THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

HEIMO RIEDEL,

Grievant,

v.

DOCKET NO. 07-HE-026

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Heimo Riedel, filed three grievances against his employer, West Virginia University, which were consolidated for hearing and decision. Grievant is a tenured professor and researcher in the Department of Biochemistry (formerly the Department of Biochemistry and Molecular Pharmacology).

The first grievance, filed on October 6, 2004, complained about three letters which the Department Chair, Dr. Diana Beattie, had sent to Grievant, and placed in his personnel file. As relief Grievant sought to have these letters removed from his personnel file, that “all parties who have knowledge of any of the issues raised in the letters” be informed the letters had been removed from his file, that “any and all consequences of the letters” be reversed, and “specific steps” be taken “to

protect me from incorrect and unsupported claims and the resulting damage." In addition, Grievant asked for a transfer to a different department "to protect me from incorrect and unsupported claims and the resulting damage."

The second grievance was filed on November 12, 2004, and claims reprisal and discrimination. It lists five specific actions alleged to have been taken by Dr. Beattie, insupport of these claims. The relief sought by Grievant was varied, and will be addressed more specifically later in this decision.

The third grievance, filed on April 19, 2005, consists of eight numbered paragraphs, related to various issues. The first two issues were related to Grievant's research space. These two issues were withdrawn from the grievance on February 22, 2008, after a ruling by the undersigned that the Grievance Board does not award punitive or tort-like damages. The remaining issues relate to charges to Grievant's grant for three months of a graduate student's stipend; the requirement that Grievant sign Employee Effort Certification Reports; reimbursement for a stolen notebook computer; a cap placed on Grievant's salary support; and vacation time. The final paragraph claims reprisal. The relief Grievant sought was varied.

Twenty-three days of hearing were held at level three, beginning May 18, 2005, and ending April 27, 2006. A level three decision denying the grievances was issued on March 2, 2007. Grievant appealed to level four on March 8, 2007. A level four hearing (See footnote 1) was held before the undersigned Administrative Law Judge on May 15, 2008, in the Grievance Board's Westover office. Grievant represented himself, and Respondent was representedby Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision upon the receipt of the last of the parties' written arguments on June 26, 2008.

Synopsis

This grievance challenges several different actions. Most of these actions were taken by Dr. Diana Beattie, Chair of the Department of Biochemistry, or alleged by Grievant to have been taken by Dr. Beattie. Dr. Beattie has retired from West Virginia University, rendering several issues moot. Two of the complaints requested as relief reimbursement for expenses or personnel costs, which relief had already been granted, but Grievant was unwilling to drop these complaints until it was proven to his satisfaction that the reimbursement had occurred. These complaints are moot. Many of the complaints were not timely filed. In these instances, the findings of fact reflect the dates Grievant was

aware of the grievable event.

Grievant requested that three letters placed in Grievant's personnel file be removed from his file. The first two letters did not impose any discipline upon Grievant, but they did document complaints and counseled him regarding his behavior, copies were sent to senior administrators at West Virginia University, and the letters were placed in Grievant's personnel file. Respondent did not contest Grievant's request that the first letter be removed from his personnel file, and did not prove the complaints in the second letter were valid. Respondent proved the charges in the third letter.

The following Findings of Fact are made based upon the record developed at levels three and four.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU"), in the Department of Biochemistry ("the department") as a tenured professor.

2. Prior to beginning his employment at WVU in 2003, Grievant was employed at Wayne State University.

3. Dr. Diana Beattie was the Chair of the department when these grievances were filed. Dr. Beattie has since retired, and is no longer an employee of WVU.

4. Dr. Beattie sent Grievant a letter dated May 19, 2004, regarding appropriate interaction with graduate students, post-doctoral fellows, and others under the faculty member's supervision. Grievant received this letter shortly after it was written, in May 2004. Dr. Beattie was advised by personnel in the Social Justice Office at WVU to place this letter in Grievant's personnel file, and she did so. Grievant was not aware that this letter had been placed in his personnel file until shortly before he filed his grievance on October 6, 2004.

5. By letter dated September 21, 2004, Dr. Beattie advised Grievant of a number of complaints she had received from those working in his research lab, and counseled him to carefully consider these complaints and consider ways to correct the problems. A copy of this letter was also sent to Robert Stitzel, Ph.D., Associate Chair, Jim Hackett, Associate Vice President, Fred Butcher, Ph.D., Senior Associate Vice President, and Thomas Saba, Ph.D., Associate Vice President, and the letter was placed in Grievant's personnel file. 6. In early September 2004, Dr. Beattie told her secretary, Melissa Fowler, to send an email to faculty in the department telling them some used desk

chairs had been placed in the hall and were available to anyone who wanted them. Ms. Fowler sent the email to all faculty in the department. The chairs were taken by someone almost immediately.

7. About an hour later, Grievant confronted Ms. Fowler about why he was not notified that the chairs were available before the email was sent to everyone, and told her the email to all faculty was not a good procedure. Grievant asked Ms. Fowler the same question repeatedly, relating to why the email had been sent to everyone, and became loud. Ms. Fowler tried to explain to Grievant that she was just doing what she had been asked to do, and he should take his issue up with Dr. Beattie. Debbie Hall, another employee in the same office, heard the exchange, and attempted to answer Grievant's questions, without success. Both Ms. Fowler and Ms. Hall were very upset by Grievant's actions, and later in the month, both went to Dr. Beattie and told her they wanted to file a grievance over this incident. Both felt that Grievant was disrespectful toward them, and that their answers were not good enough for him. Dr. Beattie asked Ms. Fowler and Ms. Hall if they would write her a letter, documenting what had happened, instead of filing a grievance, and they did so.

8. Dr. Beattie did not exert any pressure on Ms. Fowler or Ms. Hall to fabricate their statements.

9. By letter dated September 22, 2004, Dr. Beattie related to Grievant what she had been told by Ms. Hall and Ms. Fowler about his actions toward them regarding the chairs. She stated in the letter that this was the second incident in which Grievant hadexhibited inappropriate behavior “while interacting with people who are under your supervision. . . . Classified staff should never be made to feel that they are inferior in any way to a faculty member.” The letter advised Grievant that the administration was “very concerned about this inappropriate behavior,” and the problems encountered by individuals working in Grievant's lab. The letter concluded, “[a]fter consultation with the VP office, we feel that it is imperative for you to obtain professional counseling with the Faculty/Staff Assistance Program . . . to help you deal with both students in your laboratory and classified staff. You must provide evidence that you have received counseling before the Vice-President's office will approve any additional requests from you to hire people for your laboratory. Moreover, you will not be allowed to recruit a graduate student.” This letter was placed in Grievant's personnel file, and a copy was sent to Robert Stitzel, Ph.D., Associate Chair, Jim Hackett, Associate Vice President, Fred Butcher, Ph.D., Senior Associate Vice President, and Thomas Saba, Ph.D., Associate Vice President.

10. Grievant met twice with Cheryl Riley, who is employed in the Faculty/Staff Assistance Program at WVU, for employee counseling sessions. After Dr. Beattie became aware of this in late October 2004, she allowed Grievant to again hire personnel for his lab and recruit graduate students.

11. Grievant knew on September 20, 2004, that Sanjeev Kumar, a graduate student working in Grievant's lab, was leaving his lab.

12. WVU agreed to reimburse Grievant's grant for Mr. Kumar's stipend, and this reimbursement had occurred by May 16, 2005.

13. Dr. Beattie informed Grievant on September 16, 2004, that Mohan Dasu, a Research Assistant Professor in Grievant's lab, was leaving his lab. 14. WVU reimbursed Grievant's start-up account for Mr. Dasu's moving expenses, in the amount of approximately $1800.00.

15. Michael Dodrill was a student at WVU who wished to work in Grievant's lab in the Fall of 2004, as a “rotation student.” Mr. Dodrill worked in Grievant's lab for one rotation period in the Spring of 2005. His rotation was thus delayed by one semester. Fred Minear, Assistant Director of Graduate Studies, decided, together with the Chair of the Admissions Committee, and with the backing of the Admissions Committee, to delay Mr. Dodrill's rotation into Grievant's lab. Grievant has since that time remained on the list as available for a student rotation, and when Dr. Minear gave his testimony on March 24, 2006, another student was at that time working a rotation in Grievant's lab. Grievant was aware of the delay in Mr. Dodrill's rotation by October 18, 2004, at the latest. Level three Exhibit 79.

16. Tammy Miller, the supervisor of the staff in Dr. Beattie's office, told Grievant in an email that “the institution would be very intolerant of you refusing to cooperate,” in signing Employee Effort Certification Reports. Ms. Miller is not in a supervisory position over Grievant, and she was relaying a message. Ms. Miller was not threatening Grievant. Faculty are aware of the requirement that they sign Employee Effort Certification Reports.

17. A notebook computer which Grievant was using was stolen from Grievant's office September 2, 2003, and Grievant knew it was stolen on that date.

18. Dr. Beattie was concerned that the percentage effort and salary support Grievant was charging at times to one of his grants could not be justified. She did not believe he could have been spending 50 or 60% of his effort on the one grant. Dr. Saba told her she could put a cap on the salary support Grievant could charge to the grant. Shedecided a cap of 45% was reasonable. Grievant was informed of this cap on February 8, 2005, if not sooner.

19. Grievant's vacation time was charged for 75 hours, which he had not yet earned, when he was moving his lab from Wayne State University to WVU in October 2003.

Discussion

I. Burden of Proof

This grievance involves disciplinary issues and non-disciplinary issues. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Olmsted v. Bd. of Directors/Bluefield State College*, Docket No. 98-BOD-108 (Oct. 21, 1998); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant has the burden of proving his grievance relating to non-disciplinary matters by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Respondent raised a timeliness defense to several of Grievant's claims. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

W. Va. Code § 29-6A-4(a) provides, 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 upon 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.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

A continuing practice may be grieved with each new occurrence. Misclassification, for example, is a continuing practice; however, it is well-settled that, where the employer raises the defense of timeliness in such a case, the right to back pay is limited to ten days preceding the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Craig v. W. Va. Dep't of Health and Human Resources*,Docket No. 98-HHR-344 (June 24, 1999). In addition, the "'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), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen (See footnote 2) days of the most recent occurrence, i.e.[,] the issuance of a paycheck. *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)." *See v. Dep't of Educ.*, Docket No. 03-DOE-047 (June 25, 2003).

However, "when 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 Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases)." *Young v. Div. of Corrections*, Docket No. 01- CORR-059 (July 10, 2001).

II.

Disciplinary Issues - Grievance Number One.

The first grievance challenges the contents of three letters written by Dr. Beattie to Grievant, which were placed in his personnel file. As relief Grievant seeks to have the letters removed from his personnel file, and "[t]o inform all parties who have knowledge of any of the issues raised in the

letters of the removal of the letters. To reverse any and all consequences of the letters, including but not limited to any actions that limit my authority to recruit staff and/or students. To take specific steps to protect me from incorrect and unsupported claims and the resulting damage to my situation in the future." As with grievances two and three, Grievant also requested a transfer to another department. This requested relief will be addressed later in this decision in the discussion of grievance number two.

A.

Letter Dated May 19, 2004

Dr. Beattie wrote a letter to Grievant on May 19, 2004, advising him that faculty members are expected to behave appropriately in interacting with students and others under their supervision, and listing three examples of inappropriate conduct. Grievant had been accused of engaging in the type of inappropriate conduct set forth in this letter.

Grievant received this letter shortly after it was written, in May 2004, but did not file a grievance regarding this letter until October 6, 2004, when he learned it had been placed in his personnel file. Grievant acknowledged that the grievance was not timely filed, but his complaint is with this letter being placed in his personnel file, which he learned about only shortly before the grievance was filed. Grievant can grieve the placement of this letterin his personnel file. (See footnote 3) Respondent's representative stated at the level four hearing that letters such as this one are customarily removed from a personnel file after one year, and that this is what should have happened with this letter; except that it has remained in Grievant's personnel file because of the pending grievances and a civil action filed by Grievant. Grievant has demonstrated that this May 19, 2004 letter should be removed from his personnel file.

B.

Letter Dated September 21, 2004

Dr. Beattie wrote a letter to Grievant dated September 21, 2004, advising him of a number of complaints she had received from those working in his research lab, and counseling him to carefully consider these complaints and consider ways to correct these problems. A copy of this letter was also sent to Robert Stitzel, Ph.D., Associate Chair, Jim Hackett, Associate Vice President, Fred Butcher, Ph.D., Senior Associate Vice President, and Thomas Saba, Ph.D., Associate Vice

President, and it was placed in Grievant's personnel file.

Respondent argued this letter was not disciplinary in nature. While this letter does not impose any discipline upon Grievant, it clearly is advising him that his conduct is inappropriate, and counsels him to correct his behavior. In addition, this letter was sent to high level administrators, and was placed in Grievant's personnel file as documentation. It was certainly not written, distributed, or placed in Grievant's personnel file to commend Grievant. The purpose of the letter was to document inappropriate behavior and counselGrievant to correct this behavior. For purposes of determining which party bears the burden of proof under the grievance procedure, it was a disciplinary letter.

This letter relates what Dr. Beattie had been told by those who had worked in Grievant's lab. Dr. Beattie had no personal knowledge of what had occurred in Grievant's lab, and none of those who had reported irregularities to Dr. Beattie testified. Dr. Beattie testified that she heard the same types of complaints from more than one person, and she believed what she was told, and she was reporting the complaints to Grievant. Grievant denied the allegations in the letter, and pointed out that the only testimony in the record to support the allegations in the letter is hearsay. This hearsay testimony is entitled to little weight in this proceeding, particularly given that the allegations are general in nature, and do not refer to particular incidents which occurred on particular dates. Respondent has not proven that what is alleged in this letter is anything more than Dr. Beattie's characterization of the complaints she received. Grievant demonstrated this letter should be removed from his personnel file. (See footnote 4)

C. Letter Dated September 22, 2004

Dr. Beattie's September 22, 2004 letter to Grievant documented a complaint made by Ms. Fowler and Ms. Hall about Grievant. The statement of grievance reads, “I consider the claims [in the letter] untrue and lacking of evidence.” In early September 2004, Dr. Beattie told Ms. Fowler to send an email to faculty in the department telling them some used desk chairs had been placed in the hall and were available to anyone who would want them. Ms. Fowler sent the email, and someone quickly took possession of the chairs. About an hour later Grievant confronted Ms. Fowler about why he was not notified that the chairs were available before the email was sent to everyone. Grievant asked Ms. Fowler the same question repeatedly, and became loud. Ms. Hall heard the exchange, and attempted to answer Grievant's question, without success. Later in the month, both went to Dr. Beattie and told her they wanted to file a grievance over this incident. Dr. Beattie asked them if they would write out a

statement instead of filing a grievance, and they agreed to do so.

By letter dated September 22, 2004, Dr. Beattie related to Grievant what she had been told by Ms. Hall and Ms. Fowler about his actions toward them regarding the chairs. She stated this was the second incident in which Grievant had exhibited inappropriate behavior “while interacting with people who are under your supervision. . . . Classified staff should never be made to feel that they are inferior in any way to a faculty member.” The letter advised Grievant that the administration was “very concerned about this inappropriate behavior,” and the problems encountered by individuals working in Grievant's lab. The letter concluded, “[a]fter consultation with the VP office, we feel that it is imperative for you to obtain professional counseling with the Faculty/Staff Assistance Program . . . to help you deal with both students in your laboratory and classified staff. You must provide evidence that you have received counseling before the Vice-President's office will approve any additional requests from you to hire people for your laboratory. Moreover, you will not be allowed to recruit a graduate student.” This letter was placed in Grievant's personnel file,and a copy was sent to Dr. Stitzel, Associate Vice President Hackett, Dr. Butcher, and Dr. Saba.

Grievant argued that the written statement by Ms. Fowler and Ms. Hall should be discounted because it was solicited by Dr. Beattie, who had supervisory authority over them. Grievant went so far as to state that Dr. Beattie had abused these secretaries for her own purposes. It is clear that it was Ms. Fowler and Ms. Hall who went to Dr. Beattie for assistance, and Grievant's own testimony supports much of what is in the written statement. Ms. Fowler and Ms. Hall were so concerned about what had transpired that they had decided to file a grievance regarding Grievant's actions toward them. When they came to Dr. Beattie stating they intended to file a grievance, she asked them if they would document the incident in writing, rather than file a grievance. There is absolutely no evidence that Dr. Beattie exerted any pressure on Ms. Fowler or Ms. Hall to fabricate their statements.

Grievant argued the written statement should also be discounted because he was only talking to Ms. Fowler, so Ms. Hall should not have signed it. He also pointed out that Dr. Beattie's letter was inaccurate when it stated this was a second incident involving interaction with people under his supervision, because he was not the supervisor of either of these ladies. Ms. Hall witnessed the exchange, and tried to offer assistance to Grievant and Ms. Fowler. There was nothing inappropriate in her participating in providing a statement. Whether Ms. Fowler and Ms. Hall are under Grievant's direct supervision is of no consequence. Grievant is a faculty member in a position of authority over

both.

Grievant admitted he told Ms. Fowler the email to all faculty was not good procedure, and he admitted he was not happy with the answers Ms. Fowler and Ms. Hallgave to his questions, but felt he should not be held responsible for their feelings. Grievant testified at the level three hearing regarding his interaction with Ms. Fowler and Ms. Hall, as follows:

> The _ now then there's a second component about the secretaries _ I mean about their feelings I guess which again I cannot say much about. I think I should not be held responsible for that. And if _ if they complain about having to repeat answers to my questions that has a discriminatory component from my end. I think they should be very well available to answer my questions and if necessary repeatedly so I can understand them.
>
> I think that's the role of support staff to help the faculty and my language skills may indeed make it necessary at times to ask again because I cannot understand things as easily as people who have [grown up] here. (Tr. 16, Feb. 10, 2006, p. 2465.)

Grievant's view of the secretaries is apparent from his statement.

Grievant admitted he had criticized Ms. Fowler, and accused her and Ms. Hall of becoming very angry because he had criticized the email. (Tr. 16, Feb. 10, 2006, p. 2469.) When asked whether he spoke to the secretaries in a calm voice, Grievant stated, “I think I was amazingly calm.” (Tr. 16, Feb. 10, 2006, p. 2505.) He stated the email to all faculty was “not a good procedure. . . . To basically create a situation where people rush to get things and kind of a crowd may occur to try to get it first.” (Tr. 16, Feb. 10, 2006, p. 2507.) Grievant admitted he was upset about this procedure, and that he “probably repeated some questions.” (Tr. 16, Feb. 10, 2006, pp. 2508-2509.) When asked if he had raised his voice, Grievant responded, “[n]ot significantly,” and then asked what counsel for Respondent meant by “raising your voice.” (Tr. 16, Feb. 10, 2006, p. 2509.) After some additional attempt to elicit an answer to the simple question, Grievant was asked whether he had talked “in a tone that was louder than normal conversation when you were talking with the secretaries,” to which he responded, “[a] tiny bit.” (Tr. 16, Feb. 10, 2006, pp. 2509-2510.) While Grievant was not willing to admit he had raised his voice, he asserted that Ms. Fowler and Ms. Hall had become loud and were yelling at him.

The evidence supports the statements in the September 22, 2004 letter that Grievant's interaction with Ms. Fowler and Ms. Hall was inappropriate. This part of the grievance is denied.

III.

Non-Disciplinary Issues

A.

Grievance Number Two

This grievance was filed on November 12, 2004, and consists of five numbered paragraphs, each of which will be addressed separately.

1. Paragraph 1 - Discrimination, Reprisal, Harassment, and Breach of Grievance Confidentiality

The statement of grievance reads:

> I have already previously filed a grievance at Level II on October 6, 2004. I have learned that the grievance had been communicated in particular by Dr. Beattie to others at the institution including those who did not need to know such as faculty of the Department, jeopardizing the confidentiality of the process. Several administrative steps have been taken by Dr. Beattie after the grievance had been filed. In my view many of these steps constitute reprisal, undertaken in retaliation to my grievance. Broader actions are summarized next under 1.) And more specific actions follow numbered sequentially.
>
> 1.) Since the grievance has been filed Dr. Beattie has no longer responded to any of the letters or messages I had sent to her dated 10/6, 10/8, 10/11 (two), 10/12, and 11/4. This is particularly informative since Dr. Beattie has been frequently communicating with me by letter or other means until shortly before the grievance had been filed. Specifically, Dr. Beattie and her current office staff as well as Mohan Dasu and his new mentor Brad Hillgartner no longer respond to my greetings in the hallways. (See footnote 5) The complete withdrawalof support by Dr. Beattie since the grievance has been filed has a grave impact on many of my activities that depend on continuous day-to-day administrative support. Overall, as described in my grievance of October 6, 2004 I have been exposed to a systematic and ongoing defamation (See footnote 6) campaign. I understand that negative rumors have been spread to many students and staff as a result of Dr. Beattie's continuing actions. I understand that Dr. Beattie has communicated defamatory remarks to other Basic Science Department Chairs after my first grievance has been filed in an effort to deny me the relief I requested (to transfer to another Department).
>
> I have been treated highly unusually when compared to any other faculty I know at this school. I consider this treatment evidence of discrimination. In combination, many of the steps described below can only be interpreted as harassment by Dr. Beattie. I repeatedly complained to her about her repeated and damaging personnel decisions regarding my research team, in particular about the fact they were consistently conducted without my knowledge through my letters dated 10/6, 10/8, 10/11 (two), 10/12, and 11/4. Despite the fact that she knew about the distress she was causing

> Dr. Beattie continued her adverse actions to my research program as described in the specific points that follow below AFTER the original grievance had been filed. I have no choice as [sic] to interpret this as harassment with the goal to continuously irritate me.

As relief Grievant sought:

> To TRANSFER my administrative affiliation at once to an alternative structure (if necessary by making an interim arrangement until a final solution is found) to protect my program and my own situation from any further adverse actions. To stop harassment immediately! To cease any discriminatory activity at once which underlies many of the administrative steps taken. To REPAIR the damage caused by the various actions in particular to my reputation with students and staff at the School of Medicine. To restore strict confidentiality of the grievance process and ensure that any reprisal ceases without delay.

Dr. Beattie is no longer employed by WVU, so to the extent this grievance alleges improper acts, discrimination, reprisal, and harassment by Dr. Beattie, and requests that her actions cease, the grievance is moot.

> When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008).

Second, as will be discussed in the sections which follow, Grievant's claims that Dr. Beattie engaged in various actions are not supported by the record. She was not responsible for all that Grievant laid at her feet.

As to the relief sought, WVU was willing to transfer Grievant to another department, but has not been able to find a department which would accept him. John Prescott, Dean of the School of Medicine, made efforts to find a department which would accept Grievant, and was not successful. The undersigned has no authority to force another departmentat WVU to accept Grievant. As to Grievant's claim that Dr. Beattie made defamatory remarks to other department chairs about Grievant, Grievant produced no evidence to support this claim, and Dr. Beattie denied it.

2. Paragraph 2 - Transfer of Sanjeev Kumar from Grievant's Lab

The statement of grievance reads:

> Specifically, Sanjeev Kumar, a graduate student in my lab (transfer from Detroit) is no longer participating in my research program after the grievance had been filed. I have tried to obtain formal clarification on Sanjeev's exact status and on any procedure followed in the change of his status in repeated inquiries with the Department. My most recent inquiry is described in my letter of November 4, 2004 to Dr. Beattie. To this date I have not received any communication on Sanjeev's exact status, any changes, and the procedures followed. I hear through rumors that the Department had undertaken a sequence of steps to transfer Sanjeev to another research lab. I have never been informed by the department, I have never been given an opportunity to have my own views heard in any discussion about his matter.

As relief Grievant sought “an explanation about Sanjeev Kumar's exact status, any procedures followed, and a rational for any actions taken and why I was never consulted. To ensure that Sanjeev will continue to be available to serve as a consultant to new staff in the lab in the future on an as-needed basis.”

This grievance was untimely filed. Grievant knew on September 20, 2004, that Mr. Kumar was leaving his lab. This grievance was not filed until November 12, 2004. Grievant argued he had to first try to resolve issues on his own before filing a grievance, and apparently he had made some inquiries regarding Mr. Kumar's departure, but did not receive a response. Grievant's understanding is not correct. “There is no evidence that any WVU official ever made any type of representation to Grievant which would have caused him to delay filing the grievance. The delay in filing the grievance cannot be excused.” *Riedel v. W. Va. Univ.*, Docket No. 07-HE-411 (Aug. 5, 2008). Even were this grievance timely filed, Grievant has not demonstrated a violation of any statute, rule, regulation, or policy, or that he was harmed in any way. Grievant testified that this matter was handled in a way that was “very unprofessional.” He also argued it was harassment and reprisal by Dr. Beattie to transfer Mr. Kumar to a lab across the hall from his. Mr. Kumar's transfer occurred before any grievances had been filed. Reprisal is defined in West Virginia Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." By definition, this transfer does not constitute reprisal.

As to the claim of harassment by Dr. Beattie, Mr. Kumar told Dr. Beattie he was unhappy in Grievant's lab and was leaving, and he thought he was going to work with Steve Frisch when he arrived on campus. Dr. Beattie did nothing to arrange this transfer.

3. Paragraph 3 - Transfer of Mohan Dasu from Grievant's Lab

The statement of grievance reads:

> Dr. Beattie had endorsed the transfer of Mohan Dasu from my lab to Brad Hillgardner's lab and informed me of her decision on September 16, 2004 in the absence of any advance notice despite my protest and with the request that I [have] no further interact[ion] with Mohan Dasu. I have made repeated attempts to obtain an explanation of the reasons for the transfer as well as Mohan Dasu's notebook covering his efforts in my lab from 8/11/04 until 9/16/04 which were funded through my ADA grant. This includes my letters to Dr. Beattie of 10/8/04 and 11/4/04. I have not obtained any explanation for his transfer nor his notebook to this date. As a result most of his effort that I had funded was rendered unusable for the lab in the absence of his notebook.

As relief Grievant sought:

> To reimburse my ADA grant for the total personal expenses charged for Mohan Dasu's appointment from 8/11/04 to 9/16/04. Dr. Beattie authorized a transfer without any advance notice and requested me to immediatelycease any interaction with Mohan Dasu. Failure to provide the notebook over a two-month period despite my repeated requests has rendered Mohan Dasu's effort worthless for our ongoing ADA research program.

Mr. Dasu was a Research Assistant Professor in Grievant's lab for about one month. Mr. Dasu told Dr. Beattie on Monday, September 13, 2004, that he was leaving Grievant's lab, he could not stand to work for Grievant, and he had already talked to other administrators at WVU about transferring out of Grievant's lab. Dr. Beattie informed Grievant on September 16, 2004, that Mr. Dasu was leaving his lab. This grievance was not filed until November 12, 2004. Any complaint about Mr. Dasu's transfer was not timely filed. Further, Grievant did not demonstrate that WVU was required to provide him with any explanation; nonetheless, Grievant now has an explanation for Mr. Dasu's departure.

As to Mr. Dasu's “notebook,” assuming this is grievable, and assuming that there was any requirement that any effort be made to recover any such notebook, neither of which is a foregone conclusion, Dr. Beattie did inquire of Mr. Dasu about any notes he might have, and informed Grievant on November 11, 2004, that Mr. Dasu said he had given his notebook to Mr. Kumar. Mr. Kumar told Grievant that Mr. Dasu said he had left everything in the lab, and Mr. Kumar could not find any notes. Grievant produced a notebook at the level three hearing, which was labeled by Mr. Dasu as his computation book, but it contains no information except one page for August 17, 2004,

for Exp. No. 1. Grievant did not demonstrate that Mr. Dasu made any other notes, kept any other notebook, or that any such notes still exist which anyone at WVU could have retrieved for Grievant.

4. Paragraph 4 - Reimbursement for Mohan Dasu's moving expenses

Mr. Dasu's moving expenses, in the amount of approximately $1800.00, were charged to Grievant's start-up funding. Grievant demanded that his start-up account be reimbursed for this expenditure. WVU agreed at level two to reimburse Grievant's start-up account for this expenditure, and this is confirmed in the level two decision. WVU did not pursue an argument in opposition to this, and repeatedly pointed out during the level three hearing that this relief had been granted. Grievant, however, would not agree that this claim was moot. Grievant's claim for reimbursement for Mr. Dasu's moving expenses, in the amount of approximately $1800.00, has already been granted, and is moot.

5. Paragraph 5 - Rumors Spread to Graduate Students

The statement of grievance reads:

> After the grievance had been filed a new graduate student, Michael Dodrill has been denied access to my lab for rotation. This occurred as I understand from Dr. Fred Minnear based on instructions from Dr. Beattie although I had already addressed a stipulation to meet with Cheryl Riley that Dr. Beattie had made to open my lab for student rotations. Michael had complained to me about being denied access to my lab and I had assured him that I was willing to accept his rotation in two personal meetings. Despite repeated inquiries I do not understand why Michael was denied his first rotation in my lab. In addition, no additional first-year graduate student has contacted me about any interest in rotating in the lab. I hear that negative rumors are systematically being spread to incoming graduate students about my research lab. The grave consequences of such rumors are beginning to destroy my research program.

As relief Grievant sought:

> To cease spreading rumors about problems in my research lab to students or other faculty and staff. To actively communicate to all new graduate students that my lab is open for rotation and to encourage new students to participate in my research program.

The relief sought by Grievant that rumors cease is illusory, and is not relief which is available from the Grievance Board. Neither the Grievance Board nor any other body has the ability to cause humans to quit spreading rumors. Then there is the problem of sorting out what is a rumor, and what isn't a rumor. Grievant himself acknowledged that the rumor mill is not limited to employees of WVU; students also spread rumors.

Respondent argued this complaint was not timely filed. Grievant was aware of the issue with Mr.

Dodrill's rotation the first part of October, and was aware by October 18, 2004, at the latest, that Mr. Dodrill would not, in fact, be working in his lab the Fall semester of 2004. This grievance was not filed until November 12, 2004, more than ten working days after Grievant was aware of the events giving rise to the grievance. This complaint was not timely filed.

Were this complaint timely filed, it has no merit. Mr. Dodrill's rotation into Grievant's lab was delayed by one semester. The record does not reflect that Dr. Beattie participated in the decision to delay the rotation, nor does the record reflect any harm from this brief delay. Fred Minear, Assistant Director of Graduate Studies, decided, together with the Chair of the Admissions Committee, and with the backing of the Admissions Committee, to delay Mr. Dodrill's rotation into Grievant's lab. Grievant has since that time remained on the list as available for a student rotation, and when Dr. Minear gave his testimony on March 24, 2006, another student was at that time doing a rotation in Grievant's lab. The undersigned found no evidence in the extensive record to support a finding that "[t]he grave consequences of such rumors are beginning to destroy [Grievant's] research program."

B.

Grievance Number Three

This grievance was filed on April 19, 2005. The statement of grievance of Grievance Number Three consists of eight numbered paragraphs. The first two paragraphs of this grievance were related to Grievant's allegations that the research space he was promised was not provided by WVU. Grievant withdrew these claims by letter dated February 22, 2008, and they will not be addressed. The relief related to these claims, found in the first two numbered paragraph of the relief sought, will not be addressed for this reason.

1. Paragraph 3 - Sanjeev Kumar Transfer and Stipend Reimbursement

The third paragraph of Grievance Number Three states that the stipend of Sanjeev Kumar, a graduate student who transferred to WVU with Grievant from Wayne State University in January 2004, should have been charged to the "integrated research program," rather than to Grievant's research grant, for the period from January 1 through June 30, 2004, and that although WVU corrected this error in part, three months of the stipend had not been properly charged. It also states that Grievant was never provided an explanation for Mr. Kumar's transfer out of Grievant's lab in the Fall of 2004. The relief related to this paragraph, found in paragraph number 3 of the relief sought, is reimbursement for the remainder of Mr. Kumar's stipend.

Respondent argued this complaint was not timely filed, and proved that it was not. This grievance was not filed until April 19, 2005, nearly a year after the period of time in question. Further, Grievant knew on September 20, 2004, that Mr. Kumar was leavingGrievant's lab. Grievant did not demonstrate an excuse to his untimely filing. Nonetheless, Grievant now has his explanation for Mr. Kumar's transfer.

The record further reflects that WVU did agree to reimburse Grievant's grant for Kumar's stipend, and that this reimbursement had occurred by May 16, 2005, rendering this part of the grievance moot. (See footnote 7)

2. Paragraph 4 - Employee Effort Certification Reports

All faculty members who receive grant funding are required to sign an Employee Effort Certification Report. This report lists the accounts from which the faculty member's salary is funded. Grievant's complaint is that he believes he was threatened by Tammy Miller with regard to these reports, when she told him in an email that “the institution would be very intolerant of you refusing to cooperate,” in signing these reports. As relief, Grievant requested that administrative threats be ceased immediately, “and that I am provided with a detailed explanation of the intent of the threatening statement of April 15, 2005.”

Ms. Miller testified that she wrote in the email to Grievant, dated April 15, 2005, what she was told by Dr. Beattie to write, and that Dr. Beattie told her this is what Dr. Fred Butcher told her to write. Ms. Miller testified she had spent an hour and a half with Grievant trying to go through the Employee Effort Certification Report with him, in an effort to resolve any problems he was having with signing the report. She testified that during this meeting with Grievant he had threatened her “with an attorney.” When she sent the email to Grievant, she believed there was a perception that Grievant was refusing tocooperate, and she believed the institution could not tolerate noncompliance with the requirement that Grievant sign these reports. Grievant denied that he had refused to cooperate. As a result of Ms. Miller's email, Grievant met with Daniel Durbin and Dr. Butcher regarding his concerns, and an agreement was reached regarding the report in question.

Ms. Miller was not threatening Grievant. She had no power over Grievant, and it is obvious that Grievant did not feel threatened by her. Ms. Miller was relaying a message, and she was stating the facts. The fact is that faculty cannot ignore the requirement that they sign Employee Effort Certification Reports, and Grievant is well aware of this.

3. Paragraph 5 - Reimbursement for Stolen Computer

This paragraph of the grievance complains that a notebook computer which Grievant was using was stolen from Grievant's office on September 2, 2003. Grievant seeks reimbursement for the purchase price of the replacement computer. This was not grieved until April 19, 2005, and was not timely filed. It appears from the testimony that Grievant replaced the computer using his start-up funds, money which was allotted to him by WVU when he began his employment for start-up expenses, such as equipment purchases. Grievant offered as an excuse to his untimely filing that he believed his start-up funding would be reimbursed for this expense, and that he filed this grievance when this promise was revoked 1 ½ years later. Grievant did not demonstrate that anyone had ever made such a promise, and he is not excused from timely filing this complaint.

Were this complaint timely filed, Grievant did not demonstrate that his start-up funding should be reimbursed for the cost of a new computer. The major problem with this complaint is that the record does not establish ownership of the computer. The computerdid not belong to Grievant. Grievant believed it had been purchased with grant funding while Grievant was at Wayne State University, and then he brought it with him to WVU, although Tammy Miller testified that she did not believe the computer was purchased with grant money. WVU did not claim ownership of the computer. If WVU owned it, it was WVU's loss, and it was within the institution's discretion whether the computer should be replaced. If WVU did not own the computer, and Grievant did not own the computer, it probably should have been left at Wayne State. Testimony was offered that the owner of the computer should have turned a claim in to his insurance carrier, but no one did so. Grievant chose to use his start-up funding to replace this equipment which he was using in his lab. Start-up funding is provided to new research professors so they can purchase new equipment for their labs. This complaint is without merit.

4. Paragraph 6 - Cap on Salary Support

The statement of grievance reads:

> Today, during a discussion of salary support I learned from Tammy Miller that the maximum salary support that can be provided from my NIH RO1 grant has been capped at 45% into the future. There had been a previous discussion of allowable salary support with the Department Chair that did not clarify any rationale for limits of external salary support nor did it clarify any limitations on future external salary support.

As relief Grievant sought:

> I request the percentage of effort available to supplement my salary from external grant funds to be restored to 100% minus applicable teaching and service effort. I request any arbitrary cap on my effort to be removed and that my effort will be limited only by the guidelines of the Institutional Salary Incentive Plan as it equally applies to other faculty. I request to be reimbursed for any income lost as a result of the limitations imposed by administrative steps against my requests.

Part of Grievant's salary is paid from his research grants. Researchers allocate a certain percentage of their effort, or time, toward work on their grants, and the salary support from the grant is supposed to be commensurate with the effort. Tammy Miller was responsible for submitting the paperwork for Grievant for him to be paid from the grant money. The percent of Grievant's salary which he was requesting be paid from one of his grants fluctuated over a short period of time, and Ms. Miller became concerned about whether Grievant could change the percentage as he was doing. She asked for some guidance on this from Mary Jane Buckland, Senior Associate Director of the Office of Sponsored Programs, and then Dr. Saba became involved. Dr. Saba told Dr. Beattie she could set a cap on the percentage Grievant could charge to the grant if she wanted to do so.

Dr. Beattie was concerned that the percentage Grievant was charging at times to one of his grants could not be justified. She did not believe he could have been spending 50 or 60% of his effort on the one grant. She decided a cap of 45% was reasonable. Grievant was aware that a 45% cap had been placed on his salary support by February 8, 2005, but did not grieve this action until April 19, 2005. Any grievance complaining of this action was not timely filed.

5. Paragraph 7 - Vacation Time

Grievant complains that he was charged with using vacation time in the amount of 75 hours, which he had not yet earned, when he was moving his lab in October 2003. This complaint, filed April 19, 2005, is untimely. Grievant argued this constituted a continuing practice which could be grieved at any time. The charge to Grievant's vacation time occurred once, at a particular time. This is not a continuing practice.

6. Paragraph 8 - Reprisal

The statement of grievance reads:

> I consider most of the administrative actions discussed in this grievance (excluding point 7) [to be] in reprisal to the grievances I earlier filed on October 6, 2004 and November 12, 2004. I understand that my grievance activities have been widely discussed across the administration and by Department Chair Dr. Beattie with all faculty in a circulated email of 11/12/2004.

As relief Grievant requested “that any reprisal action is immediately ceased, that all punitive actions are reversed, and that appropriate disciplinary steps are taken against the reprisal actions as stipulated by WV state regulations.”

To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, *e.g*., filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251(1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*.

Several of the complaints in this grievance are related to events which occurred before Grievant had filed a grievance. By definition, these events are not reprisal. With regard to the requirement that Grievant sign Employee Effort Certification Reports, this has always been a requirement, and no

threat was made. Finally, any remaining complaints alleged reprisal by Dr. Beattie. These complaints are moot.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Olmsted v. Bd. of Directors/Bluefield State College*,Docket No. 98-BOD-108 (Oct. 21, 1998); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

3. Grievant has the burden of proving his grievance relating to non-disciplinary matters by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

4. Grievant did not timely file his complaints regarding Mr. Kumar's or Mr. Dasu's departure from his lab; the theft of a notebook computer; charges to his vacation time in October 2003; the delay in Mr. Dodrill's rotation; or the cap placed on his salary support; and, he did not demonstrate an excuse to his untimely filing.

5. The May 19, 2004, and September 21, 2004, letters discussed in this decision should be removed from Grievant's personnel file.

6. The allegations set forth in the September 22, 2004 letter are supported by the evidence. 7. Grievant's claims regarding Mr. Dasu's moving expenses and Mr. Kumar's stipend are moot.

8. Grievant did not demonstrate that he was the subject of an improper administrative threat.

9. Reprisal is defined in West Virginia Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, *e.g*., filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997). 10. Grievant's claims that Dr. Beattie engaged in reprisal, discrimination and harassment are moot.

11. Grievant did not demonstrate that he was the subject of reprisal.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART.** Respondent is **ORDERED** to remove the letters referred to in this grievance dated May 19, 2004, and September

21, 2004, from Grievant's personnel file. The remainder of 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. *See* W. Va. Code § 29-6A-7 (*See Footnote 1*). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: October 31, 2008

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

The education grievance procedure, which is not applicable to higher education employees, allowed county board of education employees fifteen days to file a grievance.

Footnote: 3

Whether Grievant can also grieve the contents of the letter because of the status it attained by being placed in his personnel file need not be addressed.

Footnote: 4

Grievant also alleged the placement of this letter in his personnel file was discrimination, because another researcher had also had several students leave his lab, but Dr. Beattie did not write a similar letter to him, or place such a letter in his personnel file. Given the conclusion reached, that the letter should be removed from Grievant's personnel file, it is not necessary to address this argument.

Footnote: 5

Certainly Dr. Beattie cannot be held responsible for someone declining to speak to Grievant. With regard to Mr. Dasu in particular, there is no doubt that the blame must fall squarely upon Grievant. After Mr. Dasu left Grievant's lab, Grievant sent him ascathing letter dated September 20, 2004, stating he was disappointed with Mr. Dasu's work, that he had learned Mr. Dasu had raised several false accusations about the situation in Grievant's lab which "are clearly unlawful," that Mr. Dasu's "approach to transfer secretly is highly unprofessional," and that "it appears as if your intent is to damage my research program rather than to support it as had been your responsibility." Grievant concluded this letter as follows: "[i]t is imperative that you stop making false statements about your situation in my lab immediately. I reserve the right to recover from you in full compensation for any damages that may occur as a result of any false statements that you have made or may be making in the future to the full exten[t] permitted under applicable law." Level three Exhibit 84. Surely Grievant did not believe Mr. Dasu would exchange pleasantries with him after this.

Footnote: 6

"A charge of slander is a defamation claim that must be brought within the parameters of a civil suit and under the jurisdiction of a court within the judicial branch of government. To the extent [Grievant] has raised such a claim herein, said claim may not be entertained as constituting a 'grievance'". . .. Archer v. W. Va. Bd. of Trustees, Docket No. 94-BOT-138 (Sept. 7, 1994).

Footnote: 7

Grievant did not consider this a moot point, because he had not been able to verify that this reimbursement had, in fact, occurred, notwithstanding that he had received an email from Daniel Durbin on May 16, 2005, stating that this had been accomplished.