THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WYATT L. GRAHAM,
Grievant,

v. **Docket No. 2011-1648-CONS**

WETZEL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Wyatt L. Graham, filed this grievance against his employer, Wetzel County Board of Education, on May 9, 2011, alleging the following:

> A stern letter of reprimand was written to me on 4-2-10, with a copy placed within my permanent file. I had asked that my response also be placed within my permanent file, attached to the letter I received from the Superintendent. My permanent file contains their letter of reprimand, but does not contain my fourteen page response to their letter.

Grievant seeks the following relief:

> I am asking that the 4-2-10 stern letter of reprimand be removed from my permanent file, shredded, totally absolved, and 'forgotten.' Since Wetzel County Schools did not want to make available 'my side' of the story, I am asking that 'their side' not be available to be told. I seek the permanent removal of their letter from my permanent file.[1]

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[1]Grievant raised a number of other issues in various grievance forms after this initial filing. The issues other than the reprimand were not addressed and pursued at the level three hearing. They need not be addressed by the undersigned. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

A level one decision denying the grievance was issued by Respondent's designee on May 16, 2011. A level two mediation session was held on February 7, 2012. The grievance was placed in abeyance by Order dated February 13, 2012. Grievant perfected his appeal to level three on March 21, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on December 11, 2012, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Owens Brown, West Virginia Education Association. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice, LLP. The matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on January 16, 2013.

Synopsis

A letter of reprimand was issued by Respondent to Grievant on April 2, 2010. The grievance contesting this discipline was filed on May 9, 2011. Respondent raises the defense of timeliness. Respondent was able to demonstrate by a preponderance of the evidence that the issues raised in this grievance were not timely filed at level one.

The following findings of fact are based upon the record established at level three.

Findings of Fact

1. Grievant is employed as a bus operator by the Wetzel County Schools.

2. Grievant received a letter of reprimand on April 2, 2010.

3. Grievant asserts that he should be permitted to attach to the letter of reprimand a letter of explanation regarding his version of events that led to the discipline.

This response was dated January 14, 2011. The response also challenges the reprimand and requests that it be removed from his file.

4. Grievant filed a challenge to this disciplinary action and the failure to include his response on May 9, 2011.

Discussion

Respondent contends this grievance is untimely as it was not initiated within the time lines 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).

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. To be considered timely, and therefore within the jurisdiction of the Grievance Procedure, a grievance must be 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 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).

WEST VIRGINIA 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(a)(1) identifies the time limits for filing a grievance and states:

> Within fifteen days[2] 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). *See Rose v. Raleigh County Bd. of Educ.*,

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[2]Pursuant to W. VA. CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny 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."

199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

In the instant case, the undisputed facts of this case demonstrated that a letter of reprimand was issued by Respondent's superintendent to Grievant on April 2, 2010. The grievance challenging this reprimand was filed on May 9, 2011. Grievant did not offer any reason for the delay in filing a challenge to this discipline. While the record is not developed on the issue of when Grievant was notified that his response would not be placed in his file along with the reprimand, the response was submitted to Respondent on January 14, 2011, and this grievance was not filed until approximately four months later. In any event, Grievant was unable to produce any authority that provides service personnel with the right to add an explanation to a letter of reprimand in their personnel file. The grievance is denied as untimely.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. 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). *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. This grievance was not timely filed at level one, and Grievant offered no proper basis to excuse the late filing.

Accordingly, this grievance is **DENIED**.

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: February 14, 2013

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Ronald L. Reece
Administrative Law Judge