GREGORY T. HINTON,

Grievant,

v. Docket No. 05-HE-447

FAIRMONT STATE UNIVERSITY,

Respondent.

D E C I S I O N

Gregory T. Hinton ("Grievant"), employed by Fairmont State University ("Respondent" or "FSU") as a Professor of Business Law, filed a level one grievance on September 9, 2005, in which he stated:

I received my prorated salary on August 31, 2005 based on a yearly salary of $59,904.00. I have the rank of Full Professor with sixteen (16) years of service in the School of Business. On or about September 1, 2005 I discovered that a newly hired Assistant Professor, Rebecca Giorcelli, has a yearly salary of $70,002.00. I believe that the principles of equity and fundamental fairness have been violated. Additionally, I believe that I am discriminated against, have been treated unfairly, and have [been] grievously treated in violation of West Virginia Code 29-6A-2(d), (h), (I) and *The Board of Education of the County of Tyler v. White*, Docket No. 03-HE-217R (2004) by Fairmont State University, formerly known as Fairmont State College and its administrators. I first raised the issue of inequity in the relative salary in July 1996. The matter has been raised subsequent to July 1996 and prior to this grievance. I have attached an exhibit which shows salary, rank and years of service comparisons. This is, and has been an ongoing, violation of my rights as an employee at Fairmont State University.

For relief, Grievant requests that his salary be adjusted relative to the salaries of faculty with lower rank and/or fewer years of service, specifically $84,000.00, and two years of back pay, with attendant benefits. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. Anne L. Patterson, Provost and Vice President for Academic Affairs denied the grievance at level two, and raised the issue of whether the grievance was timely filed. FSU President Daniel J.

Bradley denied the grievance following a level three hearing, finding that Grievant did not prove a misapplication, misinterpretation, or violation of a law or regulation. Grievant advanced his claim to level four on December 13, 2005. An evidentiary hearing was conducted in the Grievance Board's Westover office on February 23, 2006. Grievant appeared *pro se* and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. The grievance became mature for decision upon receipt of Respondent's proposed findings of fact and conclusions of law on February 27, 2006. Grievant elected not to file post-hearing proposals.

The following facts are derived from a preponderance of the evidence made part of the record at levels three and four.

Findings of Fact

1. Grievant was first employed by Respondent in 1989 as an Assistant Professor of Business Law. His salary was set at $25,002.00, an amount higher than a number of incumbent faculty in the School of Business. Grievant holds a Doctor of Jurisprudence degree and a Bachelor of Arts degree in History. He has no educational background in Business. Grievant was tenured and promoted to Associate Professor in 1994, and to Full Professor in 1997. He has received excellent evaluations and a number of awards for his service at FSU.

2. FSU relies upon data provided by the College and University Professional Association ("CUPA") to establish faculty salaries. CUPA provides a yearly national salarysurvey for four-year colleges and universities by rank and discipline. FSU is working towards paying all faculty members 90% of the median CUPA salary for rank and discipline.

3. The 2005-2006 CUPA median salary rate for a Professor in the category of "Business, Management, Marketing, and Related Support Services" is $79,314.00.

4. Grievant received a merit increase in November 2005, and an equity increase in January 2006, increasing his salary to $64,596.00, or 84.69% of the CUPA median. Grievant is presently the ninth highest paid faculty member at FSU, and the fourth highest paid in the School of Business.

5. In 1992, FSU hired Dr. Macgorine Cassell as an Associate Professor of Business Administration. Dr. Cassell was credited with seven years of service at the time he was employed, and received a beginning salary of $41,508.00. Grievant earned $29,250.00 that year. Dr. Cassell's present salary is $68,292.00.

6. In 1994, FSU employed Dr. Sunil Surendran as an Assistant Professor of

Marketing/Management, with an annual salary of $41,500.00. Grievant's salary that year was $35,383.00. Dr. Surendran's present salary is $67,536.00.

7. In Fall 2005, the highest paid faculty member at FSU earned $76,920.00. Over the years, other faculty have been hired at a salary which was more, or slightly less than Grievant was earning.

8. In July 1996, Grievant filed a formal protest with Dean Peters, then Academic Vice President, stating that his salary was less than three other faculty members in the School of Business. Vice President Peters advised Grievant that he would recommend an adjustment. 9. In July 1997, Grievant met with Frederick Fidura, Academic Vice President, after he learned that his salary reflected only a 10% increase as a result of his promotion from Associate to Full Professor.

10. In July 1999 Grievant again expressed his concern to Vice President Fidura regarding salary equity. Grievant expressed his dissatisfaction to President Bradley in January 2002, and again to Fidura by letter dated September 13, 2002.

11. In 2005, FSU employed Dr. Rebecca Giorcelli as Assistant Professor of Information Systems in the School of Business. Dr. Giorcelli was credited with one year of service, at an annual salary of $70,002.00, 95.78% of the CUPA median for an Assistant Professor of Computer and Information Sciences/Support Services.

12. Grievant filed this grievance at level one on September 9, 2005.

13. FSU raised the issue of timeliness at level two.

Discussion

Respondent has initially asserted that Grievant's claim is untimely. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely 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. 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 Public 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). *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). FSU argues that Grievant was aware for many years that newly hired faculty, including Grievant, were paid more than incumbents. Because he failed to file a grievance at the time he learned of the practice, FSU asserts that Grievant has incurred continuing damage, which cannot be converted into a continuing practice giving rise to a timely grievance. Grievant concedes that he first raised the issue of salary disparity in 1996, but asserts that his filing was timely because the hiring of Dr. Giorcelli in 2005 was the most recent occurrence of a continuing practice.

A grievance must be filed with the immediate supervisor of the grievant "[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, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." *W. Va. Code* § 29-6A-4(a).

"This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteendays of the most recent occurrence, i.e. the issuance of a paycheck. (See footnote 1) *See Haddox v. Mason County Bd. of Educ*., Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996)." *Fleece v. Morgan County Bd. of Educ.,* Docket No. 99-32-090 (Aug. 13, 1999). Therefore, it must be determined whether Grievant is the victim of unlawful "salary differences" as a result of FSU's compensation practices, and whether this would constitute a continuing practice.

As recently discussed in *Burns, et al. v. Division of Natural Resources,* Docket No. 05-DNR-430 (Mar. 17, 2006), and *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R- 416R (Sept. 6, 2005), "continuing 'damage' flowing from a past decision of the employer" is separate and distinct from a "continuing practice" as set forth in the grievance statute. A discrete event with lasting effects does not constitute a continuing practice. "[W]hen 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).' *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995)." *Young v. Div. of Corrections and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

Unlike cases in which an employee complains that an error committed in the past resulted in an error in his or her salary at that time, Grievant argues that the practice used by FSU over a period of years has resulted in a disparity. The most recent occurrence of this continuing practice was Dr. Giorcelli's employment. Dr. Giorcelli began her employment at FSU on August 24, 2005. The record does not establish the exact date Grievant learned of her salary; therefore, FSU has failed to prove the grievance was untimely filed.

Merits

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).

Grievant argues that FSU's arbitrary and capricious practice in establishing faculty salaries results in discrimination. FSU asserts that it has no formal rules for salaries or equity increases, and that paying new hires more than incumbent faculty based on the competitive value in the academic marketplace does not violate any rule, regulation or policy. FSU further denies that it has engaged in discrimination, and argues that Grievanthas failed to prove that he is similarly situated to any of the employees to which he compares himself.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." The legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant asserts he has been discriminated against because newly hired faculty members received salaries at or above his own. However, Grievant failed to prove that he is similarly situated to the individuals to whom he compares himself. First, Grievant was employed under different CUPA assessments and different contracts. *See W. Va. Univ. v. Decker & W. Va. Human Rights Comm'n*, 191 W. Va. 567, 447 S.E.2d 259 (1994). Second, Grievant compares himself to individuals who offer expertise is various specialties, each of which, as with Business Law, has its own market value at any given time. This actuality usually does not demonstrate discrimination, and does not do so in this instance.Grievant is not similarly situated to Drs. Giorcelli, Cassell, and Surendran is the differences in their contracts defining specific job responsibilities. Dr. Giorcelli teaches Information Systems, Dr. Cassell teaches Business Administration, and Dr. Surendran teaches Marketing and Management. Accordingly, Grievant has not established he is similarly situated to the new hires or that they have the same "actual job responsibilities."

Neither has FSU acted in an arbitrary and capricious manner. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances ofthe case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli, supra; Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct.

29, 2001).

It is an unfortunate occurrence in all areas of state government that new employees are frequently hired with higher salaries than incumbents. Market values, inflation, and any number of other factors, has resulted in salary inversions in public employment. Grievantarticulated the results very succinctly, those employees who have given the employer their best efforts over a number of years feel undervalued, leading to a decline in morale. Unfortunately, with limited resources, employers have determined their best bet is to allocate more money in the recruitment of employees, since studies have shown that employees with five or more years of service are unlikely to leave their positions. The evidence of record establishes that FSU uses objective CUPA data to determine the salaries of both new hires and incumbent faculty, and has not acted in an arbitrary and capricious manner.

The foregoing findings of fact and discussion support the following conclusions of law.

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely 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. 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 Public Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. A grievance must be filed within ten days of the event upon which it is based or “within ten days of the most recent occurrence of a continuing practice giving rise to a grievance.” *W. Va. Code* § 29-6A-4(a). Because the hiring of Dr. Giorcelli was either themost recent occurrence of a continuing practice, or a discrete grievable event, the grievance was timely filed.

3. 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.

4. *W. Va. Code* § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as, "any differences in the treatment of employees unless such differences are related to the actual

job responsibilities of the employees or agreed to in writing by the employees." To establish a case of discrimination a grievant must show:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

In The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

5. Grievant has not met his burden of proof and established he is similarly situated to the new hires, or that they have the same "actual job responsibilities."

6. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausiblethat it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

7. FSU's reliance on CUPA data to determine faculty salaries is not arbitrary and capricious.

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 28,2006 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The grievance procedure for education employees allows fifteen days to file a grievance. Higher education employees are included in the procedure for state employees, which allows only a ten day filing period.