DALLAS BRANCH, JR.,

Grievant,

v. Docket No. 05-HE-261

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Dallas Branch Jr. ("Grievant") employed by West Virginia University ("WVU") as an Associate Professor of Sport Management in the School of Physical Education, filed a grievance at level one on May 5, 2005, alleging that his 2004 calendar year evaluation was in violation of evaluation guidelines, arbitrary and punitive. For relief, Grievant requests a "[r]evision of Associate Dean's 2004 Annual Evaluation 'summary' statements relative to grievant that is acceptable to grievant and reflects University and School policy guidelines regarding [the] P[romotion] & T[enure] process." The parties waived consideration at level one. A level two conference was held by Dana D. Brooks, Dean of the School of Physical Education, on May 10, 2005. Dean Brooks denied the grievance, finding that Grievant had not provided sufficient evidence to support the allegations, and that it had been untimely filed. It is undisputed that the issue of timeliness was not addressed before or during the level two conference.

The grievance was denied following an evidentiary hearing at level three, and appeal to level four was made on July 29, 2005. WVU counsel, Samuel R. Spatafore, Assistant Attorney General, subsequently filed a "Motion To Dismiss", arguing that the grievance had not been timely filed, and that the Grievance Board lacks authority to grant the requested relief. Grievant's counsel, Alex J. Shook, filed a response, and a telephonicconference call was conducted on September 27, 2005, to allow the parties the opportunity to argue their cases.

The following facts are undisputed by the parties:

Findings of Fact

1. Grievant received his Annual Evaluation for the 2004 calendar year from Associate Dean, Dr. Lynn Housner, on April 5, 2005.

2. In his "Summary" section of Grievant's evaluation, Dr. Housner stated that Grievant was not making satisfactory progress toward promotion "due to poor performance in the area of research".

3. In a memorandum dated April 11, 2005, Grievant notified Dr. Dana Brooks, Dean of the School of Physical Education, that he found his evaluation to be "disappointing, confusing, threatening, unprofessional, inaccurate, and unacceptable." He requested Dean Brooks intervene, and that the offensive portion of the document be revised. He further advised that a grievance would be filed if the revisions were not implemented.

4. Dean Brooks responded by letter of April 27, 2005, stating that the evaluation would not be re-written, but that Grievant could place a letter addressing the evaluation in his permanent file.

5. Grievant filed a level one grievance on May 5, 2005.

Discussion

WVU first asserts that Grievant failed to file a grievance within 10 days of receiving the evaluation on April 5, 2005. Grievant argues that WVU did not raise the issue of timeliness at level two, as is required by statute.

It is undisputed that WVU did not raise the timeliness issue *at* or *before* the level two hearing, as is required by W. Va. Code § 29-6A-3(a)(2). (See footnote 1) **However, the Grievance Board has noted that the procedure set forth in Code §§ 29-6A-1, et seq. is inconsistent with the requirement of Code § 29-6A-3(a), because, unlike the grievance procedure for education employees, no hearing is held at level two for state employees. Since only a conference is required at level two, it is impossible for the timeliness issue to be raised at hearing at that level.**

Two basic principles of statutory construction were applied to this situation. First, "statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments", and, second, "where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions. . . ." (citations omitted). The Grievance Board has held that the employer must be given the benefit of the doubt in this

matter, and that addressing timeliness in the level two decision was acceptable. Greathouse v. Dep't of Transp./Div. of Highways, Docket No. 99-DOH-413 (Mar. 30, 2004). The next issue to be addressed is whether Grievant timely filed this grievance. 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. Once the employer has demonstrated 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. Dep't of Transp., Docket No. 96- DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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).

W. Va. Code §29-6A-4(a) states in pertinent part:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

Grievant was given his evaluation on April 5, 2005, and did not initiate these proceedings until one month later, on May 5, 2005. Thus, Grievant did not file at level one until 22 days after learning the facts of the matter, well beyond the 10 days allowed by statute. However, Grievant asserts that the grievance was promptly filed upon receipt of Dean Brooks' letter of April 27, 2005.

The Grievance Board has determined that the statutory time lines for filing a grievance will be tolled if one of two situations exist. First, if the untimely filing "was theresult either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." Naylor v. W.Va. Human Rights Comm'n, 378 S.E.2d 843 (1989). The second situation in which tolling is appropriate is when "[a]n employee who makes a good faith, diligent effort to resolve a grievable matter with school officials and relies upon the representations of those officials that the matter will be

rectified . . . ." Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987).

Neither situation applies to the present case. Grievant simply demanded a revision in his April 11, 2005, letter. He does not assert that Dean Brooks made any representation or took any action which led him to believe that the matter would be rectified, or otherwise caused him to delay in filing a grievance. The grievable event occurred on April 5, 2005, when Grievant was given his evaluation, not on April 27, 2005, when Dean Brooks refused to amend the evaluation.

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. Once the employer has demonstrated 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. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr.30, 1996); 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).

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. WVU has proven that Grievant did not file this grievance within the statutory time lines, and Grievant has presented no valid reason to toll those time lines. Accordingly, the "Motion To Dismiss" is GRANTED.

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 suchappeal 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: OCTOBER 4, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.That statute states in pertinent part, "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."