DARRYL CLAUSELL,

Grievant,

v. Docket No. 05-HE-394

WEST VIRGINIA NORTHERN COMMUNITY COLLEGE,

Respondent.

D E C I S I O N

Darryl Clausell ("Grievant"), employed by West Virginia Northern Community College ("WVNCC") as Coordinator/Continuing and Community Education, filed a level one grievance on September 27, 2005, after he did not receive an equity salary increase for fiscal year 2006, or back pay after his salary was rounded-up to the next highest pay grade subsequent to a promotion. For relief, Grievant seeks the back pay from July 1, 2005, until the date WVNCC rounded-up his salary, and a five percent equity increase. The grievance was denied at levels one and three, and appeal to level four was made on October 27, 2005. An evidentiary hearing was conducted on January 24, 2006, on the WVNCC campus. Grievant appeared *pro se*, and WVNCC was represented by Kristi A. McWhirter, Assistant Attorney General. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by WVNCC on January 20, 2006. Grievant declined the opportunity to file post-hearing proposals.

The following facts essential to this case are undisputed.

Findings of Fact

1. *West Virginia Code* § 18B-9-3 establishes a salary schedule for classified employees of institutions of higher learning. The schedule provides a minimum annualsalary for each pay grade, which has 15 steps. This salary schedule has never been fully funded, and the individual institutions continue to work towards that goal.

2. Grievant has been employed by WVNCC for approximately 26 years, and has held the position of Coordinator/Continuing and Community Education, pay grade 14, since July 1, 2005.

2. Previously, Grievant held the classification of Program Assistant, pay grade 13. During the 2004-2005 academic year, Grievant's base salary was at Step 14, one step away from being fully funded.

3. Effective July 1, 2005, Grievant was upgraded to his current position of Coordinator. Grievant received at salary increase of 5% at that time, but WVNCC did not round up his salary to Step 14 of pay grade 14.

4. Board of Trustees Administrative Rule, Section 13.2 requires that upgraded employees receive an "increase of five percent (5%) per pay grade rounded to the next highest step in the new pay grade based upon the employee's base salary. . . ." However, no college in the higher education system has rounded-up the salaries of promoted or upgraded personnel since 1994.

5. In September 2005, the WVNCC Classified Staff Council decided to increase Grievant's salary by rounding it up to pay grade 14. The reason for this action was to "promote good relations with the classified staff." Grievant had taken no action to secure this salary increase, which was not made retroactive to July 1, 2005.

6. Grievant did not receive a "Fiscal Year 2006 Salary Notification" because he received a "Notice of Promotion" instead. WVNCC does not grant equity pay increases when a promotion is effective July 1. 7. Grievant initiated these grievance proceedings on September 27, 2005.

8. WVNCC raised the issue of timeliness at levels one and three. The grievance was not considered at level two.

Discussion

WVNCC contends this grievance was untimely filed, as it was not initiated within the time lines set forth 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 the burden 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*, 180W. 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).

WVNCC argues that the grievance was untimely filed regarding both issues because Grievant signed his Notice of Promotion, which specifically stated his salary for 2005-2006, on June 15, 2005, and did not question his salary until the Classified Staff Council unilaterally determined that it should be rounded up to the next step. In his response to the "Motion To Dismiss," Grievant states that he had not been advised prior the September 19, 2005, notification of the rounding adjustment that he would not receive an equity increase. **(See footnote 1)**

Grievant was aware on June 15, 2005, that he would be receiving a five percent salary increase as a result of his upgrade, effective July 1, 2005. Although the letter did not advise Grievant the salary would not be rounded up to the next pay step, a quick calculation would have revealed that it was not. Grievant did not take any action on this matter until he after he was notified of an additional salary increase to place him in step fourteen. Grievant did not pursue the issue of rounding up his salary upon notification of his revised salary in June, therefore, this portion of the grievance was not timely filed. **(See footnote 2)** **Grievant's claim that he did not know that he would not receive an equity increase until September 19, 2005, is not credible. Grievant received a "Fiscal Year 2005 Salary Notification," dated May 17, 2004. The salary notifications for 2006 were dated June 1, 2005. Grievant knew in June that he had not received a salary notification form as he had the previous year. Grievant knew by his first**

paycheck in July that he had not received an equity increase. Grievant is an intelligent, well-educated individual with twenty-six years of work experience with WVNCC; he was aware that salary notifications were issued prior to the fiscal year, and that equity increases were effective July 1. It is simply unreasonable to believe that Grievant had no idea regarding the status of his equity increase, or was still waiting notification in September. Grievant knew in July that he had not received a salary notification reflecting an equity increase, but took no action until September. This claim is also untimely. **(See footnote 3)**

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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 the burden of demonstrating a proper basis to excusehis 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).

2. 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. *W. Va. Code* § 29-6A- 4(a).

3. WVNCC has proven by a preponderance of the evidence that Grievant did not timely file a grievance regarding rounding up his salary, or his failure to receive an equity increase.

4. Grievant offered no valid reason for his delay in filing the grievance, and there is no evidence that WVNCC acted in any way which would have caused the delay.

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel 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 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: FEBRUARY 27, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.WVNCC disputes Grievant's recollection of when he was given notice that his salary would be rounded up. Dr. Martin Olshinsky, President of WVNCC testified that he notified Grievant on September 7, 2005, the same date on a memo he signed approving the additional salary.

Footnote: 2

[2]Even if a September 19 notification of the salary increase is considered to be the grievable event, Grievant would not be entitled to back pay on an award he was erroneously granted. Although rounding up is required by Higher Education Policy Commission Procedural (HEPC) Rule, Section 13.2, it, like the minimum salary schedule, is an unfunded mandate.

Footnote: 3

[3]A review of the HEPC salary schedule confirms a WVNCC representation in its post-hearing proposals that the additional money awarded Grievant when his salary was rounded up to step fourteen equals the equity step increase he would have received.