THOMAS HALL,

Grievant,

v. Docket No. 04-HE-273

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Thomas Hall ("Grievant"), employed by West Virginia University ("WVU" or "Respondent") as an Extension Agent assigned to the College of Engineering and Mineral Resources, filed a level one grievance on April 13, 2004, after he was advised that he was not eligible for annual increment/longevity compensation. For relief, Grievant seeks reinstatement of the increment pay with interest, or in the alternative, a salary increase of $1,225.00. The grievance was denied at all lower levels, and appeal was made to level four on July 14, 2004. Grievant's representative, Mary Snelson of the West Virginia Education Association, and Respondent's counsel, Samuel R. Spatafore, Assistant Attorney General, agreed to submit the grievance for decision based upon the lower level record, supplemented by proposed findings of fact and conclusions of law filed on or before October 25, 2004.

The following facts have been derived from a preponderance of the evidence presented at the level three hearing.

Findings of Fact

1. Grievant has been employed by WVU for more than twenty years as an Extension Agent, a non-tenured faculty position, a classification generally referred to as a Faculty Equivalent/Academic Professionals ("FEAPs"), at all times pertinent to this grievance. 2. Prior to the 2003-2004 academic year, Grievant had received an annual increment in the amount of $50 for each year of his employment.

3. In 2002, WVU President David Hardesty approved the "Faculty Equivalents/Academic Professional - 590's Salary Policy." This policy erroneously provided that FEAPs "not covered by some other salary plan and for which there is not a salary schedule are eligible for an annual increment based on years of service." This policy was published on WVU's intranet

web site.

4. The WVU Board of Governors approved a "Faculty Salary Policy" on June 7, 2002, to be effective 2003-2004 and thereafter, which provides for salary increases based on meritorious performance. This policy is applicable to FEAPs.

5. On or about April 5, 2004, Elizabeth Reynolds, Interim Assistant Vice President for Human Resources, notified Grievant that a routine audit of payments had revealed a number of FEAPs had been incorrectly awarded the annual increment payment, which is only to be awarded to eligible classified and non-classified employees. She advised that those individuals who had improperly received the payments in the past would no longer receive them in the future, but they would not be asked to repay the funds.

6. Grievant filed a level one grievance on April 13, 2004, six working days after he received notification that he was not eligible to receive the annual increment.

Discussion

Initially, WVU asserts that the grievance was not timely filed because the increment payments are issued in July, and Grievant had not yet suffered any harm. Grievant argues that he properly filed the grievance within ten days of learning he would no longer receive the increment. When 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. 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 Res., 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 Res., Docket No. 96-HHR- 501 (Sept. 30, 1997).

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). Although the increment payments

would not be issued until July, Grievant had received the payments in the past and was unequivocally notified of the decision being challenged on April 5, 2004. Grievant timely filed this grievance within the statutory time lines.

As the merits of the grievance do not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant asserts that an agency must abide by the procedures itestablishes to conduct its affairs, and because the policy granting him the increment pay was still on the WVU intranet during the 2003-2004 year - it was still in effect, and WVU is required to pay him the increment for 2004. WVU argues the policy was in error since faculty employees are not eligible for this compensation.

Grievant's position in this case is entirely understandable. However, as a faculty member Grievant is neither a classified nor unclassified employee, and is not eligible for increment pay. WVU mistakenly awarded the pay to a number of FEAPs, and correction of such an error is always painful. Nevertheless, Grievant has no continued entitlement to a benefit for which he is not eligible. As a state funded institution, WVU was required to correct the mistake, and has now done so.

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

Conclusions of Law

1. 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 Res., 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 Res., Docket No. 96-HHR- 501 (Sept. 30, 1997).

2. 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). 3. 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).

4. The grievance was not prematurely filed because Grievant initiated the process within ten days of being notified of the decision being challenged.

5. As the merits of the grievance do not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

6. Grievant failed to prove that he is entitled to annual increment salary because it had been erroneously awarded to him in the past.

Accordingly, the 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: NOVEMBER 16, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE