THEODORE N. PAULS,

Grievant,

v. **Docket No. 98-BOD-242**

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Theodore N. Pauls, employed by the Board of Directors (Respondent) as an Associate Professor of Marketing in the School of Business Administration at West Liberty State College (WLSC), initiated this matter after he was issued a terminal contract for the 1998-99 academic year. The parties agreed to waive consideration to level two. Following a hearing at that level the grievance was denied by WLSC President Ronald M. Zaccari on June 30, 1998. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on July 6, 1998. An evidentiary hearing was conducted at the Grievance Board's Wheeling office on September 15, 1998, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law on or before October 16, 1998. (See footnote 1)

The relevant facts of this matter are undisputed. Grievant was first employed by WLSC in August 1993. The Marketing Department of the School of Business Administration presently has a staff of three full-time professors, including Grievant. The remaining faculty, Dr. Jean Bailey and Dr. Keith Lawson, are both tenured. There has been a decline in the enrollment of students in the WLSC business school of approximately 30% over the last ten years. In January 1998, WLSC determined that the entire FashionMarketing program would be eliminated based upon an eleven year low in enrollment, graduation rates of one to two students per year, and no anticipation of enrollment turnaround, which made the specialization an inefficient use of the school's resources. With the elimination of Fashion Marketing, the department became overstaffed by one position.

On January 29, 1998, Dr. Betsy Robinson, Interim Dean of the School of Business Administration advised Grievant that he would be issued a terminal contract. By letter dated April 27, 1998, President Zaccari notified Grievant that he would not be retained, and would receive a terminal Notice of Faculty Appointment for the 1998-99 academic year.

Grievant argues that the issuance of a terminal contract was in violation of WLSC Policy 243, which specifically addresses “Faculty Retrenchment”. Respondent asserts that it followed all applicable laws and policies when it issued Grievant a terminal contract. It further argues that the grievance was not timely filed, because Grievant was verbally advised on January 29, 1998, that he would receive a terminal contract, but did not file a grievance until on or about May 27, 1998, some seventy-eight days later.

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. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & HumanResources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public 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).

W. Va. Code §18-29-4(a)(1) provides that an employee shall schedule a conference with his or her immediate supervisor to discuss the nature of the grievance and the remedy sought, “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 . . . .” Respondent characterizes the verbal notification as the grievable event, while Grievant obviously perceives the grievable event to be the written notice. As previously stated, Grievant was advised of the terminal contract by letter dated April 27, 1998.

Although it appears the decision to reduce the Marketing faculty may have been made in January 1998, Grievant did not receive official notification that he would receive a terminal contract until President Zaccari issued the April 27 letter. Still, Grievant did not initiate these proceedings until May 27, some thirty days later. Grievant simply did not begin the proceedings in a timely manner. Unfortunately for Respondent, W. Va. Code §18-29-3 provides that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing." Respondent did not raise this issue until level four, and therefore cannot rely on a timeliness defense in this case.

Addressing the merits of the grievance, Grievant asserts that WLSC is bound to follow its own policies, and that Policy 243, Faculty Retrenchment, required that it take other actions prior to issuing him a terminal contract. Specifically, Grievant argues that the policy requires the elimination of temporary and part-time adjunct, faculty, providing they do not have a teaching specialty necessary for a particular curriculum which cannot be covered by a full-time faculty member. Grievant asserts that he is capable of assuming a number of classes now taught by temporary and adjunct faculty. Respondent did not present any testimony to rebut this.

Respondent asserts that Policy 243 applies only to large-scale layoffs of faculty when financial exigency is declared under Policy 244. John McCullough, Provost and Vice- President of Academic Affairs, testified that it was never intended to apply toward the elimination of a single, probationary faculty position, and has never been applied in his recollection. Respondent concludes that the issuance of the terminal contract was proper.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. Board of Directors Procedural Rule 36, §13.1 provides that "[a] tenured or tenure- track faculty member's appointment may be terminated because of the reduction or discontinuance of an existing program at the institution. . . ." WLSC has developed a more complex Policy 243, which in part provides guidelines for achieving staff reductions in an area which has been determined to be overstaffed. It states:

[s]taff reductions in overstaffed areas should be achieved in the following manner:

A. Normal attrition (e.g., voluntary resignation, retirement).

B. Dropping of previously retired personnel who might be employed.

C. Elimination of temporary faculty.

D. Dropping of part-time (adjunct) faculty, providing they do no have a teaching specialty necessary for a particular curriculum which cannot be covered by a full-time faculty member.

E. Dropping of non-tenured faculty . . . .

Policy 244 provides that "[o]nly the West Virginia Board of Directors has the authority to define and declare a state of **Financial Exigency**" which is defined as a state of imminent financial crisis, affecting the entire system of higher education, not individual institutions, resulting from actions or conditions beyond the control of the Board of Directors. The Policy contains the Financial Exigency Plan which provides cost-reduction steps to be taken in the following order: (1) curtailment of current expenses (maintenance, supplies, travel, extracurricular activities, cultural and student services), equipment purchases, and repairs and alteration. (2) Curtailment of personal service expenditures including part-time student help, elimination of non-essential extended education courses, reduction of extra stipend for extended education courses, elimination of part-time faculty, freezing of new employment, etc. (3) Termination of faculty positions. Although it may be the understanding of WLSC administrators that Policy 243 applies only in conjunction with Financial Exigency, addressed in Policy 244, or in large scale lay-offs, the Policies are not cross-referenced, and the language of Policy 243 does not support that interpretation. Clearly, the Board of Directors had not declared Financial Exigency at WLSC; however, the School of Business Administration did experience an overstaffing. Therefore, the guidelines of Policy 243 are applicable in this situation.

In addition to the foregoing it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the Board of Directors as a tenure-track, Associate Professor of Marketing at West Liberty State College since August 1993.

2. In January 1998, WLSC decided to eliminate its Fashion Marketing program in the Department of General Business and Marketing.

3. With the elimination of the Fashion Marketing program, WLSC no longer needed three full-time instructors in that department.

4. Grievant was the only non-tenured faculty member in the Department of General Business and Marketing.

5. By letter dated April 27, 1998, President Zaccari notified Grievant that he would be issued a terminal contract for the 1998-99 academic year.

6. Grievant initiated these proceedings on May 27, 1998.

7. Respondent did not raise a timeliness defense at level two.

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis thatit was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); 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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

2. W. Va. Code §18-29-4(a)(1) provides that an employee shall schedule a conference with his or her immediate supervisor to discuss the nature of the grievance and the remedy sought, “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 . . . .”

3. W. Va. Code §18-29-3 provides that “[a]ny assertion by the employer that thefiling of the

grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing."

4. Respondent failed to raise the issue of timeliness at or before the level two hearing.

5. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

6. Grievant has proven that WLSC Policy 243, Faculty Retrenchment, is applicable in this matter.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to re-evaluate the situation under Policy 243 to determine whether Grievant should have been issued a terminal contract.
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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: November 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by M. Eric Frankovitch, Esq., and Respondent was represented by Gregory G. Skinner, Assistant Attorney General.