JOY BUTTS,

Grievant,

v. **Docket No. 01-HE-021**

Docket No. 01-HEPC-515

HIGHER EDUCATION INTERIM GOVERNING

BOARD/SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Grievant, Joy Butts, Associate Professor of Developmental Mathematics in the Community and Technical College ("CTC"), filed this grievance against her employer, Shepherd College ("Shepherd"), on September 28, 2000. (See footnote 1) Her Statement of Grievance reads:

> **I am [a] ten-month faculty employee _ _ the college has prepared for me a nine-month appointment form which reduces my annualized pay.**

.

> **Relief Sought: I want my money for the other full month, with interest.**

This grievance was denied at Level I in a timely manner on October 2, 2000. Grievant then appealed to Level II on October 3, 2000. A Level II hearing was held on March 29, 2001, and a Level II Decision was rendered on April 5, 2001. Grievant appealed to Level IV on April 9, 2001. By agreement of the parties, a Level IV hearing was held on June 15, 2001, at Shepherd College in Shepherdstown, West Virginia. This case became mature for decision on September 7, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) Grievant filed a second grievance on the same issue when she was issued a nine- month contract for the following academic year, 2001-2002. (See footnote 3) The parties asked to consolidate these grievances for Decision at Level IV, as the evidence was the same for each case. This request was granted by order dated September 25, 2001. The

undersigned Administrative Law Judge noted there could be a problem. The first grievance was filed under the education grievance statute, and the second grievance was filed under the state grievance statute. As of July 2001, higher education employees' grievance rights are governed by the state grievance procedure. Given the ruling in this grievance, this issue need not be considered further.

Issues and Arguments

Respondent argues the grievance is not timely filed, and moved the grievance be dismissed. This argument was presented by Respondent at Level II, but the Level II Decision did not address this issue and denied the grievance on other grounds. Grievant argued the issue could not be presented at Level IV because of the Hearing Examiner's failure to address the issue at Level II. The undersigned Administrative Law Judge noted that according to W. Va. Code § 18-29-3(a) this defense must be asserted at or before Level II, but does not state the failure of a Hearing Examiner to rule on the issue at Level II renders it moot. The undersigned Administrative Law Judge also noted Level II HearingExaminers frequently are not attorneys, and the failure of a lower level Hearing Examiner to address any issue is not dispositive of a raised issue for either party.

Grievant also asked for additional time to review the transcript from below and to present additional argument on the timeliness issue. Respondent had no objection to these requests, and proposed Findings of Fact and Conclusions of Law were then scheduled to meet the requests of the parties. (See footnote 4)

Grievant argued her ten-month contract could not be reduced to a nine-month contract because of a prior circuit court order entered in 1998, which held Grievant could be placed in a ten-month faculty position to resolve a prior grievance. (See footnote 5) Grievant essentially argues this contract can never be changed. (See footnote 6)

Respondent argues that according to W. Va. Code § 18B-8-6, a faculty member cannot have a ten-month contract unless the parties mutually agree. It is noted that when Grievant first began her ten-month contract she was assigned additional duties both before and after the regular school year. There is no longer a need for these duties, and theseduties were not performed in 1999 - 2000. Respondent also pointed out Grievant is the only tenured faculty

member at CTC to have a ten-month contract, and even Grievant's supervisor has only a nine-month contract. Respondent asserts it should not be required to keep Grievant in a ten-month contract when there is no need for the additional duties, and other faculty do not have the same type of contract. Respondent maintains that although Grievant's overall compensation is reduced, her monthly salary is increased over her monthly salary from the prior year. Further, Respondent argues, in the alternative, that if the administrative law judge should find Grievant is entitled to the relief sought, that Grievant's salary should be adjusted rather than requiring Respondent to place Grievant in a ten-month contract in violation of W. Va. Code § 18B-8-6.

Since a finding the grievance was untimely filed could be dispositive of the grievance, that issue and the appropriate facts will be addressed first. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact on the issue of timeliness.

Findings of Fact

1. On or about June 16, 2000, Grievant was mailed her contract/faculty appointment for the 2000 - 2001 school year. Her ten-month contract had been changed to a full-time, nine-month contract.

2. The faculty appointment states, "[a]cceptance of this appointment is signified by signing and dating (below) this form which must be received at the Office of the Provost of The Community and Technical College at Shepherd within fifteen (15) days from the date which appears below the President's signature." (Emphasis in the Original.) The date below President David Dunlop's signature was June 16, 2000. 3. Grievant did not return the faculty appointment in a timely manner. Grievant offered no reason why her faculty appointment was not returned as requested.

4. On or about August 1, 2000, Grievant's attorney was notified Shepherd planned to start proceedings against Grievant for job abandonment. The result of this action would be the loss of Grievant's faculty appointment.

5. On August 1, 2000, Grievant's attorney signed Grievant's contract for her and faxed it to Shepherd on the same date.

6. Grievant returned to work on August 17, 2000.

7. Contrary to Grievant's testimony, she knew or should have known the contents of her faculty appointment on or before August 1, 2000. (See footnote 7)

8. On August 22, 2000, Grievant wrote the following letter to President Dunlop. This letter stated:

> This year's Shepherd College faculty appointment document dated June 16, 2000, to which you affixed your signature contains inaccurate and invalid information again for the fourth consecutive year. Although my repeated attempts to get these public documents corrected have been executed thru your designated staff, no corrections yet appear to have been made as of my August 18 review of said document.
>
> Please correct this year's document before re-issuing to me.

(Emphasis in the Original.)

9. On August 29, 2000, Grievant again wrote President Dunlop. This letter stated:

> Within ten days, please furnish me with a list of reason(s) for the following:
>
> 1. Adjustment of my base salary and related property rights of twenty-three fiscal years, as indicated on the WV Department of Administration's Personnel Action Form document which I received from Business Office personnel on Monday, August 28, and
>
> 2. Failure of the institution to provide me with the requisite timely notification described under Title 131 Procedural Rules of the State College System of WV Board of Directors Series 36 and the Shepherd College Faculty Handbook.

10. On September 8, 2000, Provost Peter Checkovich responded to Grievant's second letter at the direction of President Dunlop. He stated:

> Please note the term of your annual appointment was reduced from 10 (ten) months to 9 (nine) months[,] but your monthly salary was not reduced at all. I direct your attention to WV Code § 18B-8-6, which provides that:
>
> > Any employment for greater than a nine-month period, or any

> **responsibilities in excess of full-time duties, shall be only by mutual agreement of the employee and the institutional president or other administrative head, or the designated representative, in accordance with rules of the appropriate governing board. The terms and conditions of any such agreement shall be in writing, signed by both parties, and shall state the maximum number of additional employment days or credit hours or their equivalent to be worked and the amount of compensation to be paid.**

Inasmuch as I determined that the Community and Technical College did not need for you to perform any duties during the first two weeks of August nor the last two weeks of May '01, I decided to issue a 9 month contract to you.

As near as I can determine, there is no provision in Series 36 which requires any specific notice to you on this matter other than the Notice of Appointment. As you now know, we made extensive efforts to provide that to you much earlier in the summer. In the future it will be essential that you make appropriate arrangements to be able to receive and return the annual Notice of Appointment in the appropriate time frame.

11. This grievance was filed on September 28, 2000.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Here, Respondent asserts this grievance was untimely filed. 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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394 (Sept. 25, 2001); Hawranick v. W. Va. Dep't

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 maydemonstrate a proper basis to excuse her failure to file in a timely manner. 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). 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). If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

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

> 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.

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 v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). 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).

Respondent notes it mailed Grievant her faculty appointment in mid-June 2000. No response was received. In fact, the form was not returned until August 1, 2000, after Grievant was threatened with the loss of her position for job abandonment. The only reason

Grievant gave for this failure to respond to her mail was somewhat muddled. Grievant alleged Administrative Law Judge Sue Keller had ordered Respondent to deliver her mail in one specific manner and to one specific place. If the mail was not given to her in this manner, it appears Grievant felt free to either return the mail unopened or not respond to it.

The undersigned Administrative Law Judge requested a copy of this Order, and discovered such an Order does not exist. At one time the parties had reached a potential settlement agreement, in another grievance, which gave Grievant a mail box in a certain building. This settlement agreement was never signed, and the grievance on this matter was dismissed by Administrative Law Judge Keller, due in large part, to Grievant's failure to respond to the mail from this Grievance Board, Respondent's attorney, and Grievant's own representative. Accordingly, Grievant's belief that she had the right to ignore any mail sent to her unless it was delivered to her in a certain way is incorrect and ill-advised. When she was sent her faculty appointment, she was required to open it and respond in a timely manner. This reasonable request of her employer should be complied with, and Grievant did not do so.

Even if Grievant is given the benefit of the doubt, and in actuality did not see her faculty appointment until August 1, 2000, she needed to file her grievance within fifteen days of that date. And going further, and accepting Grievant's version of the facts, that she did not see her faculty appointment until after she returned to work on August 18, 2000, Grievant still did not file until September 28, 2000, approximately thirty working days after she received notice her contract had been changed. Thus, after looking at the issue from all angles, and in the light most favorable to Grievant, her filing on September 28, 2000,is outside the fifteen-day time period for filing a grievance as required by W. Va. Code § 18-29-4(a)(1). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). See, e.g., Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998); Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). Grievant sought to excuse her late filing by arguing the two letters she wrote on August 22 and 26, 2000, were the same as filing a grievance. It is noted that the first letter did not even mention the change in contract, but complained about an on-going, four year problem. These letters were insufficient to toll the time period for filing a grievance. There was no indication in these letters of Grievant's intent to file. Naylor, supra;

Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995). See Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). It is also noted Grievant is well acquainted with the grievance process, and with the timelines. She frequently files grievances and claims for relief by default, and complains when the timelines are not met by Respondent. (See notes 1 and 3). Additionally, Grievant was represented by an attorney, who was aware of the contents of the contract.

As this grievance was not timely filed, it is unnecessary to discuss the merits of the case. It is also noted Grievant's second grievance is encompassed in this ruling, as the issuing of the second contract does not represent a separate occurrence. The event complained of, a change in contract, occurred in June 2000.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

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. Casey v. Mason County Bd. of Educ., Docket No. 01-26-394

(Sept. 25, 2001); Hawranick v. W. Va. Dep't 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). 3. Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. 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). 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). If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

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

> 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.

5. 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 v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). 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).

6. The filing of this grievance on September 28, 2000, is outside the fifteen-day time period stated by W. Va. Code § 18-29-4(a)(1). 7. Grievant has failed to demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham, supra.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Jefferson 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: October 31, 2001

Footnote: 1

Grievant submitted this grievance to Level IV in October 2000, but it was remanded to Level II for Decision.

Footnote: 2

Grievant was represented by Attorney Larry Schultz, and Respondent was represented by its attorney, Alan Perdue.

Footnote: 3

Grievant alleged no Level II conference was scheduled or held in the second grievance, in a timely manner. The record attached to Respondent's request to consolidate the grievances, which was joined by Grievant's attorney, reveals the grievance was filed to Level II on September 4, 2001, a Level II conference was scheduled by letter dated September 5, 2001, for September 10, 2001, and Grievant did not appear for the conference. A Level II Decision denying the grievance was issued September 17, 2001, along with a recommendation the grievance be dismissed for failure to attend the scheduled Level II conference. Respondent actions were timely.

Footnote: 4

The issue of timeliness was not addressed in Grievant's submissions.

Footnote: 5

This prior grievance found Grievant had been wrongfully terminated and ordered placement of Grievant into a position substantially similar to the one she held at the time of her discharge, but preferably not in the same department as before. See Butts v. W. Va. Bd. of Directors, Docket No. 91-BOD-444 (May 28, 1992). After many years of argument between the parties as to what was a substantially similar position, Respondent asked the circuit court to resolve the issue.

Footnote: 6

For the first time, Grievant also argued she should receive the current or same compensation as the person now filling her former staff position. Insufficient evidence was presented to support this contention. No evidence about this non-faculty position was introduced including pay grade, promotions, duties, and the effect of the Mercer Reclassification Plan. Grievant is now in a faculty position which is not controlled by these types of issues. This argument is without merit and does not reflect the holding of the circuit court.

Footnote: 7

Grievant testified she first saw her faculty appointment on August 18, 2000.