WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY KAYE CALE,
Grievant,

v. **Docket No. 2013-0197-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DISMISSAL ORDER

Grievant , Kimberly Cale, is employed by Respondent, West Virginia University ("WVU") as a bus operator. Ms. Cale filed a level one grievance form dated August 6, 2012,[1] alleging an "unfair labor practice" and seeking to be allowed to wear shorts at work during the summer schedule. A level one hearing was held on August 28, 2012, and a decision denying the grievance was issued on October 8, 2012.[2]

Grievant filed a level two appeal dated October 1, 2012.[3] A mediation was held in the Westover office of the West Virginia Public Employees Grievance Board on February 26, 2013. On February 27, 2013, an Order of Unsuccessful Mediation was entered, and mailed to the parties. Grievant filed a level three appeal dated April 4, 2013. Respondent filed a Motion to Dismiss the grievance as untimely filed on April 26, 2013. A telephonic hearing was held related to this motion from the Charleston office of the West Virginia Public Employees Grievance Board on May 15, 2013. Grievant was represented at that hearing by Linda Campolong, Laborers Union Local 814.

[1] The grievance form was received by the West Virginia Public Employees Grievance Board on August 14, 2012.
[2] At the conclusion of the hearing the matter was held in abeyance for thirty days while the parties explored settlement options. No settlement was reached and the decision was rendered.
[3] No explanation was offered as to why the level one decision was issued on October 8, 2012 but the appeal was dated and postmarked October 1, 2012.

Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. Both parties were given an opportunity to speak to the motion at that time.

Synopsis

Grievant filed her level three appeal at least twenty-three days after receiving the level two mediation Order. Grievant contends that she and her Representative did not receive the Order; however, the Order was mailed to the addresses where the Notice of Mediation was sent, and both Grievant, and her representative, received those notices. Respondent asserts that the level three appeal was untimely filed, and, as such, has moved to dismiss this grievance. For the reasons more fully set out below, Respondent's Motion to Dismiss is GRANTED.

Findings of Fact

1. Grievant is a bus operator for Respondent and filed a grievance seeking to wear shorts during her summer schedule.

2. Grievant was represented at levels one and two of the grievance by Linda Campolong of the Laborers Local 814. Grievant and Ms. Campolong both listed their home addresses on the grievance forms.

3. The grievance was denied at level one by a decision issued on October 8, 2012. Ms. Campolong filed a level two appeal form for Grievant dated October 1, 2012. The envelope containing the appeal was postmarked October 1, 2012, and received by the Grievance Board on October 4, 2012.

4. A Notice of Mediation was sent to Grievant and Ms. Campolong on November 2, 2012, stating the level two mediation was set for February 26, 2013, at the

Grievance Board's Westover office. This notice was sent to Grievant at her home address, and to Ms. Campolong at the Local 814 office address in Morgantown.

5. Both Grievant and Ms. Campolong received the notice for the mediation and appeared at the appropriate place, at the right date and time.

6. The mediation was held at the Grievance Board's Westover office on February 26, 2013, and an Order of Unsuccessful Mediation was issued and mailed the next day.[4] Like the Notice of Mediation, the Order was mailed to Grievant at her home address and to Ms. Campolong at the Local 814 office.

7. Near the end of March 2013,[5] Ms. Campolong called the mediator and stated that she had not received the Order. The Mediator told her when the Order was mailed.

8. Ms. Campolong filed a level three appeal form for Grievant dated April 4, 2013. The envelope in which the form was mailed was postmarked April 8, 2013, and the form was received by the Grievance Board on April 11, 2013.

9. Given the difference between the postmark dates and the dates of receipt of the two appeal forms by the by the Grievance Board, it is more likely than not that the Order of Unsuccessful mediation was delivered to Grievant's home address and the Local 814 business address three business days after it was mailed; March 4, 2013.

10. The level three appeal was dated April 4, 2013, twenty-three days after the Order was delivered to Grievant and her representative's business address.

Discussion

The only issue before the undersigned is the Respondent's Motion to Dismiss.

[4] February 27, 2013.
[5] Ms. Campolong could not remember the exact date.

Respondent contends that this grievance is untimely because it was not initiated within the timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1). Timeliness is an affirmative defense. 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. *Smith v. Div. of Corr./St. Mary's Corr. Ctr.,* Docket No. 2012-0348-MAPS (Aug. 8, 2012) (citing*, 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); *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)).

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, W. VA. CODE §§ 6C-2-1 *et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Board, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to 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-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See, Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 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-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(c)(1) sets forth the time limits for appealing a grievance from Level Two, stating as follows:

> 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 . . . .

It is undisputed that Grievant's level three appeal was filed at least twenty-three days after the Order of Unsuccessful Mediation was sent to the parties. Respondent has met its burden that the appeal was filed outside of the mandatory statutory time period. Grievant's representative argues that the untimely filing should be excused because she did not receive the Order at her home and filed the appeal soon after discovering that the Order had been issued. However, the certificate of service attached to the Order indicates that it was mailed to the Grievant at her home address and to the Grievant's representative at the Union's office. Both Grievant and her representative received the Notice of mediation that was sent to these addresses and Grievant's representative made no objection to the Notice being sent to her business address. While Grievant's representative may not have received the Order at her home, it is more likely than not the Grievant received the Order no later than March 4,

2013, and that the Order was delivered to her representative's place of business on or about the same date. Accordingly, the level three appeal was untimely filed and the motion to dismiss must be GRANTED.

Conclusions of Law

1. Timeliness is an affirmative defense. 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. *Smith v. Div. of Corr./St. Mary's Corr. Ctr.,* Docket No. 2012-0348-MAPS (Aug. 8, 2012).

2. 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-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(c)(1) sets forth the time limits for appealing a grievance from Level Two, stating as follows:

> 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 . . . .

3. Respondent proved by a preponderance of the evidence that the level three appeal was not filed within the mandatory time period, and Grievant did not prove a proper basis to excuse the untimely filing.

Accordingly, Respondent's motion is GRANTED and 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 23, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE