WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHARON A. ROSE
Grievant,

v. **Docket No. 2012-0188-RalED**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Sharon A. Rose, Grievant, was a substitute teacher employed by the Respondent, Raleigh County Board of Education ("Board"). Pursuant to W. VA. CODE § 6C-2-4(a)(4), Ms. Rose filed a level three grievance form dated August 4, 2011, contesting the termination of her substitute teaching employment by the Respondent Board. As relief, Grievant seeks "To substitute again."

A level three hearing was held in Beckley, West Virginia, on November 8, 2011, Grievant Rose appeared *pro se* and the Respondent was represented by Gregory W. Bailey, Esquire. At the start of the hearing, Respondent's counsel renewed his motion that the grievance be dismissed as untimely filed. The parties briefly argued the motion and a ruling on the motion was held in abeyance until the evidence was taken on the merits of Grievant's claim. Evidence was introduced at the hearing related to the timeliness issue as well as the basis for the Board's disciplinary action. At the close of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. Respondent's fact/law proposal was received by the West Virginia Public Employees Grievance Board on November 15, 2011, and this matter became mature for decision on that date.[1]

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[1] Grievant did not submit fact/law proposals, however she submitted several documents for consideration with her grievance form.

Synopsis

Grievant was notified that her employment was terminated by letter dated June 29, 2011. The only grievance form signed by Grievant is dated August 4, 2011. Grievant sent a letter dated July 25, 2011, to the Board's Personnel Director indicating that she intended to file a grievance and asking for specific documents. Given the totality of the facts, it is clear that the grievance was not filed within the mandatory statutory time frame and must be dismissed.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant was employed by the Board as a substitute teacher and she substituted in a number of schools during the 2010 - 2011 school year.

2. By letter dated May 10, 2011, Grievant was notified that the Superintendent of Raleigh County Schools, Charlotte Hutchens, Ed. D., was going to recommend the termination of her employment as a substitute teacher at the June 28, 2011, Board meeting. Respondent's Exhibit 1.

3. On June 29, 2011, Superintendent Hutchens sent Grievant a letter notifying her that the Board upheld her recommendation to terminate Grievant's employment at its regular meeting on June 28, 2011. This letter also informed Grievant that she had the right to file a grievance with the West Virginia Public Employees Grievance Board "within five working days after receiving notification of the county board's action." Respondent's Exhibit 2.

4. By letter dated July 25, 2011, Grievant notified Emily Meadows Ed. D., Personnel Director, that she intended to file a grievance[2] and asked to be provided with certain documents. Grievant's Exhibit 3. The letter is marked with a date stamp indicating that it was received July 25, 2011, at 1:27 P.M.[3] This was the seventeenth working day following the date of the letter from Superintendent Hutchens dated June 29, 2011.

5. Grievant attempted to file her grievance dated August 4, 2011, on or about that date. She sent a letter dated August 4, 2011, to the West Virginia Public Employees Grievance Board asking that her grievance be filed. In the letter Grievant stated, "I am sorry about the tardiness of this but I had to retrieve information. Respondent's Exhibit 3. That letter was date stamped as received by the Grievance Board August 22, 2011 at 9:59 A.M.

6. Grievant sent a second letter to the Grievance Board dated August 19, 2011, which included a copy of her August 4 letter and grievance form. In that letter, Grievant indicated that the Respondent Board had given her the wrong address for the Grievance Board. Respondent's Exhibit 4. That letter was also date stamped as received August 22, 2011 at 9:59 A.M.

Discussion

Respondent asserts that the grievance was not filed within the mandatory time period allowed by statute, and therefore it must be dismissed. When an employer seeks

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[2]The words Grievant wrote were "I am going to Level III and need the following items:. . ."

[3] The date stamp appeared as follows: JUL 25 '11 PM 1:27. This is the same style of date stamp which appears on other documents received by the Personnel Director from Grievant. *See* Grievant's Exhibit 2 as an example.

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). "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. 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).

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); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011). In this case, that date was June 29, 2011, when Superintendent Hutchens notified Grievant that the Board had voted to terminate Grievant's substitute teacher contract the night before. Grievant notified the Board's Personnel Director that she intended to go to "Level III" by letter dated July 25, 2011. Grievant's Exhibit 3. However, the grievance form signed by Ms. Rose was dated August

4, 2011, and that is the date on the letter she sent to the West Virginia Public Employees Grievance Board. This is the earliest possible date which can be used for when the grievance was filed. Based upon the filing date of August 4, 2011, the grievance was filed twenty-four days after Grievant was unequivocally notified that her employment had been terminated.[4]

Respondent notes that W. Va. Code § 18A-2-8 provides the following:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.
> . . .
> (c) 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 argues that the grievance is untimely because it was not filed within five days as set out in this provision. However, 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

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[4] Twenty-four days is based upon calculating "days" as that term is defined in W. Va. Code § 6C-2-2(c) which states: "'Days' 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 for by statute, rule, policy or practice."

hearing. . .

This statute gives all employees fifteen days following the triggering event to file a grievance. The provision of W. Va. Code § 18A-2-8 which allows for an expedited filing of a grievance when an employee is dismissed, is similar to the provisions of W. Va. Code § 6C-2-4(a)(c) which allows an employee to file directly to level three when he or she is dismissed. This provision is permissive, not mandatory. This interpretation is guided by the West Virginia Supreme Court's ruling in a myriad of cases which states that:

> The law of this State is that school personnel laws are to be strictly construed in favor of personnel, and regulations and statutes for their protection, carefully complied with. *See, Trimboli v. Board of Education of the County of Wayne*, W.Va., 254 S.E.2d 561 (1979); *Powell v. Brown*, W.Va., 238 S.E.2d 220 (1977); *Morgan v. Pizzino*, *256 S.E.2d 592,* 163 W. Va. 454, 458 (1979).

This interpretation is further enforced by Justice Starcher's statement in *Hale v. Mingo County Bd. of Educ.*, 484 S.E.2d 640, 199 W. Va. 387, (W. Va. 1997):

> In *Spahr, supra*, we upheld a circuit court's determination that a grievance was timely filed several months after the challenged grievable event because the employees did not initially know of the actual facts relating to their grievance. *Spahr,* 182 W.Va. 726, 391 S.E.2d 739 (1990). *Spahr* and *Duryutta, supra*[5] teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because 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 process, as free as possible from unreasonable procedural obstacles and traps.

Footnote 10, *Hale, supra,*

Finally, with regard to this issue, the Grievance Board has specifically held:

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[5] *Duruttya v. Board of Educ.,* 181 W. Va. 203, 382 S.E.2d 40 (1989).

> The legislative intent of the two statutes at issue was to provide an expedited process for school employees who were terminated or suspended by creating the time frame set forth in WEST VIRGINIA CODE §18A-2-8. This was in no way meant to preclude filing under WEST VIRGINIA CODE § 6C-2-1 et seq. Further, "[t]he grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire." *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), *citing Spahr v. Preston County Bd. of Educ.,* 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v.Bd. of Educ.,* 181 W. Va. 203, 382 S.E.2d 40 (1989). *See, Watts v. Lincoln County Bd. of Educ.,* Docket No. 98-22-375 (Jan. 22, 1999). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra; Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also, Deel v. Bureau of Employment Programs*, Docket No. 00-BEP-256D (Nov. 17, 2000). *Toothman v. Marion County Bd. of Educ.*, Docket No. 05-24-036D (Apr. 15, 2005).

Short v. Wyoming County Bd. of Educ., Docket No. 2011-1420-WyoED (Oct. 27, 2011).[6]

Based upon the foregoing, Grievant Rose was required to file her grievance within fifteen days of when she was unequivocally notified that her employment was terminated, June 29, 2011. She filed the grievance form with her employer on August 4, 2011, twenty-four days after the triggering event. The filing clearly did not meet the mandatory statutory time lines. Accordingly, the grievance must be DISMISSED.

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[6] In *Short, supra,* the Administrative Law Judge cited the West Virginia Supreme Court of Appeals decision in *Ewing v. The Board of Education of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998), as further support of the appropriate interpretation of the interplay between these two statutes. That discussion was excluded herein solely for the purpose of brevity, but it significantly bolsters this interpretation and is certainly worth reading.

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. 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 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. . .

4. Respondent proved by a preponderance of the evidence that Grievant did not file her grievance within the mandatory statutory time-lines. Grievant did not demonstrate "a proper basis to excuse his failure to file in a timely manner."

Accordingly, the grievance 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: MARCH 28, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE