THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SCOTT OWEN,
Grievant,

v. **Docket No. 2021-0244-NCC**

WEST VIRGINIA NORTHERN COMMUNITY COLLEGE,
Respondent.

DECISION

Grievant, Scott Owen, is employed by Respondent, West Virginia Northern Community College. On August 13, 2020, Grievant filed this grievance against Respondent stating, "Disparate employee (faculty) compensation as evidenced from www.westvirginia.opengov.com; WVNCC Faculty Qualification for Hiring; WVNCC Faculty Promotion Policy; WVNCC Master College Catalog Faculty Directories" and attaching various supporting documents. For relief, Grievant sought to "[r]emove disparate pay inequities; compensate me at requested $15,000 plus as requested."

Following the September 9, 2020 level one hearing, a level one decision was rendered on September 25, 2020, denying the grievance. Grievant appealed to level two on October 5, 2020, amending his grievance statement to address the level one decision. On January 8, 2021, Respondent, by counsel, filed its *Notice of Intent to Raise Timeliness Defense*. On January 16, 2021, Grievant responded by email with various allegations and requested "immediate summary judgment." On January 26, 2021, Respondent, by counsel, filed *Respondent's Motion to Dismiss* to which Grievant responded by email the next day. As the motion to dismiss was filed too close in time to the scheduled level two mediation, the motion to dismiss could not be addressed by the Grievance Board at that time. Following unsuccessful mediation, Grievant appealed to level three of the grievance

process on February 16, 2021, again amending his grievance statement to provide additional detail and to allege wrongful termination and amending his relief requested to "eight years of compensation plus inflation (structured annuity or lump sum settlement)."

On February 19, 2021, Respondent, by counsel, filed *Respondent's Motion to Dismiss Amendment and Objection to Grievant's Request to Submit Claim on the Level One Record*. Grievant responded by email on February 28, 2021. Administrative Law Judge Landon R. Brown conducted a telephone conference on April 14, 2021. The parties submitted additional written arguments on April 23, 2021 and April 30, 2021. On June 14, 2021, Judge Brown issued an order denying the motion to dismiss. The level three hearing was originally scheduled to be held on September 15, 2021, before Judge Brown. Judge Brown attempted to conduct a pre-hearing telephone conference on September 13, 2021; however, the conference did not take place.

Grievant failed to appear for the September 15, 2021 hearing and an *Order to Show Cause* was issued on September 16, 2021. Grievant responded to the *Order to Show Cause* on September 29, 2021, asserting he had not appeared for the hearing as he had not received the videoconferencing information to appear remotely and alleging impropriety from the Grievance Board and Respondent regarding the telephone conference.[1] Grievant also again asserted that he was entitled to summary judgment. On November 5, 2021, the undersigned issued an *Order* denying Grievant's motion for summary judgment and ordering that the hearing be rescheduled. The grievance was administratively reassigned to the undersigned on January 6, 2022. A level three hearing

[1] As Grievant has asserted his intention to pursue criminal and other civil remedies regarding these allegations, they will not be addressed in this decision.

was held on February 10, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conferening. Grievant appeared *pro se.*[2] Respondent appeared by Ardell Mayhugh and was represented by counsel, Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision on March 18, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant was employed by Respondent as an Assistant Professor. Grievant alleged Respondent discriminated against him by compensating him at a lesser amount than faculty that were junior to him in rank and/or seniority. Grievant failed to prove he was the victim of discrimination or favoritism regarding his pay as the employees to whom he compared himself were not similarly situated to Grievant. Further, Grievant's claims regarding the misapplication of policy and procedures relating to his pay are not timely filed. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the time of filing of the grievance, Grievant was employed by Respondent as an Assistant Professor. Grievant's employment was later terminated effective January 21, 2021.

[2] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

2. For the time-period at issue, faculty appointment and pay were governed by the *West Virginia Council for Community and Technical College Education* procedural rule and Respondent's *Faculty Salary Rule, Faculty Salary Adjustment Plan, Faculty Merit Pay Administrative Procedures*, and *Criteria and Procedures for Promotion in Rank for Full-time Faculty*.

3. Of relevance to this grievance, pursuant to the procedural rule, Respondent employs two types of faculty: Full-Time Faculty and Instructional Specialists. Full-Time Faculty are either tenured or term and are ranked as either Instructor, Assistant Professor, Associate Professor, or Professor. Instructional Specialists are "appointed minimally on a nine-month basis and an hourly workload." Instructional Specialists are ranked as either Instructor/Instructional Specialist, Assistant Professor/Instructional Specialist, Associate Professor/Instructional Specialist, or Professor/Instructional Specialist.

4. Faculty base pay is calculated pursuant to Respondent's *Faculty Salary Rule*, Rule NC-2018, which states, "The College will implement annually a structure, based on available funding, of placing full time nine month faculty equitably on a base salary scale with appropriate ranges according to rank." The stated goals are for "equity" and "reward for meritorious performance." The rule lists the following "principles of distribution:"

- Promotions will be granted first at 10%.
- Distribution cannot be across-the-board.
- All faculty should receive an increase unless salary is at rank maximum.
- Distribution will consider equity first for faculty significantly below base, equity disparities within rank, and merit.
- Any merit allocation is added to base, but is tracked separately to maintain the faculty salary scale.
- The President will hold 10% of funds available for outstanding performance significantly beyond merit criteria or to address problems of retention due to academic market.

- Annual increment for years of service is not part of faculty salary scale.

5. Despite the clear statement of the *Faculty Salary Rule* that a faculty salary scale is to be implemented each year, Respondent asserts that there was no faculty salary scale.

6. Faculty merit pay is governed by the Faculty Merit Pay Administrative Procedure and Requirements. Faculty seeking merit pay must apply for the same using the required packet. Merit pay eligibility is calculated based on a points system for completion of listed activities, is reviewed by a committee, and the final determination of merit pay is made by the President. Merit pay is awarded at three levels depending upon the number of points awarded and pay is based on yearly available funding. Faculty cannot be promoted and receive merit pay in the same year but are permitted to receive merit pay and increment pay in the same year.

7. In Respondent's budget, merit pay and promotional pay are included in the same pool of funding with ten percent of the pool allocated to promotional or retention pay.

8. In January 2017, Respondent adopted the *Faculty Salary Adjustment Plan* in order to "achieve and maintain competitive wages" with a goal to increase the average wages of faculty within the four ranks to 75% of the average for each rank within the Southern Regional Education Board ("SREB"). The model would be adjusted each year based on various factors and available funds would be "distributed across the four ranks according to the proportional inequity the rank is from the goal." After the model is updated, the annual increase for each individual and the adjusted salary schedule to be used for new hires is calculated. Unlike the *Faculty Merit Pay Administrative Procedure*

and Requirements, the *Faculty Salary Adjustment Plan* does not address the receipt of a promotion and an adjustment within the same year.

9. Again, although the plan clearly requires the preparation of a salary schedule, Respondent asserts no such salary schedule exists.

10. Increases in pay were given pursuant to the *Faculty Salary Adjustment Plan* in academic years 2017 – 2018 and 2018 – 2019.

11. An across-the-board increase of 3.75% was given in academic year 19 – 20 and an increase of 1.8% in academic year 2020 - 2021.

12. Each academic year, faculty are issued new appointment letters which list the prior year's salary, and salary adjustments and any merit pay for the total academic year wages. Any annual increment is listed as a separate lump sum payment. Additional wages for overload pay or for stipends for service as a program director or division chair are separate from the appointment letters.

13. Grievant was first hired in 2014 for a nine-month term as an Instructor in the Business Administration program. At the time of hire, Grievant possessed a Master's Degree in Business Administration. Grievant was paid the standard entrance salary of $33,500 per year at that time for a nine-month term Instructor. Throughout the years, Grievant received increases in his salary through merit increase and Grievant received the academic year 2017 – 2018 increase under the *Faculty Salary Adjustment Plan*. Effective academic year 2018 – 2019 Grievant was promoted to Assistant Professor. Grievant did not receive the *Faculty Salary Adjustment Plan* increase for that year. At the time of the grievance filing, Grievant's salary was $46,328.

14. On July 27, 2020, Grievant wrote to the Provost, Dr. Jill Loveless, requesting an immediate increase in pay based on his allegation of disparate faculty pay. Grievant included a list of ten faculty members to which he compared himself based on his review of the information provided on the westvirginia.opengov.com website.

15. Grievant provided no information regarding what information is included in the website's calculation of employee compensation. The information Grievant provided from the website does not match the information included on the appointment letters for Grievant and the compared employees.

16. Provost Loveless responded by email on August 3, 2020, stating that she did not determine salaries and could not discuss other employees' salaries with Grievant but that he had referenced faculty who had longer contract terms and additional responsibilities than he. Provost Loveless stated that the existing "salary formula for faculty" was "rather unusual" and encouraged Grievant's participation in a new faculty salary committee. Provost Loveless extended an invitation to meet with Grievant to discuss his salary.

17. By email of the same date, Grievant declined to meet with Provost Loveless stating instead that he would be filing a grievance.

18. Grievant compares himself to ten other faculty members of various ranks and within various programs as follows:

Name	Program	Position	Degree	Term	Date Hired	Salary Start/ 20 -21
Hollie Buchannan	Math	Assistant Professor	Ph.D	9	2016	$33,500/ $48,148
Raymond Cantor	Psychology/ Human Services	Instructor	M.S.	9	2015	$33,500/ $45,227

Anita Dahlem	Nursing	Instructor	M.S.N.	9	2016	$33,500/ $50,773
David Hays	Nursing/ Patient Care Technology	Instructor/ Program Dir.	R.N. B.S.N.	9	2018	$38,980/ $48,807
Curtis Hippensteel	Applied Technology	Instructional Specialist/ Div Chair/ Program Dir.	M.B.A.	12	2013	$73,000/ $86,095
Brandy Killeen	Welding	Instructional Specialist / Program Dir.	A.A.S	12	2018	$50,168/ $55,232
John Lantz	Criminal Justice	Instructor/ Program Dir.	M.S.	9	2017	$37,626/ $68,301
MaryJean McIntosh	Nursing	Instructor	M.S.N.	9	2017	?/$52,886
Rustem Mulyk	Math/ Physics	Assistant Professor	Ph.D.	9	2017	$41,524/ $65,867
Tami Pitcher	Surgical Technology	Instructor	C.A.S.	9	2017	$37,626/ $43,953

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

As a preliminary matter, Grievant alleges Respondent has engaged in bad faith and appears to argue this entitles him to prevail in his grievance. The remedy for an employer's bad faith actions is an allocation of costs and not success on the merits. "The administrative law judge may make a determination of bad faith and, in extreme

instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(c)(6). In this case, Grievant asserts that during the grievance process Respondent failed to provide discovery, sought to prejudice the process by bringing up the subsequent termination of Grievant's employment, and maliciously sought to delay the grievance,

Grievant asserts that, at level one of the grievance process, Respondent failed to provide him with the faculty pay scale and payroll records in violation of the Grievance Board's procedural rule regarding discovery. In consideration of the administrative nature of the grievance process, discovery is limited. By statute, "The parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party." W. VA. CODE § 6C-2-3(k). The Grievance Board's procedural rule provides for discovery in a limited form as follows:

> Discovery—The Board strongly encourages parties to participate in informal discovery prior to hearing. All parties must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged. Further, if a party intends to assert the application of any statute, policy, rule, regulation, or written agreement or submits any written response to the filed grievance at any level, a copy is to be forwarded to the grievant and any representative of the grievant named in the grievance.
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> The administrative law judge shall have authority to order such additional discovery, by way of deposition, interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board.

. . .

> Parties shall attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed.

W. VA. CODE ST. R. § 156-1-6.12.

Although Grievant asserts he requested the faculty pay scale and payroll records in discovery at level one, Grievant failed to provide evidence of any written request for discovery made prior to the level one hearing. The only evidence presented of a written request was Grievant's Exhibit 2 from the level one hearing, which is simply a list of questions titled "Questions to Ask at Level One Hearing." There is nothing that would identify this document as a request for discovery.

Grievant further asserts in his Proposed Findings of Fact and Conclusions of Law that the administrative law judge serving as mediator at level two should have ordered discovery. Pursuant to the procedural rule, an administrative law judge's order of discovery is only made upon a party's written motion after the parties have attempted to resolve the issue informally. Grievant admits that he made no written request for discovery at level two or level three, asserting he did not understand this to be a requirement and that he did not believe he should be required to do so. Further, Grievant did receive all documents upon which Respondent relied upon at level three when Respondent disclosed its proposed level three exhibits on September 11, 2021, five months before the level three hearing in this matter. Respondent has not provided a faculty pay scale because Respondent has consistently asserted throughout the pendency of the grievance that the same does not exist. While Grievant correctly points

out that Respondent's policies and procedures refer to a salary scale, this does not prove said scale exists. In fact, in asserting that the scale does not exist, Respondent admits that it violated its own policy. If Grievant believed that the scale does actually exist, he had the opportunity to question Respondent's witnesses and call his own witnesses regarding the existence of that document. As there is no proof the document exists and Respondent's assertion that the document does not exist is against its own interest, it does not appear that the document exists. Therefore, Grievant has failed to prove Respondent's bad faith regarding discovery.

Grievant next asserts Respondent's bad faith in disclosing that Grievant's employment was terminated. Respondent disclosed the termination of Grievant's employment as part of its motion to dismiss the grievance for mootness and untimeliness. While the motion was ultimately unsuccessful, such a motion is customary and not abusive when a grieving employee's employment is severed during the pendency of a grievance. Respondent provided additional documents relating to the termination of Grievant's employment as proposed exhibits for the level three hearing because it was unclear whether Grievant was attempting to protest the termination of his employment through the instant grievance as Grievant had referenced the termination in his appeal to level three. Grievant was not prejudiced by this action in any way and, once Grievant clarified that he was not pursing the termination in this grievance and stipulated as to the date of the termination of his employment, the same has not been considered. Grievant failed to prove Respondent's actions on this issue were bad faith.

Grievant asserts Respondent has maliciously sought to delay the grievance citing the length of time to bring the grievance to level three hearing. There is no evidence of

Respondent's intentional delay in this matter. Respondent has filed customary and reasonable motions during the pendency of this action. Respondent complied with providing dates for the two scheduled level three hearings. Grievant's repeated requests for the level three hearing to be scheduled immediately were not reasonable and could not be accommodated by the Grievance Board's schedule, which customarily is fully booked two to three months in advance. Grievant provided no evidence that Respondent's assertion that its witnesses were unavailable during the beginning of the academic year was false. It was Grievant who refused to provide reasonable dates and continued to erroneously assert that a level three hearing should not be held. Grievant failed to prove Respondent intentionally delayed the grievance process in bad faith.

As to the merits of the grievance, Grievant alleges disparate pay comparing himself to various faculty members who were his juniors in rank and/or seniority. He alleges Respondent's application of policies and procedures relating to pay were arbitrary and capricious. Respondent asserts that Grievant was not similarly situated to the employees to which he compares himself and denies arbitrary and capricious actions relating to employee pay.

Grievant asserts he has been the victim of discrimination and favoritism regarding his salary. "'Discrimination' means 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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in

writing by the employee." W. VA. CODE § 6C-2-2(h).

Grievant argues that he is the victim of discrimination and/or favoritism simply because the employees to which he compares himself are junior to him in rank and/or seniority, although none of the employees are employed within the same program as Grievant. The West Virginia Supreme Court of Appeals has analyzed a similar argument under the West Virginia Human Rights Act. In that case, the Court found "[a] university does not engage in age discrimination when it pays new faculty, regardless of age, based upon the fair market value generally prevailing for entry level faculty in their respective specific disciplines." Syl. Pt. 5, *W. Va. Univ. v. Decker*, 191 W. Va. 567, 569, 447 S.E.2d 259, 261 (1994). The Court further found that employers may pay workers based upon their market value stating that, "[i]n specialized fields, subtle distinctions in technical knowledge may be rewarded by greater compensation." *See Id*. at Syl. Pt. 4. The Court specifically recognized the impropriety in comparing faculty with different degrees employed within different departments. *Id*. at 574, 447 S.E.2d at 266. Thereafter, the Grievance Board has applied the *Decker* analysis to grievances. *Hunt v. W.Va. Higher Educ. Policy Comm'n*, Docket No. 01-HEPC-453 (Nov. 29, 2001). *Price v. Marshall Univ*., Docket No. 04-HE-369 (May 19, 2005).

None of the employees to which Grievant compares himself are proper comparisons under *Decker* because none of them teach in Grievant's program. Most of the compared employees are employed within vocational programs such as Nursing, which are completely unlike Grievant's program of Business Administration. Only two of the compared employees hold the rank of Assistant Professors like Grievant and those employees both possess doctorate degrees while Grievant possesses only a master's

degree. Further, several employees are employed in the dual role of faculty and program director for their programs, a responsibility Grievant does not share. Grievant is similarly situated to none of the employees to which he compares himself and, therefore, cannot prove discrimination or favoritism.

Grievant further argues the misapplication of various policies and procedures to the determination of his pay over the years. These claims are untimely. An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

> 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 . . . .

W. VA. CODE § 6C-2-4(a)(1). "'Days' means 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 for by statute, rule, policy or practice." W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has "approved leave from employment." W. VA. CODE § 6C-2-4(a)(2).

Respondent previously raised timeliness as a defense to the grievance and the grievance was permitted to go forward on the issue of pay disparity as that claim is a continuing practice. Grievant's claims regarding the misapplication of policies and procedures are not a claim of pay disparity but are discrete events that must be grieved timely. Specifically, Grievant argues that the *Faculty Salary Adjustment Plan* is flawed

and he was improperly denied the second pay increase under the plan in 2018; that the merit pay process is flawed and the provost improperly lowered his merit points for merit pay; that he was not afforded an adjustment in rank following his hire; that the provost improperly signed notices of appointment instead of the president; and that Respondent filed to post Mr. Lantz's position when it was changed from nine months to twelve months.

Most of these events occurred years prior to the filing of the grievance and the latest of the above events occurred when Grievant signed his notice of appointment for academic year 2020 – 2021 on July 6, 2020. Grievant did not file his grievance until August 11, 2020, well past the fifteen days within which he was required to file. A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990); *Straley v. Putnam County Bd. of Educ*., Docket No 2014-0314-PutED (July 28, 2014), *aff'd*, *Straley v. Putnam County Bd. of Educ.*, No. 15-1207 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision). "[W]hen a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in the past." *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001). Grievant's claims are in the nature of continuing damage and are not timely filed.

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). Grievant has offered no evidence to excuse his failure to file grievances regarding the varied allegations of policy and procedure violations that he alleges have occurred since his hire in 2014.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. VA. CODE § 6C-2-4(c)(6).

3. "The parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party." W. VA. CODE § 6C-2-3(k).

4. The Grievance Board's procedural rule provides for discovery in a limited form as follows:

> Discovery—The Board strongly encourages parties to participate in informal discovery prior to hearing. All parties must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged. Further, if a party intends to assert the application of any statute, policy, rule, regulation, or written agreement or submits any written response to the filed grievance at any level, a copy is to be forwarded to the grievant and any representative of the grievant named in the grievance.
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> The administrative law judge shall have authority to order such additional discovery, by way of deposition, interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board.
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> Parties shall attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed.

W. VA. CODE ST. R. § 156-1-6.12.

5. Grievant failed to prove Respondent acted in bad faith.

6. "'Discrimination' means 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).

7. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

8. “A university does not engage in age discrimination when it pays new faculty, regardless of age, based upon the fair market value generally prevailing for entry level faculty in their respective specific disciplines.” Syl. Pt. 5, *W. Va. Univ. v. Decker*, 191 W. Va. 567, 569, 447 S.E.2d 259, 261 (1994). Employers may pay workers based upon their market value as, “[i]n specialized fields, subtle distinctions in technical knowledge may be rewarded by greater compensation.” *See Id*. at Syl. Pt. 4. It is not proper to compare faculty with different degrees employed within different departments. *See Id*. at 574, 447 S.E.2d at 266.

9. Grievant failed to prove discrimination or favoritism as Grievant was not similarly situated to the compared employees.

10. A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990); *Straley v. Putnam County Bd. of Educ*., Docket No 2014-0314-PutED (July 28, 2014), *aff’d*, *Straley v. Putnam County Bd. of Educ.*, No. 15-1207 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision). “[W]hen a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in the past.” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001).

11. 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).

12. Grievant's claims regarding misapplication of policy and procedures were not timely filed and Grievant did not demonstrate a proper basis to excuse his failure to timely file on those claims.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: April 29, 2021

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Billie Thacker Catlett
Chief Administrative Law Judge