THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DALLAS BRANCH, JR.,
Grievant,

v. **DOCKET NO. 2009-1391-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Dallas Branch, Jr., an Associate Professor, filed a grievance against his employer, West Virginia University, on April 2, 2009. The statement of grievance reads:

> The College of Physical Activity and Sport Sciences' Dean's Office has engaged in a systematic and deliberate attempt to violate the Faculty Performance Agreement (FPA) Guidelines approved by the College's faculty (10/07) and Provost's Office (11/07). In doing so, they have failed to honor the spirit and intent of these Guidelines as approved.

As relief Grievant sought:

> The WVU Provost's Office is requested to compel the Dean's Office representatives to adhere to the FPA Guidelines as written, reviewed, and approved by the Faculty Review Committee, the College's faculty, and the Provost's Office. Further, the grievant is seeking approval and authorization of the submitted 2009 FPA.

A hearing was convened at level one on May 8 and July 17, 2009,[1] and the grievance was denied at that level on August 7, 2009. Grievant appealed to level two on

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[1] The level one decision states that "due to a misplaced setting on the equipment, most of the proceeding conducted on May 8, 2009, was not recorded." When the hearing was reconvened on July 17, 2009, the parties discussed the grievance off the record for 90 minutes, and no testimony was placed on the record. Several exhibits were, however, admitted into evidence.

August 16, 2009, and a mediation session was held on October 16, 2009. Grievant appealed to level three on October 26, 2009. Three days of hearing were held before the undersigned Administrative Law Judge at level three on March 19, March 26, and May 18, 2010, 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' Proposed Findings of Fact and Conclusions of Law, on July 6, 2010.

Synopsis

Grievant contends that the Dean of his College violated the Faculty Performance Agreement Guidelines when the Dean assigned him a Faculty Performance Agreement which did not accept Grievant's desire to spend less time during the workday on research and more time in teaching and advising and service activities. Grievant is seeking promotion, but has made no progress in that regard since 2002, primarily because he has not produced in the area of research. In an effort to assist Grievant in achieving his goal of being promoted, the Chair of his Department and the Dean of the College refused to approve a Faculty Performance Agreement which did not focus Grievant's workday more on research. Grievant did not demonstrate that this was unreasonable or in violation of any law, rule, regulation, or policy. To the contrary, this action seems entirely consistent with the applicable Guidelines. Respondent argued that the grievance was not timely filed, but did not prove this to be the case.

The following Findings of Fact are made based upon the evidence presented at levels one and three.

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University ("WVU"), for 20 years, and is a tenured Associate Professor in the College of Physical Activity and Sports Sciences ("PASS.")

2. Grievant wishes to be promoted to full Professor. In order to be promoted, Grievant will be expected to demonstrate that he has made significant contributions in the areas of teaching and advising, and scholarship (research), as outlined in his letter of appointment.

3. Grievant has not made progress toward promotion since 2002, primarily because of a failure to publish. If Grievant wished to change the areas in which he is required to demonstrate significant contribution, he could ask to have his letter of appointment changed to reflect that he is required to demonstrate significant contribution in service rather than scholarship, for example; but, Grievant has not made such a request.

4. Professors at PASS prepare and present a Faculty Performance Agreement ("FPA"). The FPA Guidelines provide that the FPA shall be presented to the Dean of PASS by December 1. The Guidelines provide that the FPA will set forth the minimum full-time effort expected of the faculty member for each semester of the next calendar year in the three areas of contributions, teaching, scholarship, and service. The FPA consists of 15 units per semester, which represent the full-time effort of the faculty member. Faculty are encouraged to pursue activities above and beyond the minimum 15 units. All but 3 of the 15 units are set by the Guidelines as follows: 1.5 units for advising, 6 units for instruction, 1.5 units for service, and 3 units for research for those faculty, like Grievant, who have research as an area of significant contribution.

5. The Guidelines state that the FPA is used as the criterion for evaluating faculty in "Phase II" of the faculty evaluation process, which in turn is used for performance based salary recommendations.

6. The Guidelines also state that "[n]egotiation of the FPA shall reflect the areas of significant contribution and area of reasonable contribution as delineated in [the faculty member's] letter of appointment" for those faculty who are seeking tenure *and/or promotion*.

7. The Faculty Review Guidelines for PASS provide that "[t]he faculty member's activities in the mission areas of research/creative activity, teaching, and service are evaluated annually by the Dean's Office and by the Faculty Review Committee according to the FPA. The results of those evaluations are used in promotion/tenure decisions and in performance based salary recommendations (PBSR)."

8. The Guidelines state that the Dean or his designee reviews the proposed FPA, meets with the faculty member, and negotiates "the items and values included" with the faculty member. The Guidelines state that the FPA "shall be established by December 15."

9. The Dean's designee was Department Chair Jack Watson. Grievant submitted his FPA for 2009 to Dr. Watson. Dr. Watson did not agree with the FPA submitted by Grievant, because Grievant's FPA was not emphasizing the areas of significant contribution reflected in his letter of appointment. Dr. Watson believed it was his responsibility to see that the FPA emphasized scholarship in order to move Grievant toward his goal of promotion.

10. Grievant submitted three revised FPA's to Dr. Watson, none of which was acceptable to Dr. Watson. The final FPA submitted by Grievant allocated the 3 negotiable units as follows: for the Spring semester, 2 units were allocated to teaching and advising, .5 unit to research, and .5 unit to service, and for the Fall semester, 1.5 units were allocated to teaching and advising, 1 unit to research, and .5 unit to service. Dr. Watson and Grievant were unable to reach an agreement on the FPA.

11. Grievant's FPA was not established by December 15, 2008, rather, the process of negotiating an FPA continued until January 15, 2009. In a letter bearing that date, Dr. Watson informed Grievant that "[y]our next level of appeal is to the Associate Dean's Office. It is important that this process move quickly, as this FPA was intended to be signed by December 15, 2008."

12. The Guidelines provide that when agreement cannot be reached, "the final appeal shall be to the Dean." The Guidelines state, "[f]ailure to have an approved FPA by December 15 will result in the Dean's office assigning an FPA on December 31. This FPA shall then be signed by the Dean and it shall become the official Memorandum of Understanding defining the faculty member's minimum effort for the School of Physical Education for the following calendar year."

13. The Dean's Office did not assign an FPA for Grievant by December 31, 2008.

14. By memorandum dated February 10, 2009, Grievant appealed his 2009 FPA to Dana Brooks, Dean of PASS. Dean Brooks met with Grievant regarding his appeal on February 23, 2009. At that meeting Dean Brooks asked Grievant to again meet with Dr. Watson. Grievant and Dr. Watson met again, but were unable to reach an agreement on Grievant's FPA.

15. By memorandum dated March 31, 2009, Dean Brooks provided Grievant with his 2009 FPA as assigned by the Dean.

16. This grievance was filed within 15 days of the date the Dean assigned the 2009 FPA for Grievant.

17. The FPA assigned by Dean Brooks allocated the 3 negotiable units as follows: for the Spring semester 1 unit was allocated to teaching and advising, 1.5 units to research, and .5 unit to service, and for the Fall semester, 1 unit was allocated to teaching and 2 units to research.

18. The only differences between the final FPA submitted by Grievant and the FPA assigned by the Dean were that for the Spring semester of 2009, 1 unit was allocated to research rather than teaching and advising, and for the Fall semester .5 unit was allocated to research rather than teaching and advising, and .5 unit was allocated to research rather than service. Grievant received the .5 unit in service he proposed for the Spring semester.

Discussion

Respondent asked that this grievance 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 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 argued Grievant was aware in December 2008 that his 2009 FPA had not been approved by the Dean's Office, and that was the event giving rise to the grievance. While the FPA Guidelines provide that the Dean will assign an FPA for the faculty member by December 31 if an FPA cannot be negotiated, this is not what occurred in this case. It is clear that Grievant and Dr. Watson continued the process of negotiating the FPA into January 2009. Dean Brooks did not assign Grievant's FPA until March 31, 2009. Grievant filed his grievance within 15 days of this date. The grievance was timely filed.

Respondent next argued that this grievance should be dismissed because the FPA was for 2009, and that year is already over, and no relief can now be granted. While the year covered by the FPA at issue is indeed over, the FPA remains part of Grievant's

personnel file for promotion purposes, so in that regard, the issue is not moot. The FPA also is a basis for merit raises; however, none were available for 2009. While Respondent is correct that the 2009 FPA itself really plays no role in the development of the FPA for subsequent years, Grievant will have an FPA each year, and the same issues raised here will continue to be at issue, and it is somewhat hard to understand why Respondent would even raise this issue when to dismiss this grievance as moot would likely result in Respondent continuing to face the same grievance over and over. The issues raised by this grievance are not moot.

Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

The issue in this grievance is whether WVU has misapplied the Guidelines applicable to the FPA. In reviewing this issue it must be kept in mind that Grievant is not a full Professor, but he continues to seek *promotion* to full Professor.

Grievant contends that the Dean has "capped" the number of units available in service on the FPA at the minimum level of 1.5, and that this violates the FPA Guidelines. The evidence demonstrates that the first contention is erroneous inasmuch as Dean Brooks allocated 2.0 units to service for the Spring semester on Grievant's assigned FPA.

Grievant also contended that the faculty member gets to choose how the three flexible units are allocated, and the Dean's office basically must accept this. Grievant contends that the only area of negotiation is in the determination of how much the activities proposed by the faculty member are worth, and in this regard, the Dean cannot change the value of the same activities from one year to the next. The undersigned has found absolutely nothing in the FPA Guidelines to support this contention with regard to a faculty member seeking promotion. To the contrary, the Guidelines clearly state that both "the items and values included" are negotiated.

Grievant has completely ignored the fact that he wishes to be promoted, both in arguing this grievance, as well as when discussing the FPA with his Chair and the Dean. As Grievant's witness, Andrew Hawkins, a fellow professor in Grievant's Department with intimate knowledge of the FPA Guidelines stated, the FPA is a workload document designed to reflect the areas of significant contribution for those faculty who are seeking promotion and/or tenure, and it is clear that this is the case. The Guidelines clearly state, that "[n]egotiation of the FPA shall reflect the areas of significant contribution and area of reasonable contribution as delineated in [the faculty member's] letter of appointment" for those faculty who are seeking tenure *and/or promotion*.

Further, Grievant's assigned FPA allocates 2 of the 3 units *as he desired* for both semesters of 2009. This grievance is about whether Dean Brooks could assign 1 unit in the Spring semester of 2009 to research, rather than teaching and advising, and 1 unit in the Fall semester to research, rather than .5 to teaching and advising, and .5 to service.

What occurred here is that the Chair of Grievant's Department and the Dean determined that as long as Grievant continues to wish to achieve promotion, they are going

to require that his FPA reflect and promote that goal by focusing Grievant's attention during the workday on research and teaching, and minimizing his focus on service.[2] This is neither unreasonable, nor can the undersigned conclude that this violates either the letter or the intent of the FPA Guidelines.

Finally, it must be remembered that in the end the FPA Guidelines provide that the Dean *will assign an FPA* if one cannot be negotiated. Grievant seems to contend that this provision should not apply here, because there was no good faith negotiation. Negotiation is a two-way street. It appears that Grievant's Chair and Dean made every effort to impress upon Grievant the importance of focusing on research if he continued to wish to be promoted, but that this fell on deaf ears. Grievant insisted that he had total control of what was in the FPA, and refused to put more effort into research. The Dean's Office met with Grievant several times over a period of four months, and in fact, let Grievant retain more than the minimum units in both service and teaching and advising. The undersigned cannot under any circumstances characterize this as a bad faith negotiation on Respondent's part.

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

[2] Grievant asserted that Respondent is erroneously contending that the FPA is the basis for promotion and tenure. This was never Respondent's contention.

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 of the date of the event on which the grievance is based, or within 15 days of the date the event becomes known to the grievant. W. VA. CODE §§ 6C-2-3(a)(1), 6C-2-4(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. This grievance was timely filed.

5. Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

6. Grievant failed to demonstrate that the Dean acted improperly, in violation of any law, rule, regulation, or policy, or in an arbitrary and capricious manner in assigning Grievant's FPA.

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 27, 2011