LINVILLE HAWTHORNE,

Grievant,

v.

DOCKET NO. 97-BOD-252

BOARD OF DIRECTORS/

BLUEFIELD STATE COLLEGE,

Respondents.

D E C I S I O N

Grievant, Linville Hawthorne, filed the following grievance on March 28, 1997:

> In accordance with W. VA Code 18-29-1 et seq., I wish to file the following grievance with your office. I am not extremely enthusiastic about following this particular course of action since my first attempt at filing a grievance was dismissed without any action being taken by the adminstration(sic), which in itself violated my right to due process under provisions of W. VA. Code 18- 29-1 et seq.
>
> It is a common fact that I have been systematically discriminated against since coming to Bluefield State College based solely on the color of my skin. I tried to overlook the obvious, the racist remarks regarding getting rid of certain faculty members of color, having secretaries keep a record of my coming and going when no other professor was subjected to the same scrutiny, and being accused of inflating students grades when no other faculty member was subjected to this type of harassment.
>
> Nevertheless, there are several areas of concern on which I wish to base my grievance. (1) It has recently come to my attention that everyone hired in our division after myself was hired under State funding or transferred to State funding shortly thereafter except for myself. (2) I have also become aware of the fact that the last individual hired into our division in my particular discipline, had no teaching experience but was hired under State funding nevertheless even though I applied for the same position and was denied. According to the Civil Rights Act of 1964, this is a blatant violation of myconstitutional rights, and (3) I have never seen a student evaluation report until this year. I was told by an unnamed source that I had the highest student evaluation report of any faculty member at Bluefield State College for the last five

years. If this is the case, why is my position being eliminated? If you were in my shoes, what would you think? Is this happening simply because I'm black? In lieu of what has transpired regarding other minorities associated with or seeking to be associated with Bluefield State College, it makes you wonder if race isn't the primary motivating factor behind some of the recent decisions concerning employment opportunities associated with the college.

Compensation

In order to compensate me for the injustices perpetrated against me by Bluefield State College, I want to be retained by the institution as an assistant professor with tenure in my particular discipline. If this action is not feasible, I want to be compensated in the sum of 600,000.00 dollars. I arrived at this figure because I had intended to teach at Bluefield State College for the next twenty years. At my current rate of pay, my salary over the next twenty years would roughly equal the amount of 600,000.00 to which I believe I would be entitled considering the mental anguish I have endured throughout my tenure at Bluefield State College.

The grievance was denied at the lower levels of the grievance process, and Grievant appealed to level four on May 22, 1997. Hearing was held in the Grievance Board's Oak Hill, West Virginia, office on August 5, 1997, and this case became mature for decision on August 19, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Level II Respondent's Exhibits

Ex. 1-4 -

Grievance documents.

Ex. 5 -

Faculty Appointment of Linville Hawthorne from January 3, 1990 to May 12, 1990.

Ex. 6 -

Faculty Appointment of Linville Hawthorne from August 22, 1990 to Commencement 1991.

Ex. 7 -

August 16, 1991 letter from Gregory D. Adkins, President to Linville Hawthorne, with Faculty Appointment from August 19, 1991 to Commencement 1992 attached.Ex. 8 - Faculty Appointment of Linville Hawthorne from August 19, 1992 to

Commencement 1993.

Ex. 9 -

Faculty Appointment of Linville Hawthorne from August 18, 1993 to May 14, 1994.

Ex. 10 -

Faculty Appointment of Linville Hawthorne from August 17, 1994 to May 12, 1995.

Ex. 11 -

June 26, 1995 letter from Robert E. Moore, President to Linville Hawthorne, with Faculty Appointment from August 16, 1995 to May 11, 1996 attached.

Ex. 12 -

June 19, 1996 letter from Robert E. Moore, President to Linville Hawthorne, with Faculty Appointment from August 14, 1996 to May 10, 1997 attached.

Level IV Respondent's Exhibits

Ex. 1 -

August 11, 1994 memorandum from Dr. James H. Cox, Jr. to Linville Hawthorne.

Ex. 2 -

August 15, 1994 memorandum from Dr. James H. Cox, Jr. to Linville Hawthorne.

Ex. 3 -

Grievance form of Linville Hawthorne dated August 8, 1994.

Ex. 4 -

June 19, 1996 letter from Robert E. Moore, President to Linville Hawthorne (same as LII Ex. 12).

Ex. 5 -

Faculty Appointments of Linville Hawthorne from 1990 through 1997 (same as LII Exs. 5-12).

Ex. 6 -

June 26, 1995 letter from Robert E. Moore, President to Linville Hawthorne (same as

LII Ex. 11), Charles Bearce, and Julian Vigil.

Ex. 7 -

June 19, 1996 letter from Robert E. Moore, President to Charles Bearce.

Ex. 8 -

December 20, 1991 memorandum from Dr. James H. Cox, Jr. to Linville Hawthorne.

Ex. 9 -

February 17, 1992 memorandum from Dr. James H. Cox, Jr. to Linville Hawthorne.

Ex. 10 -

September 9, 1993 memorandum from William Goodman, Chair to Linville Hawthorne.

Ex. 11 -

March 15, 1994 memorandum from Dr. James H. Cox, Jr. to Linville Hawthorne.

Ex. 12 -

October 21, 1994 memorandum from Dr. James H. Cox, Jr. to Linville Hawthorne.

Ex. 13 -

November 3, 1994 letter from Michael H. Lilly, Chair to Linville Hawthorne.

Testimony

Grievant testified in his own behalf and presented the testimony of Dr. Betty Rader. Respondent offered the testimony of Dr. Betty Rader and Dr. Michael Lilly. (See footnote 1)

PRELIMINARY ISSUE

Respondent Board of Directors/Bluefield State College, moved to dismiss this grievance as untimely filed under the provisions of W. Va. Code § 18-29-1, et seq., the grievance procedure for education employees. Specifically:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which

> the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that 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. Kessler v. W. Va. Dept. of Trans., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54- 325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

Grievant's position at Bluefield State College was funded with a Title III grant of federal monies. There was a five year funding cycle for the grant at issue for the 1992-93to 1996-97 academic school years. In correspondence dated June 26, 1995, Grievant was initially notified by President Moore that there was a distinct possibility that Grievant would be issued a one-year terminal contract for the academic year 1996-97. LIV R. Ex. 6. Thereafter, on June 19, 1996, President Moore did, in fact, notify Grievant, in writing, that he was being issued a one-year terminal contract, and that he would not be retained beyond the 1996-97 academic year. LIV R. Ex. 4. Grievant admitted that he received this correspondence at the time of its issuance. Nevertheless, Grievant did not file this grievance until March 28, 1997.

Respondent argues that the event upon which this grievance is based is Grievant's notice of termination dated June 19, 1996. The running of the relevant time period is ordinarily deemed to begin to run when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, No. 23450 (W. Va. Sup. Ct. Feb. 24, 1997). Notification that a contract of employment will not be renewed prompts the running of the fifteen day

limitation period in which to file a grievance under W. Va. Code § 18-29-4. See Gerlufsen v. Bd. of Dir./Shepherd College, 93-BOD-303 (Oct. 8, 1993), aff'd Jefferson County Circuit Court, No. 93-P-110 (Feb. 18, 1994); Tannir v. Bd. of Dir./W. Va. State College, Docket No. 92- BOD-211 (Dec. 8, 1992).

If the only issue in this grievance was Grievant's termination, Respondent would be correct in its assertion that the grievance was untimely filed. However, the statement of grievance alleges various acts of racial discrimination, of which the termination is only one. The termination, therefore, is to be considered as evidence in a discrimination claim, asopposed to the event giving rise to the grievance. Several of the alleged incidents Grievant complains about occurred after he received his notice of termination in June 1996, such as the alleged hiring of additional employees under Title III funding. Therefore, Respondent's affirmative defense that this grievance is untimely filed is denied.

ISSUE

The sole issue in this grievance is whether Grievant has proven by a preponderance of the evidence that he has been discriminated against by Respondent Bluefield State College on the basis of his race. Based upon the evidence and testimony presented, I find that he has not.

DISCUSSION

___This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act, which would include a claim of racial discrimination. Nevertheless, the Grievance Board's authority to provide relief to employees for “discrimination”, “favoritism”, and “harassment”, as those terms are defined in W. Va. Code § 18-29-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over race-based discrimination claims. Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case ofdiscrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant offered several examples of incidents which he alleged proved Respondent engaged in racial discrimination. First, Grievant alleged that other faculty members, specifically John Snead and Bill Bradbury, were allowed to transfer from their Title III funded positions to State funded positions, while he was not. Dr. Betty Rader, Provost, testified that these two individuals resigned from their Title III funded positions and applied for vacancies funded by State funds when other faculty members resigned. No new positions were created, and Grievant had as much opportunity to apply for those positions as did Mr. Snead and Mr. Bradbury.

Second, Grievant alleged that the fact that Respondent hired Sheila Hallman- Warner over him for a position he applied for in 1994 is evidence of discrimination. Dr.Michael Lilly, Chairman of the Division of Business, testified that the main reason Grievant was not chosen for the position in 1994 was because he had had serious problems with attendance and as an instructor. Those problems are memorialized in memoranda sent to Grievant from Dr. James Cox, Grievant's supervisor at the Lewisburg campus, William Goodman, previous Chairman of the Division of Business, and Dr. Lilly. See LIV Respondent's Exs. 8-13. Further, Ms. Hallman-Warner was found to be more qualified than

Grievant with respect to experience in the particular field advertised for in 1994.

With respect to his attendance problems, Respondent directed secretaries on the Lewisburg and Bluefield campuses to keep an attendance log for Grievant. This process continued for several years, after which Grievant improved his attendance and Dr. Lilly ordered the log discontinued. Grievant alleges that this is also an example of discrimination, because he alleges no other faculty were subjected to the same treatment. Dr. Lilly and Dr. Rader identified one other faculty member who also had attendance problems, and for whom a log was kept. That faculty member was white.

Grievant also alleges he was discriminated against because he only received one evaluation during his tenure with Respondent. Respondent does not dispute this allegation. Dr. Lilly admitted that after he became Chairman of the Division of Business, he did not evaluate Grievant for two years. Dr. Lilly testified that Grievant was evaluated this past year, and Grievant does not dispute that fact. Nevertheless, Grievant has not shown that this failure to evaluate him was racially motivated, or that it harmed him in any way. Additionally, Grievant failed to prove that other instructors in similar circumstances were evaluated every year. While Respondent proved Grievant had serious attendance problems as an instructor, it nevertheless continued to retain him until his Title III fundingran out. The reason given for Grievant's non-retention is the discontinuation of the Title III program under which he worked, not performance problems.

Grievant also alleges that the reasons given for his non-retention are false. He alleges that Respondent has continued to hire faculty members under Title III funding. Dr. Rader testified that no faculty members have been hired under Title III funding since Grievant's non-retention. The only Title III positions that are still being maintained are staff positions, and no new staff positions have been created, although some positions have been filled due to resignations.

Finally, Grievant alleged Respondent discriminated against him because it did not offer him an adjunct professor position on the Lewisburg campus. Respondent offered Grievant an adjunct professor position for the Fall 1997 semester on the Bluefield campus, which he accepted. Dr. Lilly replied that Dr. David Perkins, Director of the Greenbrier Community College in Lewisburg, filled the adjunct positions on that campus before Grievant asked for one. While Lewisburg may have been Grievant's preference, he has not shown he is entitled to an adjunct position on that campus.

While Grievant has many theories of a conspiracy on the Bluefield campus to discriminate against blacks, he has failed to prove the existence of a conspiracy, or that Bluefield engaged in a pattern

and practice of racial discrimination. Indeed, none of Grievant's allegations are substantiated by any documentary or testimonial evidence, and all are based solely on Grievant's perception that there is a conspiracy to discriminate against blacks at Bluefield State College.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following material facts. 1. Grievant was hired as a temporary Assistant Professor in January 1990 by Respondent, to teach courses in Criminal Justice. Grievant's position was funded with federal monies received by Respondent pursuant to a Title III grant. LIV R. Ex. 5.

2. On June 26, 1995, President Moore issued letters to Grievant and two other Title III professors. In this correspondence, they were notified that the Title III funding cycle would conclude at the end of the 1996-97 academic year, and that there was a distinct possibility their positions would be eliminated at that time. LIV R. Ex. 6. Upon receipt of this letter, one of the professors resigned his position with Respondent. Thus, there remained only Grievant and one other professor holding Title III funded positions with Respondent.

3. On June 19, 1996, President Moore sent letters to Grievant and the other professor notifying them they were being issued one-year terminal contracts, and would not be retained beyond the 1996-97 academic year. After receipt of this letter, the other professor resigned his position with Respondent. LIV R. Ex. 4, 7.

4. Two faculty members employed under programs utilizing Title III funding applied for and received posted vacant positions under state funding, which had become vacant as the result of resignations. Grievant did not apply for either of these positions.

5. Grievant had problems in the past with attendance while serving as a professor of Criminal Justice at Respondent's Lewisburg campus. LIV Resp. Exs. 8-13. As a result of these problems, Respondent kept an attendance log on Grievant.

6. One other white faculty member also had attendance problems, and an attendance log was also kept on him.

7. Grievant received only two evaluations during his tenure with Respondent. 8. Grievant was not terminated because of performance problems. Respondent has not hired any additional faculty under Title III funding since Grievant's termination. Respondent has hired new staff

employees into existing Title III programs, due to resignations of existing staff.

9. Grievant was offered and has accepted an adjunct professor position at Respondent's Bluefield campus.

CONCLUSIONS OF LAW

1. W. Va. Code § 18-29-4(a)(1) provides:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievance or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

2. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that 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. Kessler v. W. Va. Dept. of Trans., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

3. Respondent has failed to prove by a preponderance of the evidence that all claims in the grievance were untimely filed.

4. W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by showing:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

5. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. Grievant made sufficient allegations to make a prima facie case of discrimination. 7. Respondent offered legitimate, non-discriminatory reasons for the actions taken which Grievant alleges constitute discrimination.

8. Grievant has failed to prove by a preponderance of the evidence that he has been discriminated against on the basis of race by Respondent.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: November 5, 1997

Footnote: 1

References to the level two transcript and exhibits will be "Tr., p. ___", and "LII Ex. ___". References to the level four exhibits will be "LIV Ex. ___".