THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NABIE Y. CONTEH,
Grievant,

v. **DOCKET NO. 2013-1725-WLU**

WEST LIBERTY UNIVERSITY,
Respondent.

DISMISSAL ORDER

Grievant, Nabie Y. Conteh, filed this grievance against his employer, West Liberty University, on April 15, 2013, at level three of the grievance procedure, after he was notified that his annual contract of employment as a probationary, tenure-track Associate Professor was not being renewed. The statement of grievance reads as follows: "[m]y position was arbitrarily terminated for no clear reasons by my dean, Loren Wenzel with a very short notice." As relief Grievant seeks, "reinstatement to my position."

A level three hearing was held before the undersigned Administrative Law Judge on September 4, 2013, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision on September 26, 2013, the deadline for submission of Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed pursuant to an annual contract. Grievant was notified in early January 2013 that his contract would not be renewed for 2013-2014, but did not file a grievance until April 2013. Grievant contended that his failure to timely file the grievance should be excused because he did not know that he had grounds for questioning the reasons given for not renewing his contract until April 2013, when he requested and received enrollment data. The evidence demonstrates that Grievant filed this grievance the day **before** he requested the enrollment data, and two days before he received the data. His alleged excuse is not supported by the facts. Further, the undersigned concludes that nothing precluded Grievant from promptly requesting this data, and nothing occurred that caused him to suddenly question and request the data, and that this situation does not fall within the discovery rule exception to the statutory timelines for filing a grievance.

The following Findings of Fact are made based upon the evidence presented at level three.

Findings of Fact

1. Grievant was employed by Respondent, West Liberty University ("WLU") as a tenure-track, full-time, Associate Professor of Computer Information Systems, in the Gary E. West College of Business, with an annual contract of employment.

2. By letter dated May 26, 2011, Grievant was first offered employment by Respondent, for the period of August 16, 2011, to May 15, 2012.

3. Grievant's most recent annual contract was for a one year period, ending May 16, 2013.

4. By email dated December 11, 2012, Grievant was notified by Loren A. Wenzel, Dean of the Gary E. West College of Business, that "[d]ue to low enrollments, your CIS position has been eliminated. I am very sorry. You will be receiving a registered letter."

5. By letter dated December 10, 2012, Grievant was notified by Dean Wenzel that, "effective May 16, 2013, your CIS faculty position in the Gary E. West College of Business will no longer exist. As such, you will not be offered a contract for the 2013-14 academic year. . . . Because there is no longer a need for your faculty position in Computer Information Systems, it will be eliminated at the conclusion of the current academic year." Grievant was out of the country at the time this letter was mailed to his address, and he received it when he returned, on or about January 10, 2013.

6. On April 15, 2013, the Grievance Board received this grievance, as is evidenced by the date stamp. The grievance form was not dated, and the envelope in which it was delivered did not bear a postmark date.

7. On April 16, 2013, after this grievance was filed, Grievant requested information on enrollment in various courses offered by the College of Business. This information was provided to Grievant on April 17, 2013.

8. WLU employed four Computer Information Systems instructors, including Grievant, in anticipation of continued increased enrollment in this area, as well as in the Gary E. West School of Business generally, and in anticipation of an MBA Program, none of which has come to fruition. The number of students selecting Computer Information

Systems as a major was unchanged from 2011 to 2012. Enrollment in the School of Business has declined since 2008, and dropped below 400 students in the fall of 2012.

9. Grievant was the least senior of the Professors employed in the School of Business.

Discussion

Respondent asked that this grievance be dismissed as untimely filed. 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 § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> 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 employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

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).

Grievant was notified of his non-retention by email on December 11, 2012, and he received the letter officially notifying him of this on or about January 10, 2013. At the latest, Grievant had until around February 1, 2013, to file a grievance, yet he failed to do so. Grievant's excuse is that he did not have any reason to question the non-renewal of his appointment until he requested and received enrollment data in April 2013.

The "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), provides that the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. "However, the discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an 'event' giving rise to a grievance within the intent of *W. Va. Code* § 18-29-4 as interpreted in *Spahr*. *Parkins v. W. Va. Dep't of Envtl. Protection*, Docket No. 03-DEP-156 (Sept. 17, 2003); *Adkins v. W. Va. Dep't of Educ.*, Docket No. 95- DOE-507 (Apr. 26, 1996)." *Cain, et al., v. Dep't of Transp.*, Docket No. 05-DOH-402 (Feb. 6, 2006). "'[T]he date a Grievant finds out an event or continuing practice was <u>illegal</u> is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice.' *Lynch v. Dep't of Transp./Div. of Highways,* Docket No. 97-DOH-060 (July 16, 1997); *Harris v. Lincoln County Bd. of Educ.,*

Docket No. 89-22-49 (Mar. 23, 1989)." *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011)(Emphasis in original).

First, Grievant waited over three months to request information on enrollment. He offered no excuse for his delay in requesting the information upon which he alleges his grievance is based, and did not indicate that a particular event triggered his request. A Grievant's failure to investigate the facts in a timely manner should not be used to toll the statutory timelines.

More importantly, however, Grievant's excuse for untimely filing is not supported by the facts. The records of the Grievance Board show that this grievance was received by the Grievance Board on April 15, 2013. The evidence placed into the record by Grievant is that Grievant did not request enrollment information until the day **after** this grievance was received by the Grievance Board, and he received the information the day after that. He filed the grievance **before** he had any data relating to enrollment. Grievant's excuse for untimely filing is not supported by the evidence. The grievance was not timely filed.

Nonetheless, the undersigned will briefly address the merits of the grievance. In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. *Turman v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-199 (Nov.8, 1999); *Fasce v. Bd. of Directors*, Docket No. 94-BOD-1072 (Sept. 13, 1995). *See Baroni v. Bd. of Directors*, Docket No. 92-BOD-271 (Feb. 11, 1993). 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. W. Va. Dep't of Health & 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.

Series 9 (133 C.S.R. 9) governs Respondent's actions, and provides that:

> During the tenure-track period, contracts shall be issued on a year-to-year basis, and appointments may be terminated at the end of the contract year. During said tenure-track period, notices of non-reappointment may be issued for any reason that is not arbitrary, capricious, or without factual basis.

133 C.S.R. 9 § 10.4. For tenure-track faculty hired after March 8, 2003, this rule further requires that the faculty member notified of the decision not to retain him by no later than March 1. 133 C.S.R. 9 § 10.6. This rule provides Respondent with broad discretion.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an

administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*. *See Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999).

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. *See generally Siu v. Johnson,* 784 F.2d 238 (4th Cir. 1984); *Smith v. Univ. of N. Carolina*, 632 F.2d 316 (4th Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, the Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. *Gruen v. Bd. of Directors*, Docket No. 95-BOD-281 (Mar. 6, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995); *Carpenter v. Bd. of Trustees*, Docket No. 93-BOT-220 (Mar. 18, 1994); *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). *See Siu, supra; Kauffman v. Shepherd College*, Docket No. BOR1-86-216-2 (Nov. 5, 1986).

This strategy generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects

of arcane scholarship beyond the competence of individual judges." *Kunda, supra*, at 548. *See also Bina v. Providence College*, 39 F.3d 21 (1st Cir. 1994), *cert. denied,* 115 S. Ct. 1406 (1995); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980).

In this instance, Grievant's contract as faculty member was not renewed due to low enrollments, and a determination that there was no need for four Computer Information Systems faculty. John McCullough, Executive Assistant to the President of WLU, explained that when Grievant was hired, Respondent was anticipating that enrollment in Computer Information Systems and the School of Business would increase, and that WLU would have an MBA program. While enrollment in Computer Information Systems as a major has not declined, it has not increased either since Grievant was hired, enrollment in the School of Business has declined each year for a number of years, and, the anticipated MBA program has not come to fruition. Grievant asserts that the reasons given are not supported by the enrollment information because enrollment in Computer Information Systems has not declined. Respondent never stated that this had occurred, or that this was the reason for not renewing Grievant's contract. The stated reason was a lack of need for Grievant's position and "low enrollments." Grievant did not demonstrate that Respondent acted in an arbitrary and capricious manner in not renewing his contract.

Finally, Grievant argued that he was entitled to a terminal contract for the 2013-2014 academic year, in accordance with the provisions of Series 9 at Section 10.3, which reads as follows:

> The maximum period of tenure-track status normally shall not exceed seven years. Before completing the penultimate year (the critical year) of a tenure-track appointment, any non-tenured faculty member shall be given written notice of tenure, <u>or</u> *offered a one-year written terminal contract of employment*. . . ..

133 C.S.R 9 § 10.3. (Emphasis added.) Dr. McCullough pointed out, this provision is clearly not applicable to Grievant's situation. This provision is applicable when a tenure-track faculty member has been employed for the maximum number of years set forth above, and a decision must be made as to whether to grant tenure. This provision clearly states that the procedure is that either tenure is granted at that point **or** the faculty member is offered a terminal contract.

The following Conclusions of Law support the Dismissal of this grievance.

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. Grievances *must* by statute be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). 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).

3. This grievance was not filed within the statutory time lines for filing a grievance.

4. Grievant failed to demonstrate an excuse for his failure to timely file his grievance.

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: October 11, 2013