THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL DUNN, et al.,
Grievants,

v. **Docket No. 2009-0983-CONS**

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievants are employed by Marshall University ("MU") as classified employees. They filed this grievance on February 13, 2009. The Statement of Grievance asserts in pertinent part:

> That Marshall University (employer) has/is discriminating against the classified staff employees in regard to how they pay classified employees. . . . Marshall Classified employees are paid 27% below a current salary market or around 73% of a current Market. . . . The University has strived to keep all other classes of employees-Faculty, non-classified, administrative at 86% or above their current respective "Current" market.[1]

The relief sought is:

> Full funding of the current 2001 classified salary schedule in state code by March 15th 2009. Have BOG pay policies written for all Classified Staff, non-Classified staff, Faculty, and administration[.] That all pay classes of employees [be] at the same percentage of their respective salary market.

This grievance was denied at Level One, and mediation was unsuccessful. A Level Three hearing was conducted at Marshall University in Huntington, West Virginia, with the agreement of the parties on September 3, 2009. Grievants were represented by Michael Dunn, co-Grievant, and MU was represented by Jendonnae Houdyschell, Senior Assistant

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[1]The Statement of Grievance listed many issues that were not argued or even discussed by Grievants, such as age and gender discrimination and violation of the Americans with Disabilities Act. These issues will not be addressed as they are deemed abandoned.

Attorney General. This matter became mature for decision on September 25, 2009, after the submission of the parties' proposals.

Synopsis

Procedurally, Respondent asserts this grievance was not timely filed, and Grievants do not have standing to require it to adopt a policy for the nonclassified staff.

Grievants assert MU's action represents a continuing practice, and, thus is timely filed. They assert MU is required by W. VA. CODE § 18B-2A-4 3 (j) to have a written pay plan and policy for all employees.

On the merits, Grievants maintain MU has violated its Mission Statement and has not treated the classified staff in a fair and equitable manner, as their present rate of pay is only 73% of the current market salary. Grievants note some nonclassified staff are paid at the current market salary, and faculty, at the time of filing this grievance, were paid at 86% of the current market value.[2]

Respondent avers Grievants have not demonstrated that MU violated any rule, regulation, statute, or policy, and Grievants have not met their burden of proof and established any discrimination.

Grievants did not meet their burden of proof and establish MU violated any rule, regulation, statute, or policy. For the reasons stated below, this grievance must be DISMISSED.

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

Findings of Fact

1. Grievants are all classified staff at MU. They serve in a variety of classifications and have different degrees of seniority.

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[2]Testimony at the Level Three hearing indicated faculty were now at 82% of market value.

2. In 2001, the Legislature enacted W. VA. CODE § 18B-9-3 which established a personnel classification system and salary schedule for classified staff.

3. In 2005, MU adopted the personnel classification system and salary schedule.

4. On a yearly basis since 2005, the classified staff has asked MU to fully fund the salary schedule. Grievants' Exh. 11 at Level One.

5. At this point in time, MU classified employees are paid at 94% on the salary schedule.

6. The majority of state colleges and universities have not fully funded the classified employees' salary schedule. Grievants' Exh. 3 at Level Three.

7. MU reviews all salaries and assesses its ability to give increases on a yearly basis. The last assessment prior to filing this grievance was in October 2008.

8. In January, the classified staff learned about MU President Steve Knopp's salary increase to market level.

9. On February 10, 2009, the West Virginia Higher Education Policy Commission ("HEPC") submitted its Personnel Study Final Report to the legislature as required by W. VA. CODE § 18B-1B-13. This report covered all areas of higher education, including compensation. Grievants' Exh. 3 at Level Three.

10. There are basically three types of employees at MU - classified, nonclassified, and faculty.

11. Classified employees are defined in W. VA. CODE § 18B-9-2(a) as:

> "Classified employee" or "employee" means any regular full-time or regular part-time employee of a governing board, the commission or the council . . . who hold a position that is assigned a particular job title and pay grade in accordance with the personnel classification system established by this article or by the commission and council. . . .

12. Nonclassified employees are defined in W. VA. CODE § 18B-9-2(b) as:

> "Nonclassified employee" means an individual who is responsible for policy formation at the department or institutional level, or reports directly to the

> president, or is in a position considered critical to the institution by the president pursuant to policies adopted by the governing board. . . .

13. Full-time faculty are defined in W. VA. CODE § 18B-8-1(f) as "any faculty member designated as such by the president, consistent with approved policy of the appropriate governing board, and those persons with faculty rank who have research or administrative responsibilities."

14. W. VA. CODE §18B-8-3 discusses faculty salary policies, and states, "[e]ach governing board shall establish and maintain a faculty salary policy that is competitive and which furthers the goals of attracting, retaining and rewarding high quality faculty."

15. W. VA. CODE § 18B-8-3a discusses institutional salary policies and the distribution of faculty increases. This Code Section details the complex manner in which faculty increases are calculated and decided.

16. The rules governing the employment, promotion, retention, and compensation of faculty, classified staff, and nonclassified staff vary greatly. Nonclassified staff are at-will employees, and as such, have no right to grieve their termination absent a violation of a substantial public policy. A faculty member's promotion, salary advancement, and retention are governed by a variety of complex rules, policies, and detailed assessments by peers and supervisors. Testimony McGuffey and Stephens.

17. There is no written policy or salary schedule for nonclassified employees. Past practice is for each person who reports to the President to get a list of his/her nonclassified employees, and a pool of money equal to the percentage approved by the Board. This money is then distributed as the individual sees fit, but many supervisors give an equal percentage across-the-board. Testimony McGuffey.

18. Increases for the classified staff are based on the available funds, and the relationship to the total classified salaries being paid to the 2001 salary schedule. The salary increases are then used to fill the gap between the current pay level and the salary schedule. All classified staff, whose current salary is below the 2001 salary schedule,

receive an amount to bring them all to the same level on the salary schedule. The last increase brought these employees up to 94% on the salary schedule.

Discussion

The many issues raised by Grievants and Respondent will be addressed one at a time.[3]

I. Timeliness

MU contends this grievance is untimely filed, as it was not initiated within the time lines contained in W. VA. CODE § 6C-2-4(b)(1). When an 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/her 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). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

Respondent argued this grievance was not timely filed, as Grievants have been aware of the pay schedule since it was enacted by the Legislature in 2001 and adopted by MU in 2005. Additionally, Respondent notes Grievants were aware of MU's latest failure

[3]Given the ruling on the other issues, the subject of standing will not be addressed.

to fully fund the salary schedule in October 2008, when all the salaries were reviewed. Grievants assert the grievance was timely filed, as this grievance falls within the continuing practice exception.

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4 (1) identifies the timelines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule and stated at Syllabus Point 1, "the 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."[4]

"This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen 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*

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[4]"It is not the discovery of a legal theory which triggers the statute, but the event. . . ." *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). *See also Byrd v. Cabell County Bd. of Educ.*, Docket No. 96-06-324 (May 22, 1997); *Adkins v. Boone County Bd. of Educ.*, Docket No 93-03-023 (Apr. 8, 1993).

Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). 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 . . .. *See, Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990)." *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995).

Grievants are challenging a decision that was made in 2001 by the Legislature, and adopted by MU in 2005. Grievants had asked MU on a yearly basis to fully fund the salary schedule to no avail. Additionally, Grievants were well aware that their salaries were reviewed in October 2008, and the salary schedule was not fully funded at that time.

Grievants assert their time to file should run from the filing HEPC report and the newspaper report of the President's salary. The HEPC report of February 2009 cannot be labeled as an event, as no action was taken at that time. This report told Grievants what they already knew - the salary schedule was not fully funded, and they were losing ground toward the current market salary every year. The newspaper report of President's Knopp's current market salary is also not an event.

Grievants' claim does not fall within the continuing practice exception. In looking at this issue in a manner most helpful to Grievants, the undersigned Administrative Law Judge believes Grievants could have filed this grievance in October 2008, when they learned that, once again, the salary schedule would not be fully funded. Grievants did not begin the grievance procedure within 15 days of learning this information and waited until February 13, 2009, to file. Accordingly, this grievance is not timely filed. Grievants did not present any justification for their failure to timely file this grievance.

Even if the grievance had been timely filed, the undersigned would conclude MU has not violated any rule, regulation, statute, or policy.

I. Merits

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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).

A. Violation of rule, regulation, statute, or policy

W. VA. CODE § 18B-9-3 discusses the annual salary schedule of higher education classified employees and states:

> (a) There is hereby established a state annual salary schedule for classified employees consisting of a minimum annual salary for each pay grade in accordance with years of experience: Provided, That payment of the minimum salary shall be subject to the availability of funds, and nothing in this article shall be construed to guarantee payment to any classified employee of the salary indicated on the schedule at the actual years of experience absent specific legislative appropriation therefor. The minimum salary herein indicated shall be prorated for classified employees working less than thirty-seven and one-half hours per week. Despite any differences in salaries that may occur, a classified employee is equitably compensated in relation to other classified employees in the same pay grade if the following conditions exist. . . .

(Emphasis added).

As noted in the HEPC report, "the Legislature did not appropriate money to support the 2001 salary schedule. Institutions alone shouldered the burden of finding funding, primarily through tuition and fee increases." Grievants' Exh. 3 at Level Three at 16.

The above-cited Code Section is clear - "absent specific legislative appropriation" there is no statutory "guarantee" to classified employees as to when the salary schedule will be fully funded. Accordingly, Grievants have not demonstrated a violation of any rule, regulation, statute, or policy.

B. Discrimination

Grievants argue they have been treated differently from other similarly situated employees. For purposes of the grievance procedure, discrimination is defined as "any

differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306 , 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants have not met their burden of proof and established a case of discrimination, as they are not similarly situated to the employees to whom they compare themselves: faculty members and nonclassified staff.

The West Virginia Supreme Court of Appeals held in *Flint v. Wood County Board of Education*, 207 W. Va. 251, 531 S.E.2d 76 (1999), that to be considered similarly situated, the employees must be in the same classification as the employees to whom they compare themselves. The Court stated "the first prerequisite for establishing a *prima facie* case of discrimination or favoritism is a showing that the grievant is similarly situated, in a pertinent way, to one or more other employees." In *Flint*, the Court found the grievants could not make such a showing because they were not in the same classifications as those to whom they compared themselves and were not performing the same job responsibilities. This ruling was affirmed in *Airhart v. Wood County Bd. of Educ.*, Docket No. 99-54-419 (May 19, 2000), *aff'd* in part, *rev'd* in part, 212 W. Va. 175, 569 S.E.2d 422 (2002).

This same ruling has also been applied to state employees. In *Farley v. West Virginia Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-015 (June 22, 2000), the administrative law judge cited to *Flint* and noted the

grievants did not hold the same classifications as any of the employees to whom they compared themselves. As the employees were not similarly situated, no discrimination was found. *See Aultz v. W. Va. Dep't of Transp.*, Docket No. 90-DOH-522 (Feb. 28, 1991).

A review of the case law and facts reveals the actions of MU were not discriminatory. Grievants are not similarly situated because they are not in the same classifications/categories as faculty members and nonclassified staff. Grievants do not perform the same job duties and are not required to possess the same skills and abilities. Additionally, the rules and practices governing the employment, retention, promotion, and compensation are very different among the groups. For example, nonclassified employees are at-will and cannot avail themselves of the grievance process. Faculty have little employment protection until they receive tenure, which is achieved through a lengthy, multi-level, assessment process. Accordingly, Grievants have not met their burden of proof and established a case of discrimination.

C. Authority to grant relief

It is not the role of the Grievance Board, nor has the undersigned Administrative Law Judge the authority, to change policies or to require an institution to establish a policy absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). *See Gary v. Dep't of Health and Human Res.*, Docket No. 97-HHR-461 (June 9, 1999).

Grievants assert that W. VA. CODE § 18B-2A-4 (j) requires the Board of Governors to have an approved, written salary policy for nonclassified employees. This Code Section states the board of governors is to, "administer a system for the management of personnel matters, including, but not limited to, personnel classification, compensation and discipline for employees at the institution under its jurisdiction. . . ."

Grievants have failed to prove the Code Section requires MU have a written policy for the compensation of nonclassified employees. This Section states the Board of

Governors is to administer classification and compensation. It does not require the Board of Governors to establish a personnel classification system - that duty lies with the commission.[5]

Additionally, the testimony at both Level One and Level Three described the manner in which nonclassified employees receive salary increases, and how they are assigned job titles. This practice has been in place for many years, and this is the manner by which MU has decided to administer nonclassified staff compensation.[6] The Grievance Board is without authority to require MU to fully fund the salary schedule or to enact a policy for nonclassified employees, as this type of relief is not available through the grievance procedure. The Grievance Board is not allowed to substitute its judgement for the administration of MU. *Skaff, supra*.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. When an 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 her 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-

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[5]W. VA. CODE § 18B-9-4 (a) states the role of establishing a personnel classification system and the assignment of a classification to a pay grade is the responsibility of the "commission." *See also* W. VA. CODE § 18B-9-2 (g) which states, "[personnel classification system" means the process of job categorization adopted by the commission and council jointly by which job title, job description, pay grade and placement on the salary schedule are determined."

[6]The testimony clearly revealed that the job responsibilities of nonclassified employees vary greatly from institution to institution, and it was not possible to assign a hard and fast classification to these positions as it was with Grievants.

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). "If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

2. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4 (1) identifies the timelines for filing a grievance and states,

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *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). "[T]he 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 County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

4. "This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen 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).

5. 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 . . .. *See, Spahr v. Preston Co[unty] Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990)." *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995).

6. The HEPC report of February 2009 and the newspaper report of President Knopp's current market salary cannot be labeled as events, as no action was taken at that time.

7. Grievants' claim does not fall within the continuing practice exception; thus, this grievance is untimely filed.

8. Grievants have not presented any justification for their failure to timely file this grievance.

9. Respondent met its burden of proof and demonstrated this grievance was untimely filed.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. CODE § 6C-2-5. 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 Civil Action umber should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.19 (eff. Dec. 27, 2007).

JANIS I. REYNOLDS
Administrative Law Judge

Dated: February 16, 2010