ROBERT SIMILIE,

Grievant,

v.

DOCKET NO. 05-HE-187

WEST VIRGINIA UNIVERSITY/

INSTITUTE OF TECHNOLOGY,

Respondent.

D E C I S I O N

Grievant, Robert Similie, filed this grievance against his employer, the West Virginia University/Institute of Technology ("WVUIT") on March 22, 2005. His Statement of Grievance reads:

> The responsibility of compliance officer was directed to me by the President, Vice President without compensation
>
> Relief sought: Compensation for work performed from January 1, 2004 to October 27, 2004.

This grievance was denied at all lower levels, and Grievant filed to Level IV on June 3, 2005. The disposition of this case was delayed by Grievant's failure to respond to requests from the Grievance Board for information. Respondent filed a Motion to Dismiss based on the grounds of timeliness. The parties agreed to submit the case on the record developed below. This case became mature for decision on August 29, 2005, the date of the receipt of Respondent's proposed findings of fact and conclusions of law. Grievant elected not to submit these proposals, although he did make some arguments in a letter dated July 27, 2005. (See footnote 1)

Issues and Arguments

Grievant asserts he should have received additional compensation for the duties he assumed

from January 1 through October 31, 2004. He avers he was asked to assume these duties by WVUIT's President and/or Vice-President not by a direct order, but "it was indirect in its gesture." Transcript at 3.

First, WVUIT argues this grievance should be dismissed as it is untimely filed. Second, Respondent asserts Grievant assumed the duties on a volunteer basis without any directive from the President, Vice-President, or Athletic Director, or any discussions about compensation, and Grievant did not ask for compensation until mid-October 2004.

Grievant asserts his grievance is not untimely because Interim President Galan Janeksela's denial of his request for compensation in October 2004, was not an "official notice," and he did not receive an official notice until March 2005. Grievant also avers Dr. Janeklesa's offer to discuss the issues negated his denial.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Professor of Art and was the Faculty Athletic Representative ("FAR"). Grievant received release time for his duties as FAR, and served in that position for 12 years. The FAR serves on the certification committee for athletes and assists the Compliance Officer ("CO") with these type of issues.

2. Although somewhat unclear from the record, each participating college or university is required by the National Collegiate Athletic Association ["NCAA"] to have a CO. This position deals with athletic certification and eligibility issues, investigates rule violations and completes numerous reports. 3. After January 1, 2004, WVUIT did not have a CO, and Grievant started performing several of the duties of the position. He was very helpful to many of the coaches, and made many telephone calls to assess the eligibility of a variety of athletes. The FAR has the right to make these types of calls.

4. As testified to by Grievant and other witnesses, no one asked him to assume these duties, and no change of position was reported to the NCAA. The NCAA later cited WVUIT for a violation because it had no CO of record.

5. On April 1, 2004, Dr. Sandra Elmore assumed the duties of Interim Athletic Director. She did

not ask Grievant to serve as CO, although he offered to do so, but did tell him she would be asking him questions about certification issues. Grievant did not request payment for the certification duties he was performing. Dr. Elmore performed many of the duties of the CO, such as investigating violations of NCAA rules and completing reports. Resp. Exh. 7.

6. The position of CO was posted as a portion of another position several times in the Spring of 2004, but was not filled. Grievant did not apply. Eventually the money for this position was applied to relieve some of the budget deficit.

7. On July 1, 2004, Dr. Janeksela assumed the position of Interim President as well as retaining his prior duties as Vice-President of Academic Affairs.

8. During the Summer of 2004, after Dr. Janeksela assumed his new duties, Grievant informed Dr. Janeksela that the duties he was performing in the compliance area were taking a lot of time. He did not ask for any compensation at that time. Grievant believed Dr. Janeksela should ask him if he wanted compensation for these duties without Grievant asking for it. 9. On October 25, 2004, Grievant requested compensation for the additional duties he had performed. He also informed Dr. Janeklesa that he was resigning as FAR as of December 20, 2004.

10. On October 29, 2004, Dr. Janeksela denied Grievant's request for compensation stating, "It is against policy to retroactively pay someone. Secondly, neither Karen or I agreed to pay you for the time period indicated. Third, the funds were not allocated to pay you in the budget for 03-04 or 04-05. The budget has already been established for this year." Resp. Exh. 6. Dr. Janeksela also offered to meet with Grievant if he desired to do so.

11. Grievant responded through an undated email shortly thereafter, and stated he believed the money was there, noted Dr. Janeksela obviously did not understand how much work he had done, and complained about how he had been treated. Resp. Exh. 6.

12. On October 30, 2004, Dr. Janeksela replied to Grievant accepting his resignation effective December 20, 2004, and thanking him for his service. Resp. Exh. 6.

13. Sometime in March 2005, Grievant again wrote Dr. Janeksela asking for compensation for the additional duties he had performed in 2004. (See footnote 2)

14. On March 8, 2005, Dr. Janeksela again denied Grievant's request stating, "as I have stated before, state law required that any arrangement for the paying of monies has to be complete in writing before hand; not after the fact." Resp. Exh. 6.

15. Grievant filed this grievance on March 22, 2005. 16. On March 30, 2005, Dean Stephen Brown denied the grievance at Level II following a conference. Dr. Brown stated the grievance had been untimely filed as it had not been filed within ten days of receiving Dr. Janeksela's October 29, 2004 refusal, the grievable event.

Discussion

As this grievance does 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 (2004); 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. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Assistant Principal. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Because the issue of timeliness could be depositive of the case, it will be addressed first.

I. Timeliness

Respondent contends this grievance was untimely filed as it was not initiated within the time lines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis 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 theburden of demonstrating a proper 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).

The timeliness issue is governed by the time lines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> 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 relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Grievant was notified on October 29, 2004, that he would be not compensated for the duties he voluntarily assumed without a contract or any discussion about compensation. Grievant did not file this grievance until five months later on March 22, 2005. Accordingly, this grievance was not timely filed. Thus, Grievant has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Grievant's second request for the same compensation months later does not restart the time line. Grievant argues the grievable event from which his filing date should be counted is when Dr. Janeksela replied on March 8, 2005, again stating he could not compensate him for duties he had performed without a contract, direction, or agreement. Grievant did not view the first denial as actual notice because Dr. Janeksela offered to discuss the issue with Grievant. While it is true Dr. Janeksela offered to discuss the issue with Grievant, there was no indication he would change his mind, and Dr. Janeksela's response to Grievant's second email on October 30, 2004, indicates there was no change. An untimely filing will only be excused on grounds of equitable estoppel, if the untimely filing resulted from deliberate conduct by the employer or actions which the employer should have known would cause the employee to delay filing his claim. Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (1989); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH- 341 (Oct. 29, 1997); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). Here, there was no such deliberate conduct on the part of Respondent. Further, Grievant did not explain why he waited so long to request compensation again.

Accordingly, Grievant has not provided a proper excuse to explain his untimely filing. The grievable event was when Grievant was told in October he would not be paid and Grievant did not file at that time. See Adkins v. W. Va. Dep't of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996) at 7. See also Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999); Pryor, supra; Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991); Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

II. Merits Because of the above ruling, the merits will not be addressed in detail, but it should be noted that WVUIT did appreciate the work Grievant did during a difficult time. Further, while Grievant did many helpful duties he did not complete all the duties of a CO. Additionally, he was not directed by anyone to perform these duties, did not discuss compensation until he had performed these duties for ten months, and many of the duties he performed were within the duties of the FAR for which he had received release time. Further, a state agency cannot retroactively pay for duties performed. W. Va. Code § 6-7- 7; Resp. Exh. 8.

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 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 (2004); 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. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. W. Va. Code § 29-6A-4(a) states a grievance must be filed "[w]ithin 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. . . ." 3. The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

4. An untimely filing will only be excused on grounds of equitable estoppel if the untimely filing resulted from deliberate conduct by the employer or actions which the employer should have known would cause the employee to delay filing his claim. Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (1989); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

5. There was no conduct on the part of Respondent that would have caused Grievant to delay

the filing of this grievance.

6. Grievant was clearly told on October 29, 2004, that he would not be compensated for the additional duties he performed, and he did not file this grievance until March 22, 2005. Accordingly, this 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, and 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 are 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 ofthe 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

Date: September 28, 2005

Footnote: 1

Grievant represented himself, and WVUIT was represented by Elaine Skorich, Assistant Attorney General.

Footnote: 2

It is unknown why some of Grievant's email is undated.