WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DALE OLSON

Grievant,

v. **Docket No. 2019-1684-WVU**

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Dale Olson, is employed as a professor by Respondent, West Virginia University, at WVU's College of Law. On May 31, 2019, Grievant filed the above styled grievance, stating: "Grievant assigned course on last day of spring semester to be taught in fall for which grievant has no background/experience or competence in discriminatory manner and in violation of requirement to mediate in faith and to compensate for off-contract mandated work as required by applicable law."

As relief, Grievant requests "(1) Assignment to alternative course; (2) protection from threatened dismissal of tenured position; (3) mandated compensation; (4) such other, different and additional relief as deemed appropriate (5) express reservation of rights."

On February 18, 2022, the level one administrator dismissed the grievance without a hearing because Grievant did not provide available hearing dates. Grievant appealed to level two on April 15, 2022. On April 27, 2022, Respondent submitted a motion to dismiss, alleging that Grievant's level two appeal was filed untimely. On June 9, 2022, an evidentiary hearing on this motion was held online before the undersigned. On June

27, 2022, each party provided proposed findings of fact and conclusions of law on the motion. An order denying the motion was issued on July 13, 2022.

A level two mediation occurred on October 18, 2022, and an order issued therefrom on January 4, 2023. Grievant appealed to level three on January 19, 2023. On April 13, 2023, a level three hearing was held before the undersigned. Grievant appeared in person and was self-represented. Respondent was represented by Samuel Spatafore, Assistant Attorney General. This matter matured for decision on June 5, 2023. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by West Virginia University (WVU) as a law professor teaching Business Torts, Anti-Trust, and Intellectual Property. When a professor for the introductory course of Business Associations left at the end of the spring semester, Grievant was assigned the class for the fall semester. Grievant was the only professor available in that time slot due to zero enrollment in his Anti-Trust class. Grievant claims discrimination, improper engagement while off contract, lack of due process in being threatened with dismissal should he fail to comply, and lack of authority by WVU to unilaterally reassign classes. Grievant seeks $10,000 in additional compensation, asserting he spent much time preparing while off contract during the summer due to his lack of competency in the course. WVU asserts that professors are routinely reassigned courses vacated at the last minute, that professors typically prepare for reassignments while teaching the course, that WVU policy allows for unilateral assignments, that Grievant was competent to teach the introductory business class due to his experience in business law, and that faculty are never given additional compensation for preparation

time. Grievant did not establish the amount of time he worked off contract or that he needed to work off contract, and thus failed to prove entitlement to additional compensation. Grievant also failed to prove discrimination, lack of due process for discipline that never occurred, or that WVU acted improperly in unilaterally assigning him the class. Accordingly, this 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. Grievant, Dale Olson, is employed as a professor by Respondent, West Virginia University (WVU), at WVU's College of Law.

2. Grievant has been a faculty member at WVU's College of Law since 1976, regularly teaching courses in Business Torts, Anti-Trust, and Intellectual Property.

3. Grievant has an extensive background in business law from his prior practice in a big law firm and his current role as a law professor.

4. Business Associations is an introductory course in business law at WVU's College of Law and is popular with students because it covers material on the West Virginia Bar Exam.

5. A professor scheduled to teach Business Associations in the fall of 2019, left his position at the end of the 2019 spring semester.

6. Grievant had originally been scheduled to teach an Anti-Trust course for the fall semester of 2019 in the same time slot as Business Associations but had zero enrollment as of May 2019.

7. The remaining faculty at the College of Law were all scheduled to teach classes in the same time slot as Business Associations for the fall of 2019.

8. Grievant was informed in May of 2019 that he was being assigned to teach Business Associations for the fall semester of 2019.

9. Dr. Elaine Wilson, Associate Dean and faculty member at the College of Law, made this assignment based on the authority delegated to her by the Dean. (Dr. Wilson's testimony)

10. Classes are assigned pursuant to departmental need and student demand. (Testimony of Associate Provost Dr. Tracy Morris).

11. Dr. Wilson acted in conjunction with need, student demand, the lack of available faculty, and zero enrollment in Grievant's Anti-Trust course. (Dr. Wilson's testimony).

12. Dr. Wilson determined that Grievant was qualified to teach the introductory Business Associations course due to his extensive experience in business law. (Dr. Wilson's testimony).

13. WVU policy, titled "Department Chairs and Faculty in Other Leadership Positions: Protocols for Appointment, Assignment, and Review," states:

> The Chair makes final decisions at the department level on such matters as operating budget allocations, faculty teaching assignments, course offerings….

(Respondent's Exhibit 1).

14. The policy more generally provides:

> This document uses the context of a traditional academic department in the General University, with leadership vested in a "department chair," reporting to a Dean. However, there are a variety of academic structures within the institution … .

> Some of those units may require variations from the detail of the present document, but in general the concepts to be applied are the same. …

15. WVU's College of Law makes these decisions through its Dean, who delegated responsibility for class assignments to Dr. Wilson. (Dr. Wilson's testimony).

16. Dr. Wilson has a background similar to Grievant in Business Torts, Anti-Trust, and Intellectual Property, which came into play in her determination that Grievant was qualified to teach the introductory course in Business Associations. (Dr. Wilson's testimony).

17. While Grievant was notified well in advance, it is not unusual for faculty to pick up a class at the last minute due to a sudden event such as sickness or retirement. (Testimony of Dr. Wilson and Dr. Morris.)

18. For instance, Dr. Wilson has been assigned classes within 48 hours of their start time. (Dr. Wilson's testimony).

19. It is not unusual for teaching schedules to change or for faculty to work off contract during the summer. (Dr. Wilson's testimony).

20. Regardless, course preparation by faculty is discretionary. (Dr. Wilson's testimony)

21. Grievant could have used the textbook and syllabus from the prior Business Associations course, which is common practice for faculty teaching a course for the first time. (Testimony of Dr. Wilson and Dr. Morris).

22. Nevertheless, class preparation is built into compensation for teaching and faculty never receives additional compensation for preparation. (Dr. Morris' testimony).

23. Academic freedom does not equate to faculty choice in class assignment. (Dr. Morris' testimony).

24. Grievant requests $10,000 for his summer preparation time based on faculty being paid $10,000 for each summer course they teach.

25. On May 31, 2019, Grievant filed the current grievance over his assignment of Business Associations for the fall of 2019.

26. Respondent and Grievant communicated by email regarding the grievance.

27. Respondent communicated with Grievant via his work email ending in "wvu.edu."

28. Grievant communicated with Respondent using multiple email addresses.

29. On February 18, 2022, Respondent issued a dismissal order after Grievant failed to provide available dates for the level one hearing. Respondent emailed the dismissal order to Grievant at his work email ending in "wvu.edu" and to Grievant's attorney.

30. Grievant's attorney did not forward the dismissal order to Grievant. (Grievant's testimony).

31. Grievant did not know about the dismissal order until he read the email from Respondent on April 5, 2022. (Grievant's testimony).

32. Until recently, Respondent served its level one decisions and orders by regular mail, never by certified mail or email.

33. Respondent switched to service by email during the COVID-19 pandemic in 2020.

34. Respondent provided no authority to justify this change in practice on service.

35. For its part, the Grievance Board has consistently served its final orders and decisions on grievants and their attorneys by certified mail. (Judicial notice).

36. Grievant has had the same address since 1980 and listed the address on his grievance.

37. Grievant appealed to level two on April 15, 2022, which was within ten days of his seeing Respondent's email on April 5, 2022.

38. On April 27, 2022, Respondent filed its motion to dismiss, alleging that Grievant's level two appeal was filed untimely.

Discussion

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is on the party asserting the grievance was untimely filed. Once the employer has demonstrated that a grievance was filed untimely, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, 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); *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).

On February 18, 2022, Respondent emailed its level one grievance dismissal order to Grievant's work email ending in "wvu.edu." Respondent also emailed the dismissal

order to Grievant's attorney of record. Grievant's attorney did not forward the dismissal order to Grievant. Grievant did not know about the dismissal order and did not see or read the February 18th email with the attached dismissal order until April 5, 2022. Respondent contends Grievant utilized his "wvu.edu" email to communicate on March 8, 2022, regarding an unrelated matter with Dr. Elaine Wilson, Associate Dean for Academic Affairs, and thus should have seen the level one dismissal order emailed him on February 18, 2022. Respondent asserts its policy obligates employees to regularly check their email. Grievant counters that his use of the "wvu.edu" email was infrequent and that technical glitches made the email sent to him by Respondent invisible for a period.

Respondent has, until recently, served its level one decisions and orders via regular mail. Respondent switched to delivery via email in 2020, after the start of the COVID-19 pandemic. Respondent offered no authority to justify this change. Grievant's physical/mailing address has been the same since 1980 and is listed on his level one grievance filing. Grievant appealed to level two on April 15, 2022, which was within ten days of the date he saw the email.

West Virginia Code §§ 6C-2-1, et seq., governs public employee grievance procedures. West Virginia Code § 6C-2-4(b)(1) states: "Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration." The Administrative Procedures Act (APA), codified in West Virginia Code §§ 29A-1-1, *et seq*., is more generally applicable to the grievance process and has at times been deemed controlling when not contradicted by rules and laws more specifically applicable to the Grievance Board. *See Smith v.*

Kanawha Cnty Bd. of Ed., Docket No. 2008-0286-KanED (July 18, 2008), *Frost v. Bluefield State College*, Docket No. 2013-2074-BSC (March 19, 2015).

As Respondent has not cited any authority to support its practice of delivering its level one decisions and orders by email, the service and notice provisions of the APA apply. The APA requires State agencies to serve final decisions or orders by registered or certified mail or in person on both Grievant and his attorney and, at the very least, to provide any required notice in person or via United States mail. The APA states: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . .. A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail." W. VA. CODE § 29A-5-3.

Even if level one decisions or orders are deemed never to be "final," and thus not subject to the "in person or by registered or certified mail" service provision, State agencies must still comply with the less stringent provision of the APA requiring notice by United States mail. The APA states: "Whenever an agency or person is authorized or required to give any notice under this chapter, unless a different method of giving such notice is otherwise expressly permitted or prescribed, such notice shall be given either by personal delivery thereof to the agency or person to be so notified, or by depositing such notice in the United States mail, postage prepaid, in an envelope addressed to such agency or person at the last-known address of such agency or person. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the agency, or by affidavit of any person over eighteen years of age, naming

the agency or person to which or to whom such notice was given and specifying the time, place and manner of the giving thereof." W. VA. CODE § 29A-7-2.

West Virginia Code § 6C-2-4(b)(1) sets forth a grievant's "receiving an adverse written decision" as the triggering event used to calculate the deadline for appeal to level two. The meaning of "receiving an adverse written decision" is not set forth in the Code, so must be interpreted in conjunction with other applicable statutes, such as the APA. Read in conjunction with the APA, Grievant never "receiv[ed] an adverse written decision," as the level one dismissal order was never sent to him by regular, registered, or certified United States mail, and was not hand delivered.

Respondent contends that decisions are not "served" but are only "issued" or "transmitted," implying that the later terms are less stringent than "service" and that these obviate any "notice" requirement. Respondent points out that the procedural rules set forth by the Grievance Board in W. VA. CODE ST. R. §§ 156-1-1, *et seq*., mention "service" only in relation to motions, continuances, discovery, and appeals, and only require that level one decisions be "issued." While these procedural rules do not define "issued," they define "service" as "personal delivery, facsimile transmission, or delivery by first class United States Postal Service mail…." Significantly, the procedural rules only specifically exclude subpoenas from the "service section," and thus presumably from the "service" requirement. Interestingly, these procedural rules have no "service," "transmission," or "issuance" requirement for level three decisions emanating from the Grievance Board. Nevertheless, the Grievance Board has consistently served its final orders and decisions on grievants and their attorneys by certified mail in conjunction with the stringent

standards of the APA, deeming the APA applicable to at least the manner of issuance or delivery of final orders and decisions.

Further, the Grievance Board is not authorized to enact procedural rules that conflict with its enabling statutes. The Grievance Board's procedural rules are to be interpreted in conjunction with these applicable statutes. West Virginia Code § 6C-3-4 sets forth the Grievance Board's rule-making authority, stating: "The board may adopt, modify, amend and repeal procedural rules promulgated in accordance with article three [§§ 29A-3-1 *et seq*.], chapter twenty-nine-a of this code, necessary to effectuate the provisions of this article and article two [§§ 6C-2-1 *et seq*.] of this chapter …" West Virginia Code § 6C-2-3(s) states: "The board shall prescribe rules and procedures in compliance with this article, article three [§§ 6C-3-1 *et seq*.] of this chapter and the State Administrative Procedures Act under chapter twenty-nine-a [§§ 29A-1-1 *et seq*.] of this code for all proceedings relating to the grievance procedure."

Respondent also argues that West Virginia Code § 6C-2-3(n)(2) only requires that a decision be "transmitted" to the parties. Respondent asserts that West Virginia Code §§ 6C-2-4(a)(2) and (a)(3) simply require the chief administrator to "issue" the level one decision, which it interprets as being in lieu of "service" on the parties. West Virginia Code §§ 6C-2-1 *et seq*. does not define "transmit" or "issue" to distinguish these terms from "service" or "notice." Nor does it state that "transmit" or "issue" replace any "notice" requirement found in the APA. While the Grievance Board's procedural rules do not overtly contradict West Virginia Code §§ 29A-3-1 et seq. and West Virginia Code §§ 6C-2-1 et seq., any vagueness in the procedural rules must be construed in accordance with State Code as embodied in the APA.

The APA does not provide a definition of “notice” or “service.” This suggests that the precise terminology for the act of delivery of a decision or order is not as significant as the manner of delivery prescribed therein. The APA [§ 29A-7-2] allows for methods of notice different from those prescribed therein if the variance is expressly prescribed. As neither West Virginia Code §§ 6C-2-1 *et seq*. nor the Grievance Board’s procedural rules expressly prescribe a method of delivery that is different from those in the APA, the “notice” and “service” requirements provided in the APA are applicable to grievance proceedings.

Respondent contends that 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). Ultimately, the burden is on Respondent to prove that Grievant was “unequivocally notified” of the level one dismissal order outside of the ten-day period directly prior to the filing of his appeal to level two on April 15, 2022. Respondent did not prove by a preponderance of the evidence that Grievant was “unequivocally notified” of the level one dismissal prior to April 5, 2022. Respondent did not prove by a preponderance of the evidence that Grievant’s appeal to level two was filed untimely.

As for the merits, this grievance does not involve a disciplinary matter. Thus, 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*.

Grievant claims that Respondent improperly assigned him the Business Associations class without his consent or compensation for preparation time. He asserts lack of authority by WVU to unilaterally reassign classes, improper engagement while off contract, lack of due process in being threatened with dismissal should he fail to comply, and discrimination. Grievant seeks $10,000 in additional compensation, asserting he spent hundreds of hours preparing while off contract during the summer due to his lack of competency in the course. WVU asserts that professors are routinely reassigned courses vacated at the last minute, that professors typically prepare for reassignments while teaching the course, that WVU policy allows for unilateral assignments, that Grievant was competent to teach the introductory course due to his experience in business law, and that faculty are never compensated separately for preparation time.

Grievant did not prove that WVU acted improperly in unilaterally assigning him the Business Associations class. The evidence shows that Respondent's policy gives it authority to unilaterally assign classes. Respondent routinely and unilaterally reassigns classes. Grievant could have utilized the existing syllabus and textbook. Respondent showed that Grievant did not need to work off contract and that professors routinely prepare for reassigned classes during the semester. Grievant did not show or even allege that Respondent assigned him more classes than was his contractual obligation. Nor did Grievant establish the amount of time he worked off contract. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(*citing*

Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995)). Thus, Grievant failed to prove entitlement to additional compensation.

Grievant also failed to prove discrimination. Discrimination for purposes of the grievance process has a very specific definition. "'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). Grievant did not show that he was similarly situated to or treated differently than any other employee. The evidence showed that Dr. Wilson chose Grievant for the assignment because he had zero enrollment in his class for the same time slot as Business Associations and was the only professor available during that time to teach the class. Respondent presented uncontested evidence that faculty are routinely assigned classes at the last minute and are never paid extra for class preparation.

Lastly, Grievant failed to prove he was entitled to due process for an alleged threat of dismissal. "'The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id*. at 732, 356 S.E.2d at 486. Grievant was not dismissed. Thus, Grievant's due process claims are premature. The Grievance Board will not decide matters that are

"speculative or premature, or otherwise legally insufficient." *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994). Accordingly, the grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is on the party asserting the grievance was untimely filed. Once the employer has demonstrated that a grievance was filed untimely, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); S*ayre 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); *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).

2. West Virginia Code §§ 6C-2-1, et seq., governs public employee grievance procedures. West Virginia Code § 6C-2-4(b)(1) states, "Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration."

3. The Administrative Procedures Act states: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . .. A copy of the order

or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail." W. VA. CODE § 29A-5-3.

4. The Administrative Procedures Act states: "Whenever an agency or person is authorized or required to give any notice under this chapter, unless a different method of giving such notice is otherwise expressly permitted or prescribed, such notice shall be given either by personal delivery thereof to the agency or person to be so notified, or by depositing such notice in the United States mail, postage prepaid, in an envelope addressed to such agency or person at the last-known address of such agency or person. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the agency, or by affidavit of any person over eighteen years of age, naming the agency or person to which or to whom such notice was given and specifying the time, place and manner of the giving thereof." W. VA. CODE § 29A-7-2.

5. West Virginia Code § 6C-2-4(b)(1) sets forth a grievant's "receiving an adverse written decision" as the triggering event used to calculate the deadline for appeal to level two.

6. Read in conjunction with the Administrative Procedures Act, Grievant never "receiv[ed] an adverse written decision," as the level one dismissal order was never sent to him by regular, registered, or certified United States mail, nor was it hand delivered.

7. West Virginia Code § 6C-3-4 sets forth the Grievance Board's rule-making authority, stating: "The board may adopt, modify, amend and repeal procedural rules promulgated in accordance with article three [§§ 29A-3-1 *et seq*.], chapter twenty-nine-a of this code, necessary to effectuate the provisions of this article and article two [§§ 6C-

2-1 *et seq*.] of this chapter …" West Virginia Code § 6C-2-3(s) states: "The board shall prescribe rules and procedures in compliance with this article, article three [§§ 6C-3-1 *et se*q.] of this chapter and the State Administrative Procedures Act under chapter twenty-nine-a [§§ 29A-1-1 *et seq*.] of this code for all proceedings relating to the grievance procedure."

8. Any vagueness in the Grievance Board's procedural rules must be construed in accordance with the Administrative Procedures Act and West Virginia Code §§ 6C-2-1 *et seq*.

9. As neither West Virginia Code §§ 6C-2-1 *et seq*. nor the Grievance Board's procedural rules contradict the Administrative Procedures Act on this matter, the "notice" and "service" requirements provided in the Administrative Procedures Act are applicable to grievance proceedings.

10. The 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).

11. Respondent did not prove by a preponderance of the evidence that Grievant was "unequivocally notified" of the level one dismissal prior to April 5, 2022.

12. Respondent did not prove by a preponderance of the evidence that Grievant's appeal to level two was filed untimely.

13. 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*.

14. Grievant did not prove by a preponderance of the evidence that WVU acted improperly in unilaterally assigning him the Business Associations class.

15. Grievant failed to prove by a preponderance of the evidence the amount of time he worked off contract, that he needed to or was entitled to work off contract, or that he was entitled to additional compensation.

16. "'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).

17. Grievant failed to prove by a preponderance of the evidence that he was subjected to discrimination.

18. "'The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id*. at 732, 356 S.E.2d at 486.

19. Grievant failed to prove by a preponderance of the evidence that an alleged threat of dismissal entitled him to due process.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[1] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: July 18, 2023

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Joshua S. Fraenkel
Administrative Law Judge

[1]On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.