THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRY BUTT,
Grievant,

v. **Docket No. 2008-1026-CalED**

CALHOUN COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant is currently employed by the Calhoun County Board of Education ("CCBOE") as a paraprofessional. Her Statement of Grievance reads:

> The Grievant sought payment of an offered stipend for four days of autism training that she participated in on July 30-August 2, 2007. This training was held outside of the Grievant's employment term.

The Relief Sought is, "Grievant seeks payment of the stipend for two days in the amount of $200.00 (The Grievant has previously received $200.00)"

The parties disagree on whether this grievance was timely filed, and this is an issue to be resolved by this Decision. The grievance was denied at Level 1, and mediation was unsuccessful. Grievant filed to Level 3 on May 21, 2008. Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Greg Baily, Esq., of Bowles Rice McDavid Graff and Love, LLP, represented CCBOE. A Level 3 hearing was held on August 27, 2008. This matter became mature for decision on September 23, 2008, when Grievant submitted proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts she timely filed this grievance on December 21, 2007, after a final discussion with Superintendent Jane Lynch. Grievant also avers she is entitled to receive a stipend for all the days she attended summer training, as well as counting these days for staff development.

Respondent avers this grievance was untimely filed, as Grievant was aware in late August or early September 2007, that her request to receive a stipend for all four days was denied. Respondent also maintains Grievant has received all compensation to which she is entitled, and she was well aware, before she attended the training, what her compensation would be.

For the reasons discussed 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. Grievant has been employed in a 200-day position as a paraprofessional for eight years. She is required to have 18 hours of staff development each school year.

2. In June 2007, CCBOE's paraprofessionals received a letter from Larry Stein, Director of Federal Programs, notifying them of an opportunity to complete autism mentor training. This letter noted the training would be on July 30 and 31, and August 1 and 2, 2007, and CCBOE would "provide a daily stipend of $100 and cover the costs of travel and meals. . . ." The letter states, "if you choose to receive the $100 daily stipend you cannot count the training as staff development (CE)," and "you may count up to twelve hours of

this training as staff development (CE) in lieu of August 22, 23, and still receive the $100 stipend for the remaining two days of the training if you would so choose." Exh. 2 at Level 1.

3. Grievant elected to attend this training which garnered 24 hours of training time.[1]

4. On August 21, 2007, Grievant talked to Carroll Dye, who is on the Staff Development Committee. She informed Grievant that she thought Grievant should receive the stipend for all four days and had written an email to the Committee to say the same. Testimony Grievant & Dye.

5. On August 23, 2007, Grievant requested two days of stipend and two days of staff development.

6. On August 30, 2007, Grievant submitted another Supplemental Pay Request, and on this form requested a stipend for all four days. Exh. 6, Level 1. Karen Kirby, Grievant's supervisor returned the request, and informed Grievant that Superintendent Jane Lynch had stated only two days of stipend were allowed. Grievant was directed to talk to Donald Pitts, Director of Support Services and the Chairman of the Staff Development Committee, if she had any further questions. Testimony Grievant.

7. Mr. Pitts and Grievant met on or about August 31, 2007, and discussed the issue. Mr. Pitts agreed to check the Staff Development Guidelines and get back to Grievant. The next day Mr. Pitts e-mailed Grievant and informed her that the Guidelines did not require CCBOE to pay a stipend for all four days, and she could only be paid a

---

[1]It appears Grievant may not have sought prior approval.

stipend for two days pursuant to the guidelines set out in the letter. Testimony Grievant & Pitts.

8. On September 25, 2007, Grievant again requested payment for all four days of training. Exh. 7, Level 1. Superintendent Lynch did not receive this request.

9. On November 13, 2007, Grievant sent an e-mail to Superintendent Lynch again seeking payment for all four days. Superintendent Lynch responded that same day and stated, "You may be paid for 2 days. You need to turn in your CE prior to December 15th." Grievant's Exh. 3 at Level 3. Grievant responded to this e-mail clarifying she did not want the CE days, just the money, and she would do the staff development later.[2]

10. Grievant sent a Level 1 grievance form dated November 27, 2007, to West Virginia School Service Personnel Association, but there is no indication this form was sent to the Grievance Board until Grievant appealed to Level 2. Grievant did not mean for this document to be filed as a grievance. Testimony Grievant.

11. Grievant met with Superintendent Lynch on December 17, 2007, and Superintendent Lynch repeated her former decision that Grievant could not receive a stipend for the two other days. Superintendent Lynch advised Grievant to complete another Supplemental Pay Request requesting only two days, and this would be paid. On December 17, 2007, Grievant completed another Supplemental Pay Request, and shortly thereafter she received a stipend payment for two days.

12. Grievant filed a Level 1 grievance form dated December 21, 2007. This is the date Grievant intended to file her grievance. Testimony Grievant. This grievance form

---

[2]It was unclear when Grievant would complete this staff development, as she had already planned not to attend the December training and TP day.

was received by the Grievance Board and given a Docket Number. The Level 1 hearing was held on January 25, 2008, by agreement of the parties.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *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, the employee has not met his burden. *Id.*

CCBOE contends this grievance is untimely filed, as it was not initiated within the time lines contained in W. VA. CODE § 6C-2-4(a). 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 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).

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 time lines 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. . . .

Respondent asserts this grievance was untimely filed as Grievant was told in early September 2007 that she would not receive payment by Mr. Pitts. Additionally, Grievant's supervisor informed her of Superintendent Lynch's denial around that same time. Respondent also notes Grievant was again unequivocally informed by Superintendent Lynch in her November 13, 2007, email that she would receive the stipend for only two days.

The first issue to address is whether Grievant "filed" her grievance on November 27, 2007. W. VA. CODE R. § 156-1-2.1.4 addresses filing and states, "The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules." Grievant and her attorney both assert this grievance was not filed until December 21, 2007. As this was Grievant's intention, the undersigned Administrative Law Judge cannot find otherwise.

Given that the grievance was filed on December 21, 2007, this grievance is untimely filed. Grievant was told in the June 2007 letter what the compensation would be. If she had questions, she could have asked before she attended. Upon her return to work, she

completed her form requesting two days of staff development and two days of stipend. This form is dated after her discussion with Ms. Dye. Next, a few days later, she submits an amended form requesting four days of stipend. She was then told by her supervisor and by Mr. Pitts in late August and early September that she could only receive two days of stipend. Subsequently, Superintendent Lynch unequivocally informed Grievant on November 13, 2007, that this decision had not changed. Accordingly, the undersigned Administrative Law Judge finds this grievance was untimely filed.

As the grievance is found to be untimely filed, Grievant has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Higginbotham, supra.* Grievant stated she did not file after the August 30, 2007, request was rejected because she "felt she should talk to someone before filing a grievance." She wanted to work something out. Level 1 Trans. at 18. She talked to Mr. Pitts, and he was clear, she would not receive any additional stipend money.

A desire to "work things out" can justify not filing for a short time, and grievants are given fifteen days to file a grievance. However, it does not explain Grievant's failure to file when the answer she received in September was clear - no stipend. It also does not explain why she did not file after she received the November 13, 2007, notification from Superintendent Lynch - no stipend. (It should be noted an employee may file a grievance, and then ask for it to be held in abeyance while the issues are worked out informally.)

Grievant's excuse is insufficient to excuse her untimely filing, and this grievance must be Dismissed. As this grievance must be dismissed as untimely, the merits will not be discussed.

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 his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article."

3. W. VA. CODE § 6C-2-4 (1) identifies the time lines 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. . . .

4. This grievance was not timely filed, as the events giving rise to the grievance occurred in late August/early September, and it was not filed until December 21, 2007.

Accordingly, this grievance is DISMISSED as untimely filed.

Any party may appeal this 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 number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: March 27, 2009

_____

Janis I. Reynolds
Administrative Law Judge