NICK WOUNARIS, JR.,

Grievant,

v. **DOCKET NO. 99-BOD-033D**

BOARD OF DIRECTORS/WEST VIRGINIA STATE COLLEGE,

Respondent.

DECISION ON DEFAULT

Grievant, Nick Wounaris, Jr., filed this grievance against the Board of Directors/West Virginia State College ("State"), at level four on January 25, 1999. Grievant protests his dismissal from State by Hazo W. Carter, Jr., President, and Cassandra B. Whyte, Vice President of Administrative Affairs, dated October 8, 1998. A level four hearing was conducted on March 2, April 12 and 13, 1999. This matter became mature for decision at the close of the hearing on April 13, 1999. Grievant appeared pro se, and State was represented by Kristi A. Rogucki, Esq., Assistant Attorney General.

ISSUES

Grievant alleges State defaulted on his grievance, denied him due process, and discriminated against him, a white male, at a predominantly black institution of higher learning. State denies the allegations made against it, and asserts that Grievant was an

at-will employee who could be terminated at any time for any reason, and also asserts the grievance was untimely filed.

DEFAULT

Grievant contends he has prevailed because State defaulted on the grievance. W. Va. Code § 18-29-3(a) provides, in pertinent part:

> . . . If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

Grievant was terminated on October 8, 1998, when he was personally given his termination letter by his immediate supervisor, Vice President of Administrative Affairs, Dr. Cassandra Whyte. At that time, Grievant asked Dr. Whyte to meet to discuss his termination. He also told her he wanted to speak with President Hazo Carter regarding his dismissal. Dr. Whyte did not discuss his termination with him at that time, and she also told him he could not speak to President Carter.

Barbara Rowell, the Human Resources Director, was on a medical leave of absence during this time. In her absence, Grievant had acted as the Human Resources Director, including dealing with employee grievances. Upon Grievant's termination, Dr. Whyte was the individual responsible for the Human Resources department. Thus, Dr. Whyte was the appropriate person for Grievant to talk to regarding his dismissal. Despite this, Dr. Whyte

testified that she did not think Grievant meant he was filing a grievance when he asked to speak to her or Dr. Carter about his dismissal, and she did not ask him to clarify what he meant when he asked for a meeting with her or Dr. Carter. Grievant waited for Dr. Whyte to set up a conference to discuss his dismissal, but no conference was ever initiated by her in response to his request.

Following the brief discussion with Dr. Whyte on October 8, 1998, Grievant was escorted from the building and off campus by Mr. Gil Flores, Director of Public Safety. Mr. Flores was present during Grievant's discussion with Dr. Whyte, but did not remember Grievant formally invoking the grievance procedures. However, he does remember Grievant asking him to pay close attention to the questions he was asking Dr. Whyte, and also remembers Grievant going to the President's office before leaving the campus.

_____Grievant drafted a Freedom of Information Request on October 8, 1998, the date of his termination, which he sent to President Carter. Although not specifically identified in the request, it is quite obvious from a review of the document that Grievant is requesting information relating specifically to his termination, as well as other issues, such as discrimination, selection, and procedures governing non-classified employees at State. Grievant sent a copy of this document to Dr. Whyte, as well as Bruce Walker, Esq., General Counsel for the State College and University Systems of West Virginia.

Despite this memorandum, no conference was scheduled with Grievant regarding his dismissal. However, Dr. Whyte did respond to Grievant by letter dated October 12, 1998, acknowledging his FOIA request and directing him to contact Lawrence Smith, Director of Fiscal Affairs, to view the records requested. On October 16, 1998, Grievant

wrote to Mr. Smith asking for his final paycheck to be issued. Mr. Smith responded by letter dated October 19, 1998.

On October 20, 1998, Grievant wrote a letter to Dr. Whyte summarizing the discussion they had in her office on October 8, 1998, and specifically noting that she refused to speak to him about his termination, and told him he could not speak with Dr. Carter. Still, no meeting was set up with Grievant by Dr. Whyte or anyone else at State.

Finally, on December 9, 1998, Grievant wrote a letter to Chancellor Clifford Trump, summarizing the events which had transpired since his termination, and alleging default on the part of State, as well as discrimination. Along with that letter, Grievant completed a grievance form and submitted it to the Chancellor. On December 10, 1998, Bruce Walker responded to Grievant, acknowledging receipt of his letter to the Chancellor, and the grievance form. Mr. Walker informed Grievant in that letter that he had to first request an informal conference with his immediate supervisor, and then file his grievance. Mr. Walker goes on to say that, "[w]e find no record that you attempted to schedule a conference with your supervisor within fifteen days of [October 8, 1998] or attempted to file a grievance in any other manner during that period." Finally, Mr. Walker informs Grievant that, if he is alleging that State defaulted in processing his grievance, he must make those assertions, in writing, to his immediate supervisor, Dr. Whyte. On December 15, 1998, Grievant complied with Mr. Walker's instructions, and informed Dr. Whyte that he was asserting State was in default. Dr. Whyte responded to Grievant on January 7, 1999, denying State was default, and contending that he had never filed a grievance, or asked for an informal conference with her regarding his dismissal.

Grievant again wrote to Dr. Whyte and Chancellor Trump on January 14, 1999, asserting that State was in default, and again asking that his grievance be addressed. Bruce Walker responded to Grievant on January 20, 1999, again asserting that Grievant had not properly initiated or processed his grievance. Following that correspondence, Grievant appealed to level four on January 25, 1999, asking for relief on his grievance.

At the level four hearing, Mr. Walker testified that, because he, personally, was unaware that Grievant had attempted to initiate his grievance through Dr. Whyte, State could not be in default. While I am sure Mr. Walker wishes he had known that Grievant attempted to discuss this matter with Dr. Whyte on October 8, 1998, the date he received his termination letter, there is nothing in the grievance statute that requires the employer's counsel to be aware of that attempt before the employer can be held in default. See, Syl. Pt. 2, Harmon and Chiles v. Fayette County Bd. of Educ., No. 25323, ___ W. Va. ___,___ S.E.2d ____ (1999).

This is especially true in this instance, where Dr. Whyte was, in effect, acting as the Human Resources officer at the time Grievant was handed his termination letter. If anyone at State should know the requirements of the grievance process, it should be the Human Resources officer. The uncontested facts in this matter are that, when Dr. Whyte presented Grievant with his termination letter on October 8, 1998, he asked her when they could get together and discuss his termination. Even though Grievant did not say the magic word, "grievance", Dr. Whyte should have been keenly aware that a discharged employee has the right to invoke the grievance process, and should have been on alert enough to have asked Grievant if he was asking for an informal conference at the time. As it turned out, Dr. Whyte never offered Grievant the opportunity to discuss this matter

with her, or with anyone else at State, and thus, State failed to comply with the grievance requirements and time lines, thus placing it in default at level one. Further, even if it could be argued that Dr. Whyte had no such obligation in this matter, Grievant did file his grievance on the accepted grievance form on December 9, 1998. While State may have believed the grievance was untimely filed at that time, that did not excuse it from responding to, and processing, the grievance form in some way. It did not respond in a timely fashion, and thus, was in default again.

W. Va. Code § 18-29-3(a) only provides two excusable reasons for an employer to avoid being in default: sickness or illness. Neither of those excuses were offered by State. Rather, in accordance with W. Va. Code §18-29-3(a), State requested a hearing to show that the relief sought by Grievant was contrary to law or clearly wrong. Grievant requests reinstatement, back pay, benefits, a new job title, a $20,000 salary increase, and an apology from State. State argues that the relief sought by Grievant is contrary to law and clearly wrong, because (1) the grievance was untimely filed; and (2) Grievant was an at-will employee, who could be terminated at any time for any, or no, reason.

TIMELINESS DEFENSE

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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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 Transp., Docket No. 96-DOH-445 (July 29, 1997); 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).

W. Va. Code § 18-29-4(a) provides that,

> (1) 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 . . . , 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.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievance in the grievant's own behalf or by both the grievance and the designated representative.
>
> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
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> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent. (Emphasis added).

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra.

See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant received his termination letter on October 8, 1998. R. Ex. 2. As discussed above, Grievant also requested an informal conference with his supervisor on that same day. No conference was ever scheduled to discuss Grievant's termination.

On the morning of October 9, 1998, Grievant requested grievance procedure information from the Human Resources Office. R. Ex. 3. On that same date, Grievant personally obtained a packet of information from James Buchanan, Administrative Secretary for the Human Resources Office, detailing the grievance procedure. R. Ex. 3. This packet of information included the Grievance Form for all four levels of the grievance procedure, a grievance time line, and a complete copy of W. Va. Code § 18-29-1, et seq. R. Ex. 4. Grievant filed his grievance on a form furnished by the employer, on December 9, 1998, two months after receipt of his termination letter. State alleges that no grievance was ever filed until Grievant completed the proper grievance form. However, the statute clearly states that a grievance form is not required to be filled out until ten days following the supervisor's response from the informal conference. Grievant never had an informal conference, and State was in default before Grievant could be said to be penalized for failing to complete a proper grievance form.

AT-WILL EMPLOYMENT

W. Va. Code § 18-29-2(c) defines "employee" as "any person hired as a temporary, probationary or permanent employee by an institution either full or part time." Thus, although Grievant serves at the will and pleasure of State because he is classified exempt, he is nonetheless an "employee" within the meaning of W. Va. Code § 18-29-2(c). See

Willis, supra. See Wilhelm v. Dep't of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994) (hereinafter "Wilhelm"), aff'd sub nom Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996); Bonnell v. W. Va. Dep't of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990). There is no dispute that Grievant was serving in an at-will employment status. See Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996); Ramos v. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-363 (Jan. 29, 1999); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy. Roach, supra; Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978).

Although this issue is addressed here for the first time, it would appear that if an at-will employee's claim of unlawful discharge is subject to dismissal for failure to state a claim upon which relief can be granted, then an at-will employee cannot prevail by default, unless he alleges a violation of a substantial public policy. See Wilhelm, supra. Further, Wilhelm held that simply alleging discrimination under the Grievance Board's statute is not sufficient to state a claim. However, in the instant grievance, Grievant has alleged a violation of a substantial public policy, i.e., race discrimination. Racial discrimination, if proven, would be a violation of the West Virginia Human Rights Act, §§ 5-11-1, et seq., and the West Virginia Supreme Court held in Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995), that this Grievance Board can adjudicate a claim that is also covered by the Human Rights Act. Therefore, and only, because Grievant has

raised a claim involving a substantial public policy, would he be entitled to any relief due to the employer's default.

However, there is no authority vested with this Grievance Board to grant Grievant a new job title or $20,000 in damages. This relief is similar to "pain and suffering" damages. In Snodgrass v. Kanawha County Board of Education, Docket No. 97-20-007 (June 30, 1998), this Grievance Board stated, "[a]n administrative law judge may 'provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .'. W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case." Accord, Vest, supra. As the statutory relief authorized to the Grievance Board is limited to reinstatement, back pay, benefits, and interest, it would be contrary to the Grievance Board's statutory jurisdiction to comply with all of Grievant's requested relief, and that portion of his requested relief is denied.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was employed by State as Assistant Vice President for Administrative Affairs, and served as an at-will employee.

2. Grievant was hand-delivered his termination letter by Vice President of Administrative Affairs, Dr. Cassandra Whyte, his immediate supervisor, on October 8, 1998, stating he was being dismissed because of "loss of confidence."

3. Grievant requested an informal conference to discuss his termination with Dr. Whyte and President Hazo Carter on October 8, 1998.

4. Grievant was never given an informal conference.

5. Grievant repeatedly wrote letters to Dr. Whyte, President Carter, and Chancellor Clifford Trump, with copies to State's counsel, Bruce Walker, Esq., protesting his dismissal, asserting claims of discrimination, and asking for his grievance to be heard.

6. Grievant filed his grievance on a form provided by State on December 9, 1998.

7. State still did not schedule a conference with Grievant, or respond to the grievance in any way, except to tell him that he had not followed the proper procedures.

CONCLUSIONS OF LAW

1. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. W. Va. Code § 18-29-3(a).

2. Dr. Cassandra Whyte, as Grievant's immediate supervisor, and acting Human Resources Director at the time of Grievant's dismissal, was the grievance evaluator required to make a response to Grievant's request for an informal conference to discuss his termination.

3. Dr. Whyte did not respond in a timely fashion to Grievant's request, and Grievant has prevailed in his grievance by default.

4. There is nothing contrary to law or clearly wrong in reinstating a dismissed at-will employee, with full back PAY and benefits.

5. This Grievance Board has no authority to grant Grievant a new job title or $20,000 in damages. See Snodgrass v. Kanawha County Board of Education, Docket No. 97-20-007 (June 30, 1998).

6. “An administrative law judge may 'provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .'. W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award ‘tort-like’ damages for pain and suffering, and will not choose to do so in this case." Snodrass v. Kanawha County Board of Education, Docket No. 97-20-007 (June 30, 1998). Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995).

7. As the statutory relief authorized to the Grievance Board is limited to reinstatement, back pay, benefits, and interest, it would be contrary to the Grievance Board’s statutory jurisdiction to comply with all of Grievant’s requested relief, and that portion of his requested relief is denied.

Accordingly, Grievant’s motion for default is **GRANTED IN PART**, and State is hereby **ORDERED** to reinstate Grievant to his former position of Assistant Vice President for Administrative Affairs, with full back pay and benefits, plus interest from the effective date of his discharge.

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. 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ
Administrative Law Judge

Dated: May 18, 1999