WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL LEE FROST,
Grievant,

v. **Docket No. 2011-0578-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

DISMISSAL ORDER

Grievant, Daniel Lee Frost, filed a grievance against his employer Bluefield State College ("BSC"), Respondent on October 15, 2010. Grievant asserts that a one time, across the board, salary enhancement approved by the Bluefield State College Board of Governors was in conflict with BSC Policies 33 and 41 and violated W. VA. CODE § 18B-9-4. Grievant maintains that no salary enhancement could be given until the salary schedule set out in W. VA. CODE § 18B-9-4 was fully funded. The relief sought was to fully fund the salary schedule (immediately).

On or about August 31, 2011, Respondent motioned for the dismissal of the instant grievance contending the grievance was not timely filed at level three.[1] A telephonic conference was conducted on November 2, 2011 to address the pending motion. Grievant was represented by Ben Barkey, West Virginia Education Association Organizational Development Specialist. Respondent BSC was represented by legal counsel, Kristi A. McWhirter, Assistant Attorney General. Both representatives addressed case status and

[1] Respondent's motion also noted for consideration that this grievance failed to state a claim upon which relief can be granted and that Grievant is trying to indirectly receive what this Grievance Board has already denied him in *Frost v. Bluefield State College,* Docket No. 2010-0636-BSC (Feb. 24, 2011).

presented oral argument addressing timeliness. Further, the parties were given leave to further file written briefs to address contested issues deemed relevant to the pending Motion to Dismiss.[2] Respondent submitted written argument in support of its motion. Grievant chose not to oppose a dismissal order relating to the level three filing of this matter.

This matter became mature for decision on or about December 1, 2011, the established deadline for the submission of the parties' argument documents. After a detailed review of the record, arguments presented and pertinent law, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by BSC, Respondent, as a Counselor 2.

2. Grievant filed this grievance on October 15, 2010. His statement of grievance is as follows:

> Bluefield State College Board of Governors has approved a "one time"; across the board "salary enhancement" to all has known about this mandate employees *[sic]* which is in direct contradiction of its own policies (BSC BOG Policies 33 & 41). In addition to being totally illegal according to § 18B-9-4 of the West Virginia State Code. Additionally it has been stated if enrollment continued to increase and it has according to BOG minutes, the salary schedule would be fully funded."

3. Grievant requested as relief:

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[2] The doctrine of *res judicata* was at one time or another raised by Respondent in relation to this grievance matter. Said defense is and was separate and distinct from the instant timeliness issue. It is not contended that Respondent has abandoned the *res judicata* issue but the merits of such was not developed in relation to this untimely action. The merits of a *res judicata* defense as it relates to the grievance case will not be addressed in this decision.

> To fully fund the classified salary schedule immediately as promised six years ago!!! As this administration and BOG have known this since the Spring of 2000 and has been reminded of said mandate at almost every BOG meeting from JULY *[sic]* through JUNE *[sic]* 2009 that I am personally aware of.

4. Respondent denied the grievance at Level One and Grievant appealed to Level Two, Grievance Board mediation.

5. The parties participated in mediation on June 22, 2011.

6. Grievant appeared in person and was represented by Ben Barkey, West Virginia Education Association Organizational Development Specialist.

7. 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 June 23, 2011.

8. An *Order* of *Unsuccessful Mediation* (hereinafter "Order") was issued on June 23, 2011. The Mediation Order stated that any appeal to Level Three must be made in writing within ten (10) days of receipt of the Order. (R. Ex. 1).

9. Respondent's Office of Human Resources and the Bluefield State College Office of the President received the Order on June 24, 2011. *(Id.)*

10. Grievant was on approved leave for part of each of the following days: June 29, July 1, 6 and 8.

11. Bluefield State College was closed July 4, 2011, for the Independence Day holiday.

12. Grievant mailed a level three grievance form to the Grievance Board. This form was physically received on August 15, 2011, the postmark specifies a date of August

13, 2011.[3] (R. Exs. 2-3). *See* 156 C.S.R. 1 § 2.1.4 (2008).

13. Grievant dated the level three grievance form July 24, 2011. (R. Ex. 2).

14. Respondent by Counsel provided evidence tending to establish that Respondent fully funded the salary schedule effective July 1, 2011. (R. Ex. 4).

15. On December 1, 2011, Grievant, by Representative, submitted written documentation that Grievant has chosen not to oppose a dismissal order relating to the level three filing timeline of this matter.

Discussion

Respondent contends this grievance is untimely as it was not initiated within the timelines contained within W.VA. CODE § 6C-2-4. 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).

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[3] Date of filing is determined by United States Postal Service postmark. *See* 156 C.S.R. 1 § 2.1.4 (2008).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public *employee* and his or her *employer* to reach solutions to problems which arise within the scope of their employment relationship. See generally WEST VIRGINIA CODE §§ 6C-2-1 *et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with West Virginia Grievance Statutes and applicable Regulations.[4] To be considered timely and therefore within the jurisdiction of the Grievance Procedure, a grievance must be filed within the timelines set forth in the grievance statute. 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) *aff'd, Circuit Court of Kanawha County*, No. 97-AA-10 (Jan 21, 1999). If the respondent meets the burden of proving the grievance is not timely, 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 28, 1997).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA CODE §6C-2-4(c)(1) sets forth the time limits for appealing from Level Two and states:

> 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 . . .

WEST VIRGINIA CODE § 6C-2-2(c) defines "days" as:

> working days exclusive of Saturday, Sunday,

[4] See WEST VIRGINIA CODE §§ 6C-2-1 *et seq.* and Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

> 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 for by statute, rule, policy or practice.

The procedural rules of the Grievance Board define filing as:

> "File" or "filing" means to place the grievance form in the United States Postal Service mail, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard East, Charleston, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark.

156 C.S. R. 1 § 2.1.4 (2008).

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).

In this case, a Public Employees Grievance Board Order was issued and mailed subsequent to the mediation session from the Charleston Grievance Board Office to the parties in accordance with the Certificate of Service attached thereto on June 23, 2011. The Order was mailed to all parties, including Grievant and his representative, on June 23, 2011. Respondent and its Representative received the Order on June 24, 2011. Looking at this case in a light most favorable to Grievant, and allowing for three working days for delivery, Grievant should have received the Order on or about June 28, 2011. Pursuant to the level three grievance form postmark, Grievant did not file the appeal to level three

until August 13, 2011. Excluding the partial days Grievant was on approved leave, and the Independence Day holiday, he filed the level three appeal thirty-one (31) days after June 24th (date Respondent received the level three appeal) and twenty-nine (29) working days after June 28th (giving Grievant three working days to receive Order), both well outside the ten working day time limit.

Respondent filed a Motion to Dismiss this grievance on August 31, 2011. Respondent submitted exhibits and argument in support of its motion. Respondent established untimeliness in the facts of this matter by a preponderance of the evidence. Subsequent to proper notice and adequate time to prepare oral and written argument, Grievant failed to demonstrate a proper basis to excuse his failure to file at level three in a timely manner. Further, on December 1, 2011, Grievant, by Representative, submitted written documentation that Grievant has chosen not to oppose a dismissal order relating to the level three filing timeline of this matter.

The following conclusions of law are appropriate in this matter:

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. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. 7 Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

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

4. Grievant did not timely file this grievance at level three. Respondent proved by a preponderance of the evidence that Grievant did not file this grievance within the time period allotted by applicable WEST VIRGINIA CODE.

5. Grievant failed to demonstrate a proper basis to excuse his failure to file at level three in a timely manner.

Accordingly, Respondent's motion is **GRANTED** and this matter is **DISMISSED**.

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: December 30, 2011

Landon R. Brown
Administrative Law Judge