

**GRACE NORTON,**

**Grievant,**

**v.**

**Docket No. 96-BOD-369**

**BOARD OF DIRECTORS,**

**WEST VIRGINIA NORTHERN**

**COMMUNITY COLLEGE,**

**Respondent.**

### **DECISION**

Grace Norton (hereinafter "Grievant") filed this grievance pursuant to the provisions of W.Va. Code §§18-29-1, et seq., alleging various violations by West Virginia Northern Community College (hereinafter "WVNCC") in connection with her 1994 faculty performance evaluation. The grievance was denied at levels one and two, then directly appealed to level four pursuant to Code §18-29-4(c).

Prior to the scheduling of a level four hearing, Respondent filed a Motion to Dismiss on the basis that Grievant's appeal to level four was not filed in a timely fashion, as required by statute. A conference call was conducted on October 17, 1996, during which both parties presented arguments on the timeliness issue, followed by the submission of written memoranda. Upon consideration of the arguments of the parties, applicable law, and previous decisions of this Grievance Board, the undersigned finds that Respondent's Motion is well-founded and that this grievance must be dismissed, as discussed below.

There does not appear to be any dispute between the parties as to the relevant underlying facts. A written level two decision dated July 1, 1996, was rendered by Dr. Linda S. Dunn, President of WVNCC, which decision correctly informed Grievant of her appeal rights under Code §18-29-4. This decision was initially mailed to Grievant's home address via certified mail on July 1, 1996. Grievant never claimed the letter at the post office, so it was again mailed to her via regular and certified mail on July 24, 1996. She claimed the letter on July 25, 1996, and signed a certified mail receipt on that date. Grievant then completed a level four grievance form dated August 16, 1996, which was

received in the Charleston office of this Board on August 22, 1996, with a postmark of August 20, 1996.

Code §18-29-4(c) states in pertinent part that “within five days of receiving the [level two decision] . . . , the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four.” Grievant alleges that her appeal was filed at level four within the five-day requirement of this section. Her argument turns upon an interpretation of the term “days” as defined in Code §18-29-2(b), which reads: “‘Days’ means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings.” Included with Grievant's submissions was a copy of her employment contract for the 1996-1997 school year, which was executed both by her and by the president's office on May 28, 1996. Because the contract specifies that the appointment is for a nine-month faculty position, covering the period of August 12, 1996, to May 19, 1997, Grievant argues that she was not actually “employed” by WVNCC when she received the level two decision. Since her contract took effect on August 12, 1996, her filing of the level four appeal on August 16, 1996, was within five “days” as defined in the statute. [\(See footnote 1\)](#) However, since Grievant's appeal was postmarked August 20, 1996, that is the date it was filed. See McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

The burden of proof is upon the party 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). Respondent has met its burden in this case. Grievant has not disputed that she received the written level two decision on July 25, 1996, and did not file her level four appeal until, according to her interpretation, a minimum of fifteen working days later. There is no precedent or basis for Grievant's interpretation of §18-29-2(b). In fact, the definition of “days” specifically includes days “prior to or subsequent to” the employment term and only excludes weekends, holidays, and days which the institution is closed for emergency reasons. Although the time between July 25 and August 16 was not technically within Grievant's employment term, these days would certainly fall within the purview of days prior and subsequent to the actual term. Moreover, evidence introduced by Respondent reflects that Grievant was involved in several activities during the summer of 1996, including teaching summer courses, and that she was a tenured faculty member. Accordingly, it is apparent that, with regard to other activities related to her position as a

faculty member of some years' duration, Grievant did not hesitate to perform her job duties during the summer months. Likewise she has not presented a sufficient excuse for failing to appeal the level two grievance decision within the required timelines.

Therefore, this grievance was not timely filed within the requirements of Code §18- 29-4(c) and must be dismissed for lack of jurisdiction. See Jack v. W.Va. Dept. of Human Resources, Docket No. 95-HHR-431 (Dec. 21, 1995). Grievant has not provided a sufficient reason to excuse her failure to file in a timely manner. Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995).

Respondent's Motion to Dismiss is hereby **GRANTED** and this grievance is **DISMISSED** for lack of jurisdiction.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County, and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

**Date: December 9, 1996** \_\_\_\_\_

**V. DENISE MANNING**

**Administrative Law Judge**

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[Footnote: 1](#)

*Although not postmarked until several days later, Grievant has alleged that she actually placed the appeal form in the outgoing mail bag at the college on August 16, 1996. She claims she had assumed it went out in the U.S. Mail on that date. However, the procedural rules of the Grievance Board, specifically 156 C.S.R. 1 §2.1.1, require that a lower level grievance appeal be placed in an "official depository of the United States Postal Service" to be considered officially "filed." Especially since August 16 was a Friday, Grievant should have taken definitive action to ensure that her grievance would be postmarked on that date, and she did not. Therefore, her grievance was filed on the date of the postmark of August 20, 1996.*