THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Paul V. Hamilton,
Grievant,

v. **DOCKET NO. 2011-0248-MU**

Marshall University,
Respondent.

DECISION

Grievant filed this grievance on August 31, 2011, challenging a salary determination, and alleging violations of University and department policies. His stated relief sought is "Equitable base salary raised between $75,000 and next highest ranking economic professor."

A level three hearing was held in the Grievance Board's Charleston office on March 1, 2011. Grievant appeared *pro se*, and Respondent was represented by Jendonnae L. Houdyschell, Sr. Assistant Attorney General. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Synopsis

Grievant alleged that the salary offered to him on his renewal contract was unfair, as a new member of his department was granted a higher salary although she had less tenure and experience. According to department policy, if such a situation arises, existing faculty will be considered for "comparable compensation." Grievant accepted the contract with the offered salary after attempting to negotiate a raise, and then filed this grievance. However, Respondent has at all levels of the grievance procedure argued that the

grievance was untimely and should be dismissed on that basis. Respondent met its burden of proving an untimely filing, and the grievance is therefore denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed by Respondent as a tenure-track, Assistant Professor of Economics in the Department of Finance and Economics.
2. On or about August 9, 2010, Grievant received a Notice of Appointment indicating his position for the upcoming academic year in a full-time position at a salary of $64,479.00, beginning August 17, 2010.
3. Grievant signed the Notice of Appointment on August 17, 2010, and noted on the bottom thereof, "The state salary is not compliant w/The Greenbook & LCOB Handbook in regards to salary equity [within] the division. I am filing an official grievance to correct this error."
4. The Notice of Appointment came after a summer-long negotiation between Grievant and MU regarding his salary, as Grievant had known since June 15, 2010, that a new faculty member had been appointed at a higher salary, though she had less experience.
5. On August 11, 2010, Grievant emailed Dean Chong W. Kim stating he had received the Notice of Appointment and that it "did not reflect any adjustments for salary inversion within the division," and that he had not heard back from Dr. Kim since their "latest round of meetings a few weeks ago."

6. The same day, Grievant recieved an email back from Provost Gayle Ormiston stating, “I apologize to you for not getting back to you after our meeting. Before there are any other steps taken, I suggest that you, Dean Kim, and I meet to discuss the situation one more time. If you are amenable to this suggestion, I will have Barbara Hicks find a time for us to meet.”

Discussion

Timeliness is an affirmative defense that must be proven by Respondent by a preponderance of the evidence. West Virginia Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." West Virginia Code § 6C-2-4 (1) identifies the time lines 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. . . . The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged.[1]

"The time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."[2]

---

[1] *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).

[2] *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

It has been held that salary equity grievances complain of an ongoing practice that extends the time for filing from the date of each paycheck, making a grievance filed on that issue timely with respect to the date of each "new" event. However, this grievance, as has been expressly stated by Grievant, is about the issue of "salary inversion" being against the policies of the Univeristy, as a series of consulations should have occurred prior to the new faculty member being hired. Grievant is not asking for an equal salary, he is asking for a higher salary, which he claims is his due based on the Univeristy and Departmental polcies he cites.

Grievant's complaint is therefore twofold: he and other members of the department were not consulted prior to the new hire, and he was not considered for a comparable salary. These are the same issues recently considered by the Grievance Board in the matter of *Banks, et al. v. Marshall University*, Docket No. 2009-1359-CONS (October 13, 2010).[3] In that case it was determined the the issues were a failure of Marshall to "abide by the remedies and procedures it properly establishes to conduct its affairs."[4] The failure is a discrete event with a definite date and time, not a continuing event such as ongoing discrimination or inequality.

Grievant states he was made aware of the genesis of the issue, that is, the new hire's salary, by at the latest, June 15, 2010. He then attempted to negotiate a higher salary for himself, and received his Notice of Appointment with his current salary on August

---

[3]See also *Watson v. Marshall University*, Docket No. 2008-1789-CONS (Sep. 9, 2009), which describes the evaluation and determination process as a procedural issue.

[4]Citing *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977) and *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

9. He was invited to discuss the issue further, but instead signed his Notice of Appointment with a notice that he would file this grievance. he did so, but his filing was made sixteen days after August 9, which is outside the time limits for filing.

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner.[5] Grievant asserts that his ongoing negotiations and requests for information regarding his salary level, salary inversion, and the process for determining the new hire's salary extended the deadline for filing, since he had not received a definitive answer. However, his argument is rebutted by the fact that he received his Notice of Appointment, which very clearly sets out his salary for the upcoming academic year.

The following conclusions of law support this discussion:

Conclusions of Law

1. A grievance must be filed "[w]ithin 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." W. Va. Code § 6C-2-4(1).
2. This grievance was filed sixteen days after Grievant became aware that his salary for the upcoming academic year had not been increased as he had requested.
3. This grievance is untimely.

---

[5] *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).

4. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

5. Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate 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). *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).

6. Grievant did not assert any basis for excusing his untimely filing.

For the foregoing reasons, this grievance is hereby **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).

April 13, 2011

M. Paul Marteney
Administrative Law Judge