THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LESLIE BENNETT,
Grievant,

v. **Docket No. 2010-1379-RanED**

RANDOLPH COUNTY BOARD
OF EDUCATION,
Respondent.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Grievant Leslie Bennett filed a grievance against Respondent alleging he was wrongfully terminated on April 22, 2010. At level one, this grievance was dismissed for timeliness. Grievant then filed a request with the West Virginia Public Employees Grievance Board ("Grievance Board") to have the grievance remanded back to level one for a hearing. Respondent filed a Motion to Dismiss on May 11, 2010. Grievant responded by filing a Memorandum in Opposition to Respondent's Motion to Dismiss on May 20, 2010. A phone conference was held on May 24, 2010. Grievant was represented by Andrew J. Katz, Esq., and Respondent was represented by Gregory W. Bailey, Bowles Rice McDavid Graff & Love.

Findings of Fact

1. Grievant was a bus operator for Respondent.

2. On April 8, 2010, the parties had a pre-determination hearing, and Grievant was terminated from his employment by a formal vote of the Board of Education ("Board").

3. By letter dated April 9, 2010, Grievant was officially informed of Respondent's decision to terminate his employment.

4. On April 22, 2010, Grievant filed a grievance regarding his termination. On the grievance form, Grievant requested a level one hearing.

5. By letter dated April 26, 2010, Dr. Jim Phares, Superintendent of Randolph County Schools, denied Grievant's request for a level one hearing, asserting the grievance was untimely because the grievance was not filed within 5 days as set forth in W. VA. CODE §18A-2-8.

6. Upon receipt of Dr. Phares' letter, Grievant filed with the Grievance Board a Motion to Remand Back to Level 1 for a Level 1 Hearing.[1]

7. On May 11, 2010, Respondent filed Respondent's Memorandum in Opposition to Motion to Remand and Respondent's Motion to Dismiss, asserting W. VA. CODE §18A-2-8 is the controlling statute.

8. Grievant then filed a Memorandum in Support of Motion to Remand Back to Level 1 and in Opposition to Respondent's Motion to Dismiss.

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);

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[1]The date on the letter attached to the filing is April 22, 2010. However, since Dr. Phares' letter is attached and dated for April 26, 2010, the undersigned believes this date is erroneous. Grievant's Motion was received by the Grievance Board on May 5, 2010.

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(a)(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. . . .

However, W. VA. CODE §18A-2-8 titled "Suspension and dismissal of school personnel by board; appeal" states that the "affected employee shall be given an opportunity, within five days of receiving the written notice, to request, in writing, a level three hearing and appeals pursuant to the provisions of article two, chapter six-c of this code..."

Respondent asserts this grievance is untimely because it did not follow the time requirements of W. VA. CODE §18A-2-8. Grievant, however, asserts the controlling statute is W. VA. CODE § 6C-2-3(a)(1). While these two specific statutes have never been addressed in this manner, the West Virginia Supreme Court has given some guidance as to how to reconcile two statutes relating to the grievance procedure.

In *Ewing v. The Board of Education of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998), the appellee challenged a hiring decision of the Summers County Board of Education made pursuant to W. VA. CODE §18A-4-7a. The appellee filed a

grievance, but then sought a continuance so as to file a petition for a writ of mandamus as is permissible under W. VA. CODE §18A-4-7a. The West Virginia Supreme Court held:

> When an individual is adversely affected by an educational employment decision rendered pursuant to W. VA. CODE §18A-4-7a (1993) (Repl. Vol. 1997), he/she may obtain relief from the adverse decision in one of two ways. First, he/she may request relief by mandamus as permitted by W. VA. CODE §18A-4-7a. In the alternative, he/she may seek redress through the educational employees' grievance procedure described in W. VA. CODE §§18-29-1 to 18-29-11 (1992) (Repl. Vol. 1994).[2] Once an employee chooses one of these courses of relief, though, he/she is constrained to follow that course to its finality.
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> When ascertaining legislative intent,
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> [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908). Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, [172] W. Va. [312], 305 S.E.2d 268 (1983). Syl. Pt. 3, *Shell v. Bechtold*, 175 W. Va. 792, 338 S.E.2d 393 (1985) [202 W.Va. 242] [(per curiam)].

Id. at 554.

When looking at these two statutes, the legislative intent was to provide an expedited process for school employees who were terminated or suspended by creating the time frame set forth in W. VA. CODE §18A-2-8. This was in no way meant to preclude filing under W. VA. CODE § 6C-2-1 et seq.

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[2]In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007).

Grievant filed within 15 days of being informed of his termination.

Therefore, Respondent's Motion to Dismiss is **DENIED**.

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-2-4(a)(1) requires grievances be filed within 15 days of the grieveable event or within 15 days of discovery of the grieveable event.

3. W. VA. CODE §18A-2-8 requires grievances be filed within 5 days of notice of suspension or termination.

4. When ascertaining legislative intent,

> [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908). Syl. Pt. 1, *State ex rel.*

> *Simpkins v. Harvey*, [172] W. Va. [312], 305 S.E.2d 268 (1983). Syl. Pt. 3, *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985) [202 W.Va. 242] [(per curiam)].

Ewing v. The Board of Education of the County of Summers, 202 W.Va. 228, 503 S.E.2d 541 at 554 (1998).

5. A school employee can elect to proceed under either W.VA. CODE § 18A-2-8 or W. VA. CODE § 6C-2-1 et seq. when grieving disciplinary action.

Accordingly, Respondent's Motion to Dismiss is **DENIED**. This case is remanded to level two for mediation, as relief cannot be granted at level one.

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 § 6.19 (eff. Dec. 27, 2007).

Date: May 27, 2010

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Wendy A. Elswick
Administrative Law Judge