WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVEN EDWARD MONROE,
Grievant,

v. **Docket No. 2012-0873-DOA**

DEPARTMENT OF ADMINISTRATION/
REAL ESTATE DIVISION, and LEGISLATIVE
SERVICES/EMPLOYEE SUGGESTION AWARD
BOARD,
Respondent.

DISMISSAL ORDER

Steven Monroe, Grievant, is employed by the Real Estate Division of the Department of Administration as an Administrative Services Assistant 2. Mr. Monroe filed a grievance against the Department of Administration dated February 23, 2012, alleging that he should have received an award pursuant to the Employee Suggestion Award Program 5A-1A-2 *et seq*. based upon a money saving suggestion he submitted on April 17, 2006 while he was employed by the Department of Natural Resources.[1] Grievant alleges that the proposal was forwarded to the Secretary of the Department of Administration on May 2, 2006. As relief, Mr. Monroe seeks: "The statutory maximum cash award by the Employee Suggestion Award Program, Ten Thousand Dollars ($10,000), plus reasonable interest dating back to the date my suggestion was submitted to Secretary Ferguson, May 2006. And public recognition for submitting an idea which created monumental savings for the State of West Virginia."[2]

By letter dated March 9, 2012, the Executive Director of the Real Estate Division

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[1] Grievant's full grievance statement and the numerous documents are included in the record of this matter and are incorporated herein by reference.

[2] Grievant's request for relief is set out herein as it appears on the grievance form.

denied the grievance at level one, ruling that it was not timely filed and that he did not have the authority to grant the relief requested. Grievant appealed that decision by letter dated March 21, 2012.

By form dated March 27, 2012, Steven Monroe filed the same grievance and accompanying documents requesting the same relief. On this form, Mr. Monroe named the Legislative Services/Employee Suggestion Board as the Respondent. Rather than proceeding under two different grievances on the same issue, the undersigned entered an Order dated March 29, 2012, joining the Respondent, Legislative Services/Employee Suggestion Award Board ("ESAB") as a party to the original grievance. No objections were filed related to that Order.

John Homburg, Director of Legislative Services, sent a letter to the West Virginia Public Employees Grievance Board dated March 29, 2012, requesting that the grievance against that Respondent be denied because Grievant was not an employee of the Respondent. This letter was considered as a Motion to Dismiss. On April 5, 2012, counsel for the Department of Administration Real Estate Division ("DOA/RE") filed a Motion to Dismiss arguing that the grievance was not timely filed and that the DOA/RE had no control over the ESAB and cannot grant the relief Grievant seeks.

A telephonic hearing was held related to the Motions to Dismiss on April 17, 2012, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant participated in the conference, *pro se.* Respondent ESAB was represented by Richard Olsen, Esquire with Legislative Services and Respondent DOA/RE was represented by Stacy L. DeLong Esquire, Assistant Attorney General. At the conclusion of the hearing, the parties were allowed to submit written arguments for consideration. Grievant's written

argument was received by the West Virginia Public Employees Grievance Board on April 24, 2012. Respondents decided not to make written submissions. The Motion was mature for consideration on April 24, 2012.

Findings of Fact

1. Grievant Steven Monroe is presently employed by the Real Estate Division of the Department of Administration as an Administrative Services Assistant 2.

2. In 2005, Grievant was employed by the West Virginia Division of Natural Resources.

3. On April 17, 2012, Grievant submitted a suggestion to implement the use of Electronic Services at the Central Mail Office to be considered for the Employee Suggestion Award Program. The suggestion was submitted to the Director of the Division of Natural Resources who forwarded it to the Cabinet Secretary for the Department of Administration with a memorandum dated May 2, 2006.[3]

4. In September 2007, Grievant inquired about the status of his suggestion after noticing several other agencies were using the Electric Services at the Post Office. As a result of that inquiry, Kelly Goes, Secretary for the Department of Commerce sent a Memorandum related to Grievant's inquiry to Denny Rhodes, with Legislative Services.

5. By letter dated December 13, 2007, Locke Wysong, Chair of the Employee Suggestion Award Board informed Grievant Monroe that the ESAB had reviewed and rejected Grievant's suggestion based upon information from the Department of Administration that it had begun utilizing Electronic Mail Service without knowledge of

[3] All documents referred to herein were attached to the grievance forms filed at level one.

Grievant's suggestion.

6. Grievant Monroe alleges that he met with Cabinet Secretary Ferguson on August 30, 2011, to discuss his suggestion and Secretary Ferguson agreed to look into the matter. Grievant filed this grievance shortly following Secretary Ferguson's resignation.

Discussion

Respondents seek to have the Grievance dismissed as untimely. 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).

Additionally, Respondent ESAB notes that Grievant has never been an employee of that Board and therefore the Grievance Board has no jurisdiction over any dispute Grievant may have with that Respondent. Respondent DOA/RE opines that the sole authority to make employee suggestion awards rests with the ESAB and, therefore, the relief sought by Grievant is not available from it. These are also affirmative defenses. Pursuant to 153 C.S.R. 1 § 3, "Any party asserting the application of an affirmative defense

bears the burden of proving that defense by a preponderance of the evidence."

Grievant is now an employee of the DOA/RE. At the time he originally submitted his suggestion, Grievant Monroe was an employee of the Division of Natural Resources. It is undisputed that Grievant has never been employed by the ESAB. WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multi-county vocational center, or agent thereof, **using the services of an employee** as defined in this section.

(Emphasis added.) In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position."

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). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002), (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, 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*. Since Grievant has never been an employee of the ESAB, the West Virginia Public Employees Grievance

Board has no jurisdiction to resolve any dispute Grievant may have with the Legislative Services/Employee Suggestion Award Board and the grievance must be dismissed with regard to that Respondent. *See Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009).

The Employee Suggestion Award Program was created by the Legislature in W. VA. CODE § 5A-1A-1 so that, "cash or honorary awards may be made to state employees whose adopted suggestions will result in substantial savings or improvement in state operations." *Id.* The ESAB is composed of:

> The Secretary of Administration or his or her designee, Governor's Chief Technology Officer or his or her designee, the President of the Senate or his or her designee, the Speaker of the House of Delegates or his or her designee, two members of the House of Delegates from different political parties to be appointed by the Speaker of the House of Delegates, two members of the Senate from different political parties to be appointed by the President of the Senate, and the Secretary of the Department of Health and Human Resources or his or her designee.

W. VA. CODE § 5A-1A-2. The ESAB has the sole authority to approve any awards given pursuant to this program. W. VA. CODE § 5A-1A-3. Consequently, the Department of Administration is not vested with the authority to grant Grievant an award under the Employee Suggestion Program which is the sole remedy he seeks.

In defining what constitutes a "grievance" pursuant to the Public Employee Grievance Procedure, the statute states:

> "Grievance" does not mean any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§§ 5-16-1 et seq.], chapter five of this code, retirement or **any other matter in which the authority to act is not vested with the employer.**

(Emphasis Added) W. VA. CODE § 6C-2-2 (i) (2). The Grievance Board has consistently applied this provision by holding "any matter in which authority to act is not vested with the

state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008). Since the DOA/RE is not vested with the authority to provide the relief Grievant seeks, even if ordered to do so, the grievance must be dismissed as to this Respondent.

Finally, this grievance was not timely filed with regard to either Respondent. 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. . .

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 matter Grievant Monroe was unequivocally notified by ESAB Chair, Locke Wysong, in a letter dated December 13, 2007, that the committee rejected his suggestion for award purposes. Even if the Grievance Board had jurisdiction to hear the grievance, the time to file it began on that date. That time period was long passed when Grievant spoke with Secretary Ferguson in August of 2011. The grievance was not filed within the period required by statute.

Because the West Virginia Public Employees Grievance Board is without jurisdiction

to hear this matter and because the grievance was not timely filed, it is DISMISSED.

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. Respondents raise additional affirmative defenses as reasons for the grievance to be dismissed. Pursuant to 153 C.S.R. 1 § 3, "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." Consequently, Respondent's have the burden to prove these defenses by a preponderance of the evidence.

3. WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multi-county vocational center, or agent thereof, **using the services of an employee** as defined in this section.

(Emphasis added.) In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position."

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*. *See generally, Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002) and *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002); (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Since Grievant has never been an employee of the ESAB, the West Virginia Public Employees Grievance Board has no jurisdiction to resolve any dispute Grievant may have with the Legislative Services/Employee Suggestion Award Board. *See generally, Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009).

5. Pursuant to W. VA. CODE § 6C-2-2 (i) (2), "any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

6. The Employee Suggestion Award Board is the sole entity with the authority to authorize awards under this Employee Suggestion Award Program. W. VA. CODE § 5A-1A-3. Consequently, the Department of Administration/Real Estate Division is not vested with the authority to provide the relief Grievant seeks.

7. 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. . .

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).

8. Grievant did not file his Grievance within the mandatory, statutory time limit for doing so.

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: MAY 14, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE