a grievance. The grievance procedure is a statutory mechanism available to employees to resolve employment complaints, and the authority of the Grievance Board derives from the statute. USERRA sets forth a specific procedure at §§ 4322 and 4323 for enforcement of an individual's rights under USERRA, beginning with a written complaint to the Secretary of Labor followed by an investigation. The statutory grievance procedure does not affect claims filed under USERRA, and the undersigned cannot conclude that USERRA can be read so broadly that it invalidates the statutory

timelines for filing a grievance when its language clearly does not contemplate using the grievance procedure to address USERRA claims.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant believes that the West Virginia Division of Personnel's Administrative Rule regarding military leave, 143 C.S.R. 1 § 14.9, applies to him. Respondent pointed out that the Division of Personnel's Rules are not applicable to higher education employees, as higher education employees are not, by statute, in the classified service.

The Grievance Board has previously addressed the issue of whether the Division of Personnel's Rules are applicable to higher education employees, concluding that they clearly are not.

> _____W. VA. CODE § 29-6-10 is one part of a group of legislation wherein the Legislature created a Civil Service System for some public employees. The main purposes of this legislation are "to attract to the service of this state personnel of the highest ability and integrity" by creating a classification system and to provide security and tenure to *public employees who fall within the system*. *See* W. VA. CODE § 26-6-1 (1977)(emphasis added); *See generally, Thurmond v. Steele,* 159 W. Va. 630, 225 S.E.2d 210 (1976); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). In

> crafting this set of legislation, however, the Legislature specifically exempted from coverage employees of the State's institutions of higher education. Specifically, W. VA. CODE § 26-6-1 (1977) states in pertinent part: "All employment positions not in the classified service, *with the exception of the board of regents* [abolished], are included in a classification plan known as classified-exempt service." (Emphasis added). Furthermore, W. VA. CODE § 29-6-4(c)(12)(1999) exempts from the civil service system "[m]embers and employees of the board of trustees and board of directors or their successor agencies."
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> In this case, Grievant's employment with Marshall is not covered by the Civil Service System. Grievant is *not* a classified employee working within the civil service system or within any classified employee system. She is a full-time clinical-track faculty member employed by an institution of higher education formerly governed by the West Virginia Higher Education Interim Governing Board and currently governed by the Marshall University Board of Governors. *Compare* W. VA. CODE § 18B-8-1 (1996) with CODE § 18B-9-2(a)(1995). *See also* Series 36. Thus, based upon the exemptions provided by the Legislature, the provisions of W. VA. CODE § 29-6-10 are inapplicable, and Grievant's argument must fail.

Hunt v. W. Va. Higher Educ. Policy Comm'n, Docket No. 01-HEPC-453 (Nov. 29, 2001)(footnotes omitted).

Grievant asserted that USERRA requires that the Division of Personnel's Rules be applied to him if they are the most beneficial policy. First, this is not what USERRA says. The provision relied upon by Grievant at § 4302 says that nothing in this federal law (USERRA) shall supercede, nullify or diminish any state law or policy which "establishes a right that is more beneficial to, or is in addition to, a right or benefit for such person in this chapter."

Second, both the Rules of the Division of Personnel and those applicable to WVU employees have their origins in W. VA. CODE § 15-1F-1, as is clearly stated in the Division of Personnel's Rules at § 14.9, which provides as follows:

> §15-1F-1. Leave of absence for public officials and employees for drills, parades, active duty, etc.

(a) All officers and employees of the state, or subdivisions or municipalities thereof, who shall be members of the national guard or armed forces reserves, shall be entitled to military leave of absence from their respective offices or employments without loss of pay, status or efficiency rating, on the days during which they are ordered, by properly designated authority, to be engaged in drills, parades or other duty, during business hours, field training or active service of the state, for a maximum period of thirty working days in any one calendar year.

(b) Effective the eleventh day of September, two thousand one, all officers and employees of the state, or subdivisions or municipalities thereof, who are ordered or called to active duty by the properly designated federal authority shall be entitled to military leave of absence from their respective offices or employments without loss of pay, status or efficiency rating for a maximum period of thirty working days for a single call to active duty: *Provided,* That an officer or employee of the state, or subdivisions municipalities called to active duty who has not used all or some portion of the thirty working days of military leave of absence granted by subsection (a) shall be entitled to add the number of unused days from that calendar year to the thirty working days granted by this subsection, up to a maximum of sixty days for a single call to active duty: *Provided, however*, That none of the unused days of military leave of absence granted by subsection (a) may be carried over and used in the next calendar year.

(c) The term "without loss of pay" means that the officer or employee shall continue to receive his or her normal salary or compensation, notwithstanding the fact that such officer or employee may have received other compensation from federal or state sources during the same period.

WVU's Military Leave Procedure states, in pertinent part, as follows:

As follows, any such member employee will be provided entitlements consistent with their existing employment status, as though continuous:

1. Wage maintenance - Any employee on military leave, under the following provisions, will continue to receive normal salary or compensation for the time as indicated below, regardless of whether or not the employee receives other compensation from federal sources during the same period.

2. Payment of wages for up to thirty (30) working days in any calendar year to any such employee absent from the worksite for time in which he/she is engaged in drills, parades, field service or active service to the State.

3. Payment of wages for up to thirty (30) working days per single call to active duty for any such employee away from the worksite under provisions

> of the Military Selective Service Act or any other time in which the President or other properly designated federal authority of the United States may order him/her to active service.

Grievant readily acknowledged that his 2008 orders were active duty for training orders, but argued that active duty for training was active service. He presented only his own view as to how any of the above quoted language should be interpreted, relying on what he asserted were the military definitions of active duty and active duty for training. Grievant did not indicate that he has any special expertise in interpreting the law, or that he was involved in the development of the statute or any of these rules or policies.

Amber Tennant, WVU's Senior Employee Relations Specialist, testified that, in order to be clear about whether Grievant would be entitled to an additional 30 days of paid military leave, she consulted with Major Kelly Ambrose, the Judge Advocate General for West Virginia. Major Ambrose advised Ms. Tennant that Grievant's Orders were active duty for training orders, not Presidential call-up or federal orders, and that West Virginia law, with which Major Ambrose was familiar, did not provide for paid military leave for more than 30 days for these types of orders. Ms. Tennant stated that Major Ambrose advised her that in order to be eligible for more than 30 days of paid military leave, the employee must have been called out under Presidential/federal orders.

Respondent's interpretation of its own policies and procedures is entitled to deference.

> When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra; Edwards v. W.*

> *Va. Parkways Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency,* 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT- 978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

Peacock/Stemple v. W. Va. Div. of Corrections, Docket No. 01-CORR-542 (Jan. 15, 2002).

It is clear from the statute which gave rise to WVU's military leave policy, as well as that of the Division of Personnel, that there is a difference between the types of orders which result in only 30 days of paid military leave, and the types of orders which result in an additional 30 days of paid military leave. In order to be eligible for the second thirty days of leave, one must have a specific type of order signed by the properly designated federal authority, which Major Ambrose described as Presidential/federal call-up orders. While the statutory language is not crystal clear to the undersigned, what is clear is that this type of order is different from a field training order, referred to in the paragraph allowing the first 30 days of paid military leave, which would appear to be what Grievant's orders are. Grievant did not demonstrate that WVU's interpretation of its own procedure was erroneous.

Finally, Grievant argued he was discriminated against because of his military service, as evidenced by the fact that his salary had not kept up with the Consumer Price Index. However, he acknowledged that for the year in question, 2008, he received a large pay raise and was not underpaid for his productivity during this year. Grievant asserted that USERRA's provisions on discrimination should be applied in this analysis. The Grievance Board's authority to provide relief to employees for discrimination is statutory,

and the term discrimination is specifically defined in the grievance procedure. *See Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

For purposes of the grievance procedure, discrimination is defined 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 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant produced no evidence related to any salary increase received by any other employee of WVU, and accordingly, did not prove his claim of discrimination.

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. A grievance must be filed "within 15 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." W. VA. CODE § 6C-2-3(a)(1).

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. Grievant's claims that he should have been credited with additional days of military leave in 2006 and 2007, and that his productivity requirements should have been reduced in proportion to his military leave were not timely filed.

5. Grievant did not demonstrate an excuse for his failure to timely file his grievance with regard to military leave, productivity requirements, bonuses, and salary increases for 2006 and 2007.

6. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

7. The Rules of the West Virginia Division of Personnel are not applicable to higher education employees, as higher education employees are not, by statute, in the classified service. *Hunt v. W. Va. Higher Educ. Policy Comm'n*, Docket No. 01-HEPC-453 (Nov. 29, 2001).

8. WVU's interpretation of its own rules and regulations on paid military leave is entitled to deference.

> When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency,* 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT- 978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

Peacock/Stemple v. W. Va. Div. of Corrections, Docket No. 01-CORR-542 (Jan. 15, 2002).

9. Grievant did not demonstrate that WVU's determination that his orders were not the type of orders which made him eligible for an additional 30 days of military leave was erroneous.

10. 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

11. Grievant did not demonstrate that he was treated differently from any other similarly-situated employee.

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 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: January 25, 2010