# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**TERRENCE OLSON, et al.,**

**Grievant,**

**v.** **DOCKET NO. 06-HE-114**

**MARSHALL UNIVERSITY,**

**Respondent.**

## DECISION

Grievants (See footnote 1) filed this grievance against their employer on January 17, 2006, alleging: That Marshall University and the HEPC treated Higher Education Employees in a manner inconsistent with the way other state employees were treated by other state agencies. Specifically, that Higher Education employees were not given an extra holiday by the implementation of HB 406, whereas all other regular state employees were given an extra holiday by implementing this law. This is discrimination and a violation of Federal and State EEO and Labor laws.

Relief Sought:

At the request of all said employees, they get a choice of pay or Comp Time at the rate of time and a half if they were made to work, the return on any Comp Time or Annual Leave if they used said time to take off on January 2, 2006, or Comp Time at the rate of 7.5 hours for the holiday if it was their regularly scheduled day off or another designated holiday before June 30, 2006.This grievance was denied at the lower levels. A two day hearing was held at the Grievance Board's Charleston office. The first day of hearing was held on May 16, 2006, and the second day was held on July 31, 2006. Grievant was represented by Bob Morgenstern, Director, Higher Education Division, American Federation of Teachers, and Christine Barr, Staff Representative, American Federation of Teachers.

Respondent was represented by Jendonnae Houdyschell, Senior Assistant Attorney General. This case became mature on September 29, 2006, upon the parties' submissions of findings of fact and conclusions of law. (See footnote 2)

## Issues and Arguments

Grievants assert they have been treated differently than other state employees with regard to holidays. House Bill ("H.B.") 406 consolidated Lincoln's Birthday and Washington's Birthday into President's Day and designated the day after Thanksgiving as a legal holiday. Grievants also assert Respondent violated Title 133, Series 14 3.1 when it observed New Years Day 2006 on Friday, December 31, 2005, as opposed to the following Monday.

Respondent argues the grievance is untimely, as the implementation of H.B. 406 took effect on September 13, 2005. Also, Respondent asserts the implementation of the Bill did not change the Holiday Calendar as established by Respondent, and therefore Grievants should have known they would not be given the Friday after Thanksgiving as a holiday. With respect to the allegation that Respondent improperly observed New Years Day 2006 on Friday, as opposed to Monday, Respondent assertsthis amounts to an amendment of the grievance. Respondent further avers Grievants are not similarly situated to other state employees, and therefore no discrimination has occurred.

## Findings of Fact

1. Employees of the Higher Education Policy Commission ("HEPC") and higher education employees are employees of the State of West Virginia.

2. Title 133, Series 14 3.1 provides the number of full holidays shall be twelve, plus additional days for any statewide primary or general election. Specified holidays include Independence Day, Labor Day, Thanksgiving Day, Christmas Day, New Year's Day, and Martin Luther King's Birthday. Six additional days determined by the governing board or President as provided in Section 2.1 shall also be taken. If a specified holiday falls on a Saturday or Sunday, the preceding Friday or the following Monday will be observed as the legal holiday.

3. Respondent designated the following holidays for classified staff: New Year's Day, Martin Luther King's Birthday, Lincoln's Birthday, Washington's Birthday, Primary Election Day, Memorial Day, West Virginia Day, July 4$^{th}$, Labor Day, Columbus Day, General Election Day, Thanksgiving Day, and Christmas Day.

4. Lincoln's Birthday, Washington's Birthday, Primary Election Day, West Virginia Day, Columbus Day, and General Election Day were reassigned to be taken after Thanksgiving and between Christmas and New Year's Day. This reassignment of holidays occurs as a result of the college schedule.

5. The holiday schedule for classified staff is based on a fiscal year, not a calendar year. HEPC employees' holiday schedule is based on a calendar year.6. A calendar committee is designated to establish the holiday schedule for classified staff. The holiday schedule for Fiscal Year 2006 was established by this committee approximately two years prior.

7. The holiday schedule specifies that, for fiscal year 2006, New Year's Day would be observed on Friday, December 30, 2005. The holiday schedule is posted in advance of the fiscal year.

8. On September 13, 2005, H.B. 406 which amended *W. Va. Code* ' 2-2-1, was passed and became effective. This amendment consolidated Lincoln's and Washington's birthdays into one holiday called President's Day, and provided the Friday after Thanksgiving as a legal holiday.

9. For fiscal year 2006, the holiday schedule provided classified staff would be off work on Friday, November 25, 2005, the Friday after Thanksgiving. To achieve this, Respondent reassigned one of the designated holidays to Friday, November 25, 2006.

10. On December 15, 2005, a motion was made by the Staff Council, a group organized to represent classified staff, to present Dr. Stephen J. Kopp, President Marshall University, with "evidence suggesting the employees are due a one-time-only one day holiday to make up for the state employee holiday calendar changes contained in HB 406." Respondent's Exh. 1, Level IV. By letter dated December 20, 2005, Dr. Kopp denied the Staff Counsel's request.

11. Grievant, Mr. Olson, received an e-mailing containing Dr. Kopp's response within at least two days of December 20, 2005.

12. Respondent raised the issue of timeliness at the lower level.13. Classified staff were given the Friday before New Year's Day as a paid vacation day. Grievant argued this was error for the first time at the Level III hearing.

**Discussion**

Since this grievance is not about discipline, Grievants must prove their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of*

*Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

Because this grievance involves several issues, each will be addressed separately below.

**I. Whether Grievance was Amended.**

At the Level III hearing, Grievants asserted it was improper that Respondent had classified staff observe New Year's Day on the Friday before. When Grievants raised this issue at Level III Respondent objected, arguing it was an amendment to the grievance. This argument was advanced again at Level IV.

*W. Va. Code* ' 29-6A-3(j) states:

Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level where the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant mustfile a new grievance. The time limitation for filing the new grievance is measured from the date of the ruling.

Grievants' statement of grievance deals with discrimination as a result of the enactment of H.B. 406. H.B. 406 did not change any provisions regarding the observation of New Year's Day. Because the original statement of grievance dealt with the ramifications of H.B. 406, and that Bill did not address the observance of New Year's Day, any argument related to which day the holiday should have been observed is a separate issue. Respondents have continually objected to this issue being addressed in this grievance. The Supreme Court has held that a grievance cannot be amended at Level IV without agreement of the parties. *Hess v. W. Va. Dept. Of Health and Human Resources*, 189 W. Va. 357, 432 S.E.2d 27 (1993)

Because this argument is an amendment to the grievance and Respondent did not consent to the amendment, the merits of this argument will not be addressed.

**II. Whether Grievance is Timely.**

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). *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).

*W. Va. Code* ' 29-6A-4(a) provides:

At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance 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. informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. *Harvey, supra*; *Kessler v. Dep't of Transp./Div. of Highways*, 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).

*W. Va. Code* ' 29-6A-4 contains the same discovery rule found in the education grievance procedure, which has been interpreted to mean that, Athe time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance.@ Syl Pt. 1, *Spahr v. Preston Co. Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990). First, H.B. 406 was enacted on September 13, 2005. While it is unclear exactly when Grievants became aware

of this enactment, evidence presented showed Grievants approached Dr. Kopp about adjusting the holiday schedule on December 15, 2005. Dr. Kopp denied the request on December 20, 2005, and testimony elicited at Level IV revealed Mr. Olson, a Grievant, was informed of Dr. Kopp's decision within two days of the December 20, 2006, letter being issued. Yet the grievance was not filed until January 17, 2006, which was clearly beyond the ten days following the occurrence of the event or when the event became known to Grievants.

Even though this grievance is not timely, the undersigned feels the merits should briefly be addressed.

Grievants allege discrimination. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the 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.

*The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievants are not similarly situated with other state employees. First, Grievants' holiday calendar is based on a fiscal year, as opposed HEPC employees who receive their holidays based on a calendar year. Also, Grievants are allowed to reassign holidays so they can take several of the holidays together. Other state employees,including HEPC, do not have that luxury and must take the holidays as they fall on the calendar. Clearly, Grievants are not similarly situated to other state employees, and therefore, this grievance must be denied.

The following conclusions of law support the above discussion:

## Conclusions of Law

1. Since this grievance is not about discipline, Grievants must prove their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va.*

*Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

2. *W. Va. Code* ' 29-6A-3(j) states:

Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level where the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance is measured from the date of the ruling.

3. Grievants' argument concerning which day New Year's Day should have been observed is an amendment to the grievance that was not agreed to by Respondents, and therefore will not be addressed in this decision.

4. 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). *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).

5. *W. Va. Code* ' 29-6A-4(a) provides:

At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance 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. informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

6.

The running of the relevant time period is ordinarily deemed to begin whenthe employee is unequivocally notified of the decision being challenged. *Harvey, supra*; *Kessler v. Dep't of Transp./Div. of Highways*, 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).

7.

*W. Va. Code* ' 29-6A-4 contains the same discovery rule found in the

education grievance procedure, which has been interpreted to mean that, Athe time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl Pt. 1, *Spahr v. Preston Co. Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990).

8. Grievants failed to file this grievance within the established timelines.

Accordingly, this grievance must be **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 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: December 18, 2006**

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**Wendy A. Campbell**

**Administrative Law Judge**

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Footnote: 1

*Terrence Olson, Patsy Stephenson, Terry Thacker, Cecelia Scarberry, Johnny Bradley, Calvin Rowlings, Aaron Johnson, Cynthia Obregon, Bonnie Berry, Virginia Nelson, Melinda Morgan, Sarah Murray, Terry Anderson, Marie McDowell, Kent Holley, Chris Kennedy, Tom Laney, Joey Salyers, Mike Smith, Sharon Gates, Terry Blake, Terry Dennis, Carol Skaggs, Vicki Cole, Danny Holland, Michael Farley, Jeff Tomblin, Russell Tomblin, Mark Ward, David Green, Danny Burns, Greta Hill, Dale Henry, Mark Bays, Greg Harmon, Shelvy Campbell, Laura Brumfield, Sherrie Knapp, Jason Smith, Rodney Elliot, Billy Shockley, Jack Wilson, James Jones, John Walker, Aaron Nida, Jack Ferrell, Leonard Lovely, Greg Pickens, Gary Hall, and Mike Hall.*

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Footnote: 2

*Originally, the date for the parties' submissions was August 31, 2006. However, the parties mutually agreed to extend the date to September 29, 2006.*