WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID THOMPSON,
Grievant,

v. **Docket No. 2010-0287-CabED**

CABELL COUNTY BOARD
OF EDUCATION,
Respondent.

D I S M I S S A L O R D E R

Grievant, David Thompson, initiated a grievance against Cabell County Board of Education, Respondent on September 2, 2009, protesting his teaching assignment. A decision denying the grievance was issued on October 12, 2009. Grievant timely appealed the Level One Decision on October 16, 2009 and thereafter a Level Two Mediation session was held on February 26, 2010. Grievant was represented by legal counsel as early as October 28, 2009, and Counsel appeared with the Grievant at the Level Two Mediation. A Public Employees Grievance Board Order was issued subsequent to Mediation on March 1, 2010. Grievant appealed to Level Three of the grievance process. On March 19, 2010, Respondent filed a Motion to Dismiss the grievance on the basis that Grievant's appeal to Level Three was untimely.

A telephonic conference was conducted on June 1, 2010, to address the pending motion. Grievant appeared by legal counsel David R. Tyson of Tyson & Tyson, Attorneys-at-Law and Respondent appeared through its counsel Rebecca M. Tinder of Bowles, Rice McDavid Graff & Love LLP. Oral argument was presented by both parties. Further, the parties were given leave to file written briefs to address issues deemed contested relevant

to the pending Motion to Dismiss. Grievant's Counsel was specifically requested to show cause why the Motion to Dismiss should not be granted.

This matter became mature for decision upon receipt of the last of the parties' argument documents on June 9, 2010. Both parties submitted written argument. Upon consideration of the file, arguments presented and pertinent law, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a multi-categorical special education teacher employed by Respondent.

2. On September 2, 2009, Grievant initiated a grievance contesting his teaching assignment at level one of the grievance process.[1]

3. A Level One Decision was issued by Respondent on October 12, 2009, and Gievant appealed on October 16, 2009.

4. On February 26, 2010, Level Two Mediation transpired. Grievant was represented by legal counsel at the time of the Mediation session.

5. A Public Employees Grievance Board Order was issued and mailed subsequent to the Mediation session from its Charleston Grievance Board Office to the parties in accordance with the Certificate of Service attached thereto on March 1, 2010.

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[1] West Virginia Public Employees Grievance Procedure W. VA. CODE § 6C-2-1 et seq. (2008). The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

6. The post Mediation Order was mailed to Superintendent Smith,[2] Rebecca Tinder, Esquire,[3] David Thompson,[4] and David Tyson, Esquire[5] on the same day. Said Order was received by Respondent's Counsel and Superintendent Smith on March 2, 2010.

7. The Level Two post-Mediation Order entered on March 1, 2010 provided, in part, that:

> Pursuant to the provisions of WEST VIRGINIA CODE § 6C-2-4(c)(1), the grievant may request a level three hearing on the grievance. **A grievant wishing to do so must file a written appeal within ten (10) days of receiving an Order** stating that the level two mediation was unsuccessful. The Grievant must complete the section for "Level Three" of the previously submitted Grievance Form. (Emphasis added).

8. The cover letter and grievance form received on behalf of Grievant, by the Public Employees Grievance Board (PEG Board), providing that Grievant wished to proceed to Level Three were dated March 9, 2010; however, said documentation was not received until March 19, 2010. The date typed on the documents was March 9, 2010. The postmark date on the envelope was March 18, 2010.[6]

9. On March 19, 2010, Respondent's Counsel filed a Motion to Dismiss Grievant's request for level three proceedings based on the grounds that such request was untimely filed and requested a telephonic conference be held on the matter.

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[2] 2850 5th Avenue, Huntington, WV 25702.

[3] 600 Quarrier Street, Charleston, WV 25301.

[4] 216 Kingswood Est. Culloden, WV 25510.

[5] Tyson & Tyson, 418 Eleventh Street, Hungtington, WV 25713.

[6] A copy of Grievant's documents purported to appeal to level three were received by Respondent on or about March 18, 2010, as is evidenced by the cancelled postage stamp date on the envelope. Respondent *Exhibit A.*

10. WEST VIRGINIA CODE § 6C-2-4(c)(1) provides that within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.

11. Relevant to the instant grievance matter, according to the definitions in WEST VIRGINIA CODE § 6C-2-2, "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided by statute, rule, policy or practice."

12. The Grievance Board Order issued subsequent to the February 26, 2010, Mediation reflecting the outcome of the mediation efforts was mailed from Charleston to Grievant and his attorney on March 1, 2010.

13. March 18, 2010 is the official filing date of Grievant's appeal documents.[7] Ten working days prior to March 18, 2010 is March 4, 2010.

14. The number of working days between the Level Two Mediation Order issued and mailed by this body, the West Virginia Public Employees Grievance Board, and the appeal documentation received on behalf of Grievant exceeds a ten day period of time. The number of working days between March 3, 2010 and March 18, 2010 exceeds the ten day proscription period for appeal.

15. A telephonic conference was held on June 1, 2010 to address issues relevant to the pending Motion to Dismiss.

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[7] "File" or "filing" means to place the grievance form in the United States Postal Service mail, addressed to the Board's main office at 1596 Kanawha Boulevard, East, West Virginia 25311. Date of filing will be determined by United States Postal Service postmark. 156 CSR 1 § 2.1.4. (2008).

Discussion

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).

Respondent contends the level three appeal of this grievance is untimely filed, as it was not initiated within the timeline contained in W. VA. CODE § 6C-2-4(c)(1), and therefore moves that this grievance be dismissed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits

of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH- 060 (July 16, 1997).

WEST VIRGINIA 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(c)(1) identifies the timeline for filing an appeal in the circumstance of the instant matter. W. VA. CODE § 6C-2-4(c)(1) states, in relevant part:

> Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997); *See 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).

Pursuant to WEST VIRGINIA CODE § 6C-2-4(c)(1), Grievant had 10 days from the day he received the March 1, 2010, Order reflecting the outcome of the mediation efforts to file a Level Three appeal. Grievant and his attorney were informed of the applicable deadline and given proper instructions by the Grievance Board on how to file a Level Three appeal. *See* March 1, 2010 Grievance Board Order.

Grievant, by Counsel, argues against the granting of Respondent's motion and dismissal of this grievance. Counsel's argument has matured with time but essentially, he argues that there exists substantive rationale for denial of the motion: 1) substantial

compliance and 2) it is not proven that the appeal, as filed, was outside of the prescribed 10 day appeal period in that Respondent cannot and did not establish the exact date Grievant received the Mediation Order.[8]

The number of working days between the mailing of the Level Two Mediation Order by the West Virginia Public Employees Grievance Board, and the appeal documentation received on behalf of Grievant exceeds the ten day proscription period for appeal.[9] For this portion of the immediate discussion, twelve days is the number most readily discussed by the parties, two days late. Grievant's Counsel highlights the principles of substantial compliance and proposes the timelines for a grievance claim as found in Chapter 6C of the West Virginia Code are objectives in a largely informal grievance process that should yield to flexible interpretation providing a simple and fair grievance process, citing *Duruttya v. Mingo County Bd. of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989).[10] Respondent vehemently opposes this characterization of applicable grievance procedures. Countering that "rather than providing a flexible and fluid deadline, the Legislature proscribed a fixed and numerically designated amount of time in which to file a Level Three appeal[.] . . . Had

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[8] Respondent has failed to prove the date of "unequivocal notification of the Notice of Unsuccessful Mediation." Grievant's Response Argument to the Motion to Dismiss.

[9] Relevant to the instant grievance matter, according to the definitions in WEST VIRGINIA CODE § 6C-2-2, "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided by statute, rule, policy or practice." The number of working days between March 3, 2010 and March 18, 2010 exceeds the ten day proscription period for appeal.

[10] In the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with the filing provisions. . .is entitled to the requested hearing. Syllabus Point 2, *Duruttya v. Mingo County Bd. of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989).

the Legislature intended these deadlines to be merely aspirational, it could have easily indicated the same in the statute. The 10-day timeline is exactly what it appears to be." See Respondent's Argument Brief.

Further, Respondent highlighted that *Duruttya* is distinguished from the instant matter. *Duruttya* was a disciplinary grievance[11] in which the burden of proof was upon the respondent board of education. Mr. Duruttya had not engaged an attorney by the time he received the dismissal letter then in contention. Grievant on the other hand, has been represented by competent legal counsel in this matter since October of 2009. Mr. Duruttya was given no instructions on how or where to file his grievance. Nor was Mr. Duruttya provided with any information on the school laws relevant to his grievance. Grievant is represented by competent counsel and he and his attorney were provided by the Grievance Board with detailed instructions on how, by when, and where to file his Level Three appeal.

The West Virginia Supreme Court of Appeals has considered several circumstances and facts which represent a proper basis to excuse the failure of a grievant to file timely. The Court, in *Hale v. Mingo County Bd. of Educ.*, 199 W.Va. 387, 484 S.E.2d 640 (1997) discussed the concept of substantial compliance as it relates to timeliness and explained that in a grievance claim timeliness is not necessarily a cut-and-dried issue. A tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance

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[11] The instant grievance, on the other hand, is non-disciplinary and therefore Grievant bears the burden of proof. W.Va. Code St. R. § 156-1-3 (2008) (Procedural Rules of the West Virginia Public Employees Grievance Board).

process, as free as possible from unreasonable procedural obstacles and traps. *Id at footnote 10*, citing *Spahr v. Preston County Board of Education*, 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990); *Duruttya v. Mingo County Board of Education*, 181 W.Va. 203, 205, 382 S.E.2d 40, 42 (1989).

Grievant Counsel's substantial compliance argument, in the circumstances of this case, did not establish a proper basis to excuse a failure to file in a timely manner. The facts and circumstances surrounding this Grievant's filing is incongruent with the contours of noted substantial compliance cases. Ten working days is ten working days, unless recognized facts or circumstance establish a proper basis to excuse untimely filing. A substantial compliance rationale has not been established in the circumstances of this matter to excuse an untimely filing. The fact that the appeal documents have a date of March 9, 2010 typed on their face does nothing to establish the date mailed. It is uncontroverted that the documents were postmarked March 18, 2010, when received by both the Grievance Board and Respondent's Counsel.

The address used by the Public Employees Grievance Board to mail out the March 1, 2010, Order is the physical address of Counsel's office as evident on Grievant Counsel's letterhead.[12] The zip code on Grievant Counsel's letterhead is 25713. This zip code is a proper code for Huntington, WV; however, it is acknowledged that this zip code may be the code for Counsel's assigned post office box. To the degree that the identified zip code

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[12] "[A] party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res.,* Docket No. 99-HHR-326D (Oct. 14, 1999)." *Corley v. Bureau of Empl. Programs*, Docket No. 05-BEP-080D (Sept. 9, 2005).

would or did inhabit the timely delivery of the post Mediation Order to Grievant's Counsel is not established. It is not clear to the undersigned to what degree, if any, the address used by the administrative personnel of the PEG Board did, in deed, delay the delivery of the March 1, 2010 Order. Yet, even with the recognition of *possible* delay, with a credited delay of one full business day, Grievant's appeal is still untimely, March 3, 2010 to March 18, 2010. *See* Finding of Fact 12-14. Further, copies of the post Mediation Order were mailed to Grievant's legal counsel David Tyson, and Grievant on the same day, this fictitious one day delay would not affect both notifications. *See* Finding of Fact 6.

Lastly, Grievant's argument pertaining to Respondent's alleged failure to prove the exact date of "unequivocal notification of the Notice of Unsuccessful Mediation" must be addressed. A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

Accrediting receipt of a legal document is not a deed taken lightly. It is especially more difficult if a party has something substantial to gain by deferring acknowledgment of receipt. Nevertheless, it is proper for the undersigned to review and weigh the evidence of record to determine whether it is more likely than not, that Grievant received the Level Two Mediation Order on or before March 3, 2010. *See Jackson v. State Farm, supra.*

Evidence of record establishes that copies of the post Mediation Order were mailed to both Grievant's Counsel and Grievant on March 1, 2010.[13] *See* Findings of Fact 5, 6 & 12. Within ten days of receiving this Order, Grievant needed to file a Level Three appeal or he forfeited the opportunity to proceed with his grievance. A properly executed Certificate of Service provides evidence of when a document is placed in the mail. The postmark on the envelope transmitting the document ordinarily provides the best evidence to establish delivery date. It is noted that the photocopy of the envelope provided by Grievant does not exhibit a postmark. *See* Grievant's Response Argument Attachment. This would demonstrate delivery date. The Order was received by Respondent's Counsel Tinder and Respondent representative Superintendent Smith on March 2, 2010. *See* Finding of Fact 6, and Respondent's Motion to Dismiss. Superintendent Smith and Grievant's Counsel Tyson are both located in Huntington. It is more likely than not that the March 1, 2010 Mediation Order, which was mailed, from the same location reached Grievant's Counsel in the same city on the same day. In addition, even with the recognition of a *possible* delay, with a credited delay of one full business day, Grievant's appeal is still untimely.

Grievant, from an early stage, had the advantage of legal counsel familiar with the grievance process. In the circumstances of this case, the principles of substantial compliance and flexible interpretation do not readily excuse Grievant's failure to timely

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[13] While it has no legal significance on the issue in discussion, it may be of interest to note that Grievant was present, in person and represented by Counsel, at the February 26, 2010 Mediation session and was aware of the procedural status of the Mediation session prior to the March 1, 2010 Order.

request Level Three proceedings. The facts and circumstances surrounding Grievant's failure to file timely are incongruous with the contours of the cases noted. Respondent, by a preponderance of the evidence, established that the March 18, 2010 filing was untimely. Grievant did not meet his burden of demonstrating a proper basis to excuse the untimely filing. The appeal to Level Three of the instant grievance was not filed within the time frames mandated by applicable W. VA. CODE and regulating procedure. The grievance is dismissed on the basis of untimely filing.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed as untimely, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See 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). A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence.

2. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-

315 (Jan. 25, 1996). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

3. If the respondent meets its burden of proving a grievance is untimely, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). Grievant, who is represented by legal counsel now and at the time of appeal, did not present evidence deemed sufficient to excuse untimely filing.

4. The jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. *Clutter v. Dep't of Agric.,* Docket No. 2009-1372-AGR (May 28, 2009). To be considered timely, and therefore within the jurisdiction of the Grievance Procedure, a grievance must be filed pursuant to WEST VIRGINIA CODE §§ 6C-2-1 *et seq*.

5. WEST VIRGINIA 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(c)(1) states, in relevant part:

> Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.

6. 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).

7. Respondent met its burden of proof and demonstrated the appeal to Level Three of this grievance was untimely. The appeal of this grievance to Level Three was not filed within the statutory time frame required for filing such an appeal.

8. Grievant has not demonstrated sufficient evidence to excuse the filing of an appeal in this grievance matter outside the statutory timelines.

Accordingly, the Respondent's motion to dismiss is hereby **GRANTED**, and 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 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 (2008).

Date: June 17, 2009

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Landon R. Brown
Administrative Law Judge