MANUEL A. VELEZ,

Grievant,

v. Docket No. 03-HEPC-320

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Manuel A. Velez ("Grievant"), employed by West Liberty State College ("WLSC") as a tenured, full-time Professor of Oral Medicine and Clinical Supervisor, filed a grievance on September 2, 2003, in which he alleged a violation of W. Va. Code § 29-6A-2(d). Specifically, Grievant is given two-thirds credit for each contact hour of laboratory/clinic hour, while other faculty are given one credit hour for each contact hour. For relief, Grievant requests one full hour credit for laboratory/clinic assignments, back pay with interest for overload hours and on-call hours since Fall 1989, that on-site/on-call supervision be considered in determining teaching load, that on-site/on-call supervision be a separate, written agreement, attorney fees, court costs and reasonable expenses.

Consideration of the grievance was waived at level one by Margaret Six, Grievant's immediate supervisor, since she does not possess the authority to grant the relief requested. Ms. Six, did note, however, that she believed the grievance had not been filed in a timely fashion. Dr. Monica Kennison did not have the authority to grant the relief at level two, but also noted the matter had not been timely filed. The grievance was denied at level three by WLSC President, Dr. Richard H. Owens, and appeal was made to level four on October 9, 2003. A level four hearing was conducted in the Grievance Board's Wheeling office on February 5, 2004, at which time Grievant was represented by Daniel C. Tomassetti, Esq., and WLSC was represented by Assistant Attorney General SamuelR. Spatafore. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before March 24, 2004.

The following facts have been derived from the record in its entirety.

Findings of Fact

1. Grievant, a dentist, was employed by WLSC as an Associate Professor in Fall 1989. He was granted tenure, and promoted to Full Professor of Oral Medicine in the Dental Hygiene Program in 1995.

2. In addition to classroom lecture courses, Grievant is responsible for supervision of laboratory/clinical courses. Grievant is assigned seventeen or eighteen contact hours per semester. Typically, Grievant's semester teaching load consists of six or seven lecture hours and eleven clinical hours. Additionally, Grievant is required to be on-site for on-call supervision fifteen and one-half hours per week.

3. Lecture classes may vary from one to twelve credits, but most are three credit hours, and meet for three clock hours weekly during a fifteen week semester. School of Sciences faculty receive one hour of credit for each clock hour of lecture classes taught. However, an adjusted credit hour is assigned for contact hours in the clinic/laboratories. For each clock hour in these courses, the faculty members are credited with two-thirds of a contact hour.

4. Applying the adjusted credit hours for clinical/laboratory assignments to Grievant's course load, his seventeen contact hours are considered to be thirteen and one- third semester credit hours.

5. WLSC Policy 245 provides for a flexible faculty salary plan to accommodate special circumstances, including teaching overloads. WLSC Policy 210 states that twelvehours is the minimum, and fifteen hours the maximum semester hours for full-time teaching personnel. Hours beyond the maximum are to be compensated according to the pay schedule for overload teaching. This pay schedule is based upon rank, with a Professor earning $500 per semester hour and an Assistant Professor earning $450 per hour.

6. The “Notice Of Faculty Appointment” issued to Grievant in 2001 and 2002 included a notation, that “[t]his appointment includes responsibilities and duties as Supervising Dentist.” The notation was not included on the 2003 Notice, due to an error in a new software program being used by WLSC.

7. WLSC properly raised the issue of whether this matter was timely filed at all lower levels.

Discussion

WLSC asserts that the grievance was not filed within the time lines set forth in W. Va. Code §29-6A-4, and must be denied. A timeliness argument is an affirmative defense. As the resolution of the timeliness issue could be determinative of the grievance as a whole, it will be addressed first. When 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); 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). Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate aproper basis to excuse his 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). A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., 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).

Clearly, this grievance was not filed within ten days of the action Grievant complains of, i.e., calculation of laboratory hours, and compensation for on-call time. Grievant asserts that the grievance was timely filed under the discovery rule exception set forth in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Specifically, Grievant states that he was not mindful or aware that he had a legally protected claim regarding the overload compensation until he read another level four decision dealing with the same issue,

Baker, et al. v. Fairmont State Technical & Community College, Docket No. 02-HEPC-068 (June 27, 2002). Grievant opines that it is understandable that upon reading that decision, he would realize that he too had been discriminated against, and hada legal claim and recourse. Thereafter, he filed this matter within the required ten days after receiving his Fall 2003 teaching schedule, which revealed a continued refusal to properly calculate his contact hours.

Grievant has failed to demonstrate a proper basis to excuse his failure to file in a timely manner. He does not deny that he was unequivocally notified of his employment terms upon his employment in 1989, and that he had not expressed dissatisfaction with them through the grievance procedure prior to the filing of this matter. The circumstances of this case does not fall under the discovery rule exception because it is not the discovery of a similarly situated party prevailing on his claim, or a legal theory, that triggers the statutory time lines. Rather, the time begins to run when the grievant learns of the facts of his own case. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Rhodes v. Div. of Corr. and Div. of Personnel, Docket No. 03-CORR-152 (Jan. 27, 2004); Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (1999); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH 341(Oct. 29, 1997). "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993).

Neither does this grievance allege a continuing practice. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot beconverted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Young v. Div. of Corr., Docket No. 01-CORR-059 (July 10, 2001); Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995). See also Jones v. Div. of Rehabilitation Services, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases). The grievance was not timely filed, and this grievance does not fall

within the continuing practice or discovery exceptions.

Even had the grievance been timely filed, Grievant could not prevail on the claim of discrimination. Grievant is not similarly situated to any other faculty member at WLSC. While others have laboratory/clinic components to their teaching load, Grievant does not actually teach during this time. He does not prepare or give lectures, or evaluate students. By his own account, he walks through the clinic, observing the work being done under the supervision of the dental hygienists. Further, Grievant is compensated for his on-call time as demonstrated by the fact that he is the highest paid faculty member in the School of Sciences, and the duties of supervisory dentist are specifically included in his annual appointment.

The above findings of fact and discussion are supplemented by the following conclusions of law.

Conclusions of Law

1. 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. Dep't of Health and Human Res., Docket No. 98-HHR-010 (July 7, 1998); Harvey v. W. Va. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. 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).

2. The facts that give rise to a claim are not the discovery of a similarly situated party prevailing on their claim, or a legal theory. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (1999); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH 341(Oct. 29, 1997). "It is not the discovery of a legal theory which triggers the statute, but the event. .." Lynch v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

3. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance

pursuant to Code §29-6A-4(a). See, Spahr v. Preston Co. Bd. of Educ., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." Young v. Div. of Corr., Docket No. 01-CORR-059 (July10, 2001); Nutter v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995). See also Jones v. Div. of Rehabilitation Services, Docket No. 00-RS-046 (June 22, 2000).

4. Grievant was aware of the facts giving rise to this grievance in 1989, but did not file this grievance until September 2003, based upon his discovery of a legal theory. The grievance was untimely filed.

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 county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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.

DATE: APRIL 13,2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE