THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JOSEPH KOMOROWSKI,

Grievant,

v. **Docket No. 06-25-319**

Denise M. Spatafore

Administrative Law Judge

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Joseph Komorowski ("Grievant") filed a level four appeal through his counsel on September 21, 2006. Prior to the scheduling of a level four hearing, on October 3, 2006, Respondent filed a Motion to Dismiss on the basis that the level four appeal was untimely. A telephonic hearing on that motion was conducted on October 6, 2006. At that time, Grievant was represented by his attorney, Gregory A. Gaudino, and Respondent was represented by counsel, Richard S. Boothby. Subsequent to that hearing, Grievant was allowed until October 27, 2006, to file a responsive brief with supporting documentation, and Respondent was given until November 3, 2006, to file its reply, at which time this issue became mature for consideration.

Having reviewed the information provided by the parties, I find that the following material facts have been proven by a preponderance of the evidence:

Findings of Fact

1. In early July of 2006, Grievant filed a grievance alleging that certain duties had been taken away from him. This grievance proceeded through levels one and two of the grievance process without incident.

2. On August 16, 2006, Grievant appealed the grievance to level three.

3. On August 22, 2006, the Marshall County Board of Education ("the Board") voted to waive participation in the grievance, and issued a written decision stating as much.

4. The Board's level three decision was hand-delivered to Grievant on August 24, 2006, by David Gill, Personnel Director. Also included was the original grievance form, along with the grievance filing instructions contained on the second page of the form.

5. Also on August 24, 2006, Mr. Gill mailed the level three decision to Grievant and his attorney. This mailing also included a two-page grievance form with filing instructions for each level.

6. On August 31, 2006, Grievant delivered his grievance form, with the level four section completed, to the central office. When Mr. Gill was given the form by an office employee, he believed it was a copy of Grievant's level four appeal, which he assumed had been filed with the Grievance Board.

7. During a telephone conversation between the parties' respective attorneys on September 21, 2006, the Board's attorney asked Grievant's counsel why he had not received any information regarding the level four appeal from the Grievance Board. Grievant's counsel advised that he did not know, but that he would discuss it with his client.

8. On September 21, 2006, Grievant's level four appeal was filed with this Grievance Board.

Discussion

___W. Va. Code § 18-29-4(d) requires that an appeal to Level IV be submitted to the hearing examiner within five days of the written decision. Without question, Grievant's appeal was not filed within that time period, and it was not filed with the Grievance Board until 19 working days after the level three decision was issued. Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been

timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995). *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).

Grievant has provided at least two excuses for his untimely appeal. First, he alleges that he believed that filing with the Board's central office was sufficient, because that was where he had filed at all other levels. Second, he contends that both parties had confused this grievance with another grievance he filed around the same time, contributing to his failure to follow the proper procedure.

As to Grievant's contention that he assumed he could file his level four appeal with the Board office, this is difficult to understand. Grievant has pursued at least two previousgrievances through levels one through four of the grievance procedure, (See footnote 1) so he should be familiar with the process for filing at level four. In addition, the level three decision was mailed to Grievant's counsel the same day it was issued, and there has been no contention that it was not received by him in a timely manner. Being a competent attorney experienced in the grievance process, there has been no explanation for Grievant's attorney's failure to timely appeal to level four on his behalf.

Moreover, it is well-settled that, absent specific misdirection by a third party, a grievant is not excused for filing his grievance in the wrong place. As recently held in *Wyatt/Baker v. Marshall University*, Docket No. 06-HE-054 (March 15, 2006), when Grievants filed their level four appeal with the human resources department at the institution, after receiving clear instructions with the level three decision, this was untimely filing, and the grievance was dismissed. Similar rulings have been made in other grievances, where the only excuse for the misfiling was Grievant's mistaken belief as to where to file the appeal, despite instructions received from the employer. *See Casey v. Mason County Bd. of Educ.*, Docket No. 01-26-394 (Sept. 25, 2001); *Turley v. Marshall University*, Docket No. 01-HE-128 (Aug. 28, 2001).

Grievant argues that the underlying facts in *Duruttya v. Board of Education*, 181 W. Va. 203, 382 S.E.2d 40 (1989) are similar to those of the instant case and should result in a ruling in his favor. Indeed, it was held by the Supreme Court in *Duruttya* that a 53-day delay in appealing to level was excused, when the Grievant mistakenly filed the appeal withthe board of education. However, the

similarity ends there. In that case, the letter the grievant received from the board of education stated that he had five days to request a level four hearing and appeal pursuant to statute, but it gave no instructions as to where or how to file this request. Moreover, this individual was not represented by counsel, and the grievant presented his request for a level four hearing to an assistant superintendent who stamped it and stated that he would deliver it to the superintendent. This cannot be compared to the instant case, where an experienced grievant and counsel were both provided with a level three decision and grievance form containing clear instructions as to where to file a level four appeal.

Grievant also claims that his untimely appeal was caused by the general confusion which existed regarding his grievance form. Apparently, shortly after filing the instant grievance, he filed another grievance requesting as relief to be awarded the position of activities coordinator at John Marshall High School. Early on in the processing of the current grievance, the forms apparently became mixed up, and both parties used this second grievance form at each level of appeal and processing of *this* grievance. However, it is obvious from the evidence submitted that, despite the fact that the forms got mixed up, all parties knew when signing, dating, and processing the form that it was the first grievance with which they were dealing. Grievant has failed to adequately explain how the use of the wrong form excuses his delay in appealing to level four, since both parties knew they were processing the current grievance.

Accordingly, based upon the evidence submitted, the undersigned finds that Grievant's significant delay in filing his level four appeal was not justified or excused, andRespondent's Motion to Dismiss must be granted. The following conclusions of law are appropriate in this case.

Conclusions of Law

1. Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995). *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).

2. W. Va. Code § 18-29-4(d) requires that an appeal to level four be submitted to the hearing examiner within five days of the written decision.

3. The appeal of this grievance to level four was untimely, and Grievant has failed to provide a proper excuse to excuse his untimely filing.

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

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marshall County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Educationand State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 27, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

See Komorowski v. Marshall County Bd. of Educ., Docket No. 99-25-349 (Jan. 31, 2000) and Komorowski v. Marshall County Bd. of Educ, Docket No. 93-25-478 (Apr. 28, 1994).