

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA COPENHAVER-BAILEY,
Grievant,

v.

Docket No. 2019-1338-WVU

WEST VIRGINIA UNIVERSITY,
Respondent.

DISMISSAL ORDER

Grievant, Barbara Copenhaver-Bailey, is employed by Respondent, West Virginia University. On March 28, 2019, Grievant filed this grievance against Respondent alleging the following:

On Thursday, March 7, 2019, at 1:30 p.m., I met in the conference room in Morgan House with my supervisor, Carrie Showalter (Executive Director of the Office of Student Conduct), and HR Rep, Virginia Nardi (Employee Relations Specialist Senior). I was given the attached document and told my current appointment was not going to be renewed June 30, 2019, and my job has been classified as a Program Coordinator (non-classified, exempt, FT, benefits eligible) paying \$59,478.00. Effective July 1, 2019.

I am ascertaining the following “statutes, policies, rules, regulations, or agreements” have been violated:

- **West Virginia State Code ARTICLE 7. PERSONNEL GENERALLY. § 18B-7-1. Legislative intent and purpose.** (a)(4) Promoting fairness, accountability, credibility, and transparency in personnel decision making;
- **WVU Board of Governors Talent & Culture Rule 3.3.** Section 2.5.2. Development and Maintenance of Individual Job Descriptions. Units shall develop individualized job descriptions for all Classified and Non-Classified positions and submit the job descriptions to Talent and Culture. Talent and Culture shall maintain completed individual job descriptions.

The following facts support my assertion of the violation of the above “statutes, policies, rules,

regulations, or agreements” in the circumstances of this grievance:

- Since February 14, 2017, I have been working, in a gradually increasing percentage of my time culminating in 100 percent December 1, 2017, in the Office of Student Conduct without any change in my PIQ.
- I was never given anything formal saying my position was changing/changed.
- At some point, my supervisor changed (I guess) from Dean Corey Farris to Stacy Vander Velde (Director of Student Conduct). However, I was never given anything official. Nothing. Ever.
- My “official” PIQ continued to be the Division of Student Life Director of Assessment until the meeting on March 7, 2019.
- The PIQ that was reviewed as my “job” (concluding with the Program Coordinator classification) was one I created after being told to write/create a PIQ that included only the things I was currently doing. Whereas it may be common practice to ask an employee to “update” her/his PIQ, there was no existing PIQ to update in this instance.
- I was placed into a position that didn’t exist as no PIQ existed for over two years.

Other facts for consideration:

- **May, 2015** – As Assistant VP, I was told by my supervisor (VP Bill Schafer) that five units that reported to me were being removed in a reorganization.
- **June, 2016** – Demoted from Assistant VP for Student Success to Director of Assessment. New PIQ, compensation remained the same.
- **February 14, 2017** – In my regular one-on-one with my supervisor, Dean Corey Farris, he indicated he was going to “loan me out” to Student Conduct.
- **April 7, 2017** – In my regular one-on-one with my supervisor, Dean Corey Farris, he told me Associate Provost Sue Day-Perroots had asked him to allow me to work on the University’s 1st generation project given I was the foremost expert on campus in this area; he said he told her, “No, my priority was going to be Student Conduct.” Let me note that I had NO experience in Student Conduct when I was placed there. Following this meeting, Farris emailed me asking me to give him the proposal I had previously written to create a Center for First-Generation Students. I was happy to share this in the hopes it would

actually get implemented to better serve our students, however, to not allow me to participate in this project but expect me to provide documents I had created that would support the project, is offensive at best. Either my expertise and knowledge are needed and respected or they are not. His behavior was ambiguous and inconsistent.

- **July 19, 2017** – In my role as Director of Assessment, I met with the Director of Student Conduct, Stacy Vander Velde, to review assessment projects we were working on together. She said Dean Corey Farris told her I was going to be working 80% time in Student Conduct. At that point, I had only been told by Farris that I would be “loaned out”.
- **September 27, 2017** – Began scheduling blocks of time to work in the Office of Student Conduct. No PIQ. No office. No desk. I was working at other peoples’ desks if they were out, at the conference table, on the copy paper table. I was using a laptop I brought with me from my position as Assistant VP.
- **October 24, 2017** – Met with my supervisor, Dean Corey Farris, to complete my Performance Review. In that meeting, I asked him what was going on with my job. He said assessment wasn’t full-time work and this was all he had for me to do. Still nothing official.
- **December 1, 2017** – Completely moved out of my office in E Moore Hall to work full-time in the Office of Student Conduct. Still no actual physical office space in Student Conduct. Not even my own desk. My office in E Moore Hall remained vacant.
- **January 2018** – Was given a desk in the corner of the Assistant Director’s office.
- **July 2018** – Office of Student Conduct moved in to Morgan House. I was given a desk and an office.
- **August, 2018** – Student Life created “new” office of Student Participation and an employee from outside Student Life with little to no direct student experience was brought in to oversee. I would argue this was my former AVP position.
- **March 7, 2019** – “Officially” demoted from Director of Assessment to Program Coordinator (effective July 1, 2019).

Summary:

The meeting on March 7, 2019, was the culmination of years of unfair and inconsistent treatment that a reasonable person could characterize as abuse, harassment, and retaliation.

Whereas I understand I am a will-and-pleasure employee,

- 1) At no point in this “process” (after the February 14, 2017, meeting when Farris said I was being “loaned out”) was I ever officially told by my supervisor(s), Corey Farris, Stacy Vander Velde, or Carrie Showalter, what my role was “changing to”. In fact, Vander Velde and Showalter both indicated they weren’t sure when asked by me. Farris gave me answers like “this is all I have for you to do.”
- 2) In NO instance (after the February 14, 2017, meeting when Farris said I was being “loaned out”) did Farris ever come to me or write/email/call to discuss my “changing role”. Anytime it was brought up was by me or to me by someone other than Farris.
- 3) I have never been told formally or informally that my skills were no longer needed, no longer inline with the University’s vision, or any similar situation. To the contrary, I have repeatedly been asked to provide my expertise in different areas while still being left in a support position in Student Conduct because “there was nothing else for me to do.”
- 4) I was told Student Life was reorganizing, which in fact did happen, but again, I would argue my former position still exists as an Executive Director (not AVP but there is no longer a VP).
- 5) I was told there was nothing else for me to do but “help out” in Student Conduct. Given my areas of expertise are retention, 1st generation students, working with at-risks population, first-year experience, assessment, and these are focus areas at WVU and in higher education overall; I have over 26 years of service at WVU; I have an EdD conferred in 2005; and all of my Performance Reviews have indicated I was performing above the standard to exceptional performance; a reasonable person could conclude it seems unlikely there was nowhere else I could have been making contributions.
- 6) I have witnessed numerous positions be created across campus where a reasonable person could conclude my expertise in these timely and important matters would

have been valuable to serving our students but others were **placed** into those jobs.

As request relief, Grievant states the following:

"It is difficult to think about requesting 'relief' that includes continuing to work at WVU given the atrocious, abusive, emotionally/mentally difficult treatment of which I have been a victim. However, I am less than four-years away from retirement after serving over 26 loyal years to the institution. Therefore, I desire to be provided a situation that allows me to retire that does not affect my retirement with the lower compensation I am currently scheduled to receive effective July 1, 2019. Quite frankly, I would retire now if possible, but that is not possible, and I do NOT want to have my last years of service be at such lower compensation as to affect my retirement for the rest of my life, not to mention my financial status until that time."

Although this appears to be totally motivated by retirement/financial status of my situation, there is so much more to it regarding my reputation, my ability to job search for a position commensurate with my previous position of Assistant VP (my resume is less than impressive given the two demotions), not to mention the level of disrespect with which I have been treated, all of which are of utmost importance to me. However, I don't know if my reputation nor resume could be repaired, and false respect or an unauthentic apology are devoid of meaning. Therefore, I am relegated to focusing on how to make this outcome even remotely acceptable and fair to me (and my family).

Given these circumstances, I am requesting the following:

- 1) A retirement severance package that allows me to "retire" with the same financial status I would have been able to retire with at age 67 having received the financial compensation I am currently receiving or higher during those years.

OR

- 2) Placed into a position at WVU with responsibilities and compensation commensurate with my expertise, experience, knowledge, skills, abilities, and education,

equal to or above the level I was at four-years ago when this egregious treatment began.

- Where I can contribute to creating/providing services to WVU constituents towards the betterment of the institution and state.
- Housed on the main campus in Morgantown.
- Not within the Division of Student Life.

As authorized by W. Va. Code § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.¹ On July 9, 2019, the parties convened for a level three hearing before the undersigned. Grievant appeared in person and by Jeffery Bailey. Respondent appeared by Carrie Showalter and counsel, Samuel Spatafore, Assistant Attorney General. Respondent requested a continuance in order to file a motion to dismiss based on timeliness and failure to state a claim on which relief could be granted. Grievant acquiesced to this request. On July 23, 2019, Respondent, by counsel, filed *Respondent's Motion to Dismiss*. Grievant filed her response on August 4, 2019.

Synopsis

Grievant is employed by WVU via annual contract. While Respondent triggered the filing of this grievance by notifying Grievant on March 7, 2019, that her annual contract would not be renewed, Grievant affirms that she is not grieving the non-renewal. Rather, Grievant contends that from February 14, 2017, until March 7, 2019, Respondent failed to provide her with an accurate job description or any information on her job duties. As relief, Grievant requests either a retirement severance package or a different position with WVU. Grievant also seeks an order directing WVU to admit it failed to follow statutes,

¹W. Va. Code § 6C-2-4(a)(4) provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

policy, rules, and regulations, that WVU deal with similar situations more fairly and transparently in the future, and that WVU compensate Grievant for damages to her health and earning potential by awarding her another position commensurate with her skills. Respondent moves to dismiss this grievance, alleging that it is untimely and that it seeks relief unavailable through the grievance process. Respondent has proven that this grievance is untimely and that it seeks relief unavailable through the grievance process. Accordingly, this grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University (WVU), in the Office of Student Conduct as Director of Assessment through annual contracts.
2. On March 7, 2019, WVU informed Grievant that her annual contract as Director of Assessment would not be renewed after June 30, 2019, and that she would thereafter be classified as Program Coordinator.
3. On March 28, 2019, Grievant filed this grievance.
4. While the grievance was triggered by the non-renewal of Grievant's annual contract, Grievant does not grieve this non-renewal. (Grievant's testimony)
5. Rather, this grievance is premised on allegations that Respondent failed to provide Grievant an accurate job description for her position as Director of Assessment between February 14, 2017, and March 7, 2019. (Grievant's response to Respondent's Motion to Dismiss)

6. On March 7, 2019, Respondent provided Grievant an accurate job description. (Grievant's response to Respondent's Motion to Dismiss)

7. In her grievance filing, Grievant requested as relief either a retirement severance package or a different position with WVU outside of the Division of Student Life.

8. On July 23, 2019, Respondent filed a motion to dismiss, asserting untimeliness and the unavailability of the relief requested.

9. Respondent's motion contends that, as Grievant does not grieve non-renewal of her contract on the March 7, 2019, or any occurrence thereafter, Grievant untimely filed her grievance over fifteen days after the events grieved.

10. Respondent's motion also contends that the Grievance Board does not have the authority to order WVU to issue a severance package or to transfer Grievant to another position.

11. On August 4, 2019, Grievant filed a response to this motion. Grievant stated that "From February 14, 2017, through March 7, 2019, I did not have an accurate job description and was not provided information either formally or informally, either written or verbally, about what was 'going on' with my position in spite of my continued questioning of others about the situation. I was strung along with NO ONE telling me the institution's intention for me. Furthermore, during this time period (2/14/17 – 3/7/19), I was given two Notices of Renewal (7/1/17 and 7/1/18) as Director of Assessment despite the fact I was no longer doing that job. **THIS is the grievable situation.** As of March 7, 2019, these circumstance (sic) which am grieving still existed. I had fifteen (15) working days from March 7, 2019, to file a grievance regarding the FACT I did not have a job

description and WVU had violated the '*statutes, policies, rules, regulations or agreements*' I noted in the grievance. I was under no obligation to file a grievance at any other time during the 2/14/17 – 3/7/19 time period except fifteen (15) working days after March 7, 2019, at which time a job description was given to me. The fact I was given a job description on March 7, 2019, does not alleviate WVU from the responsibility that they violated my rights beginning February 14, 2017, for this particular situation. Although I do now have a job description, I did not for almost 2 ½ years, and at no point was WVU *fair, accountable, credible, or transparent in personnel decision making* regarding this situation during that 2 ½ years. ... I did not have an accurate job description (PIQ) beginning on February 14, 2017, through the afternoon of March 7, 2019. ... I was doing a job in the Office of Student Conduct that did not exist in the WVU HR system, until I was told to 'create a PIQ with the work you are currently doing' (December 2018). On the afternoon of March 7, 2019, I was told the results of the review of the PIQ I created."

12. Grievant requested as additional relief "for WVU to:

- admit they didn't follow the '*statutes, policies, rules, regulations, or agreements*' regarding my employment over the past 2 ½ years; and/or
- agree that they will deal with similar situations in the future with '*fairness, accountability, credibility, and transparency in personnel decision making*'; and/or
- recompense for the damage to my health and future earning potential with an appropriate position commensurate with my level of expertise, education, and experience because it is the right thing to do; and/or
- any other relief the administration (sic) law judge deems appropriate."

Discussion

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. §

156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

Respondent asserts that the grievance was not filed within the time period allowed by W. Va. Code § 6C-2-4 and that it must be dismissed without addressing the claims therein. “[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. *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).” *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). “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).

While the burden is on Respondent to prove the grievance was filed untimely, the code requires that “[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1). Because this grievance was filed directly to level three, Respondent properly asserted at level three that the grievance was filed untimely.

Respondent contends that the grievance was filed untimely because Grievant did not receive an accurate job description on February 14, 2017, yet waited until March 28, 2019, to file this grievance. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

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

W. VA. CODE § 6C-2-4(a)(1).

“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.” W. VA. CODE § 6C-2-2(c).

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). Grievant clearly knew of the incidents in her grievance well before fifteen working days prior to filing the grievance. Respondent has proven Grievant's filing was untimely.

Grievant now has the burden of proving a proper basis to excuse her failure to file in a timely manner. Grievant contends that Respondent's failure to provide her with an accurate job description was a continuing practice that began on February 14, 2017, and continued through the afternoon of March 7, 2019, when Respondent provided her with an accurate job description. As such, Grievant implies that Respondent had a continuing obligation to provide her with an accurate job description over this period and that this gave rise to a continuing right to grieve.

"A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston Cnty. Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990)" *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No 2014-0314-PutED (July 28, 2014), *aff'd*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016). Grievant contends that Respondent's infraction was its continuing failure to act rather than a single act resulting in continuing damage. She asserts that WVU engaged in a continuing practice of failing to provide her with an accurate job description and that the most recent failure occurred on March 7, 2019. "[W]hen a grievant challenges a ... determination which was made in the past . . . this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code § 29-6A-4(a). See, *Spahr v. Preston Co. Bd. of Educ.*, [182

W. Va. 726,] 391 S.E.2d 739 (1990).’ *Nutter v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). See also *Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000).” *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001).

Regardless, if Grievant’s representations are factually and legally sound, the last day that Respondent failed to provide her a job description was March 6, 2019, since Respondent provided her a job description on March 7, 2019. Fifteen working days from March 6, 2019, is March 27, 2019. Because this grievance was filed on March 28, 2019, it is untimely.

In the alternative, Respondent contends that this grievance must be dismissed because the remedies Grievant requests are unavailable through the grievance process. Respondent states that the only remedies Grievant requests are to either be provided a retirement severance package or a different position with WVU. Grievant counters that while this is the relief she requested in her grievance, she did not know this relief was unavailable through the grievance process. She therefore requests as further relief the issuance of an order directing that WVU admit it failed to follow statutes, policy, rules, and regulations; that WVU deal with similar situations more fairly and transparently in the future; that WVU compensate Grievant for damages to her health and earning potential by awarding her another position commensurate with her skills; and that the undersigned award her any other relief he deems appropriate.

“A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11 (2018) “Any party asserting the

application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). Respondent therefore has the burden of proof.

Even when considering Grievant's amended request for relief, it is clear that the relief requested is unavailable through the grievance process. The undersigned does not have the authority to order that Respondent provide Grievant a retirement severance package, offer Grievant a different work position, admit to any wrongdoing, be fair and transparent with employees who are not a party to this grievance, or pay Grievant tort-like damages. Further, the undersigned has uncovered no other appropriate relief.

"[I]t is not the role of this Grievance Board to change agency policies.... The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (*citing Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted). The Grievance Board is an administrative agency and not a court. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (*citing* Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

Grievant's request to be awarded another position as compensation for damage to her health and earning potential, along with retirement severance, is "tort-like" relief. "Tort" is a legal term that means "[a] private or civil wrong or injury. . .for which the court will provide a remedy in the form of an action for damages." BLACK'S LAW DICTIONARY 1489 (6th ed. 1990). The Grievance Board is not authorized by statute to hear tort claims or award damages for emotional distress. "Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as 'tort-like' damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997)." *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

Neither did Grievant properly request relief for other employees. "Grievance" means a claim by an employee alleging a violation "applicable to the employee". W. Va. Code § 6C-2-2(i)(1). "Grievant cannot grieve for another employee. *Super v. Randolph County Bd. of Educ.*, Docket No. 99-42-043 (Mar. 5, 1999)." *Joy v. Jefferson County Bd. of Educ.*, Docket No. 2016-1687-JefED (May 16, 2017). Class actions are not permitted in the grievance process and an employee may only file on behalf of a group of employees if each employee files a grievance form acknowledging their intent to join the group. W. VA. CODE § 6C-2-3(e)(2). As no other employee filed a form, Grievant did not properly request relief on behalf of any other employee. As a result, Grievant failed to request relief available through the grievance process.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.
2. 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).
3. An employee is required to "file a grievance within the time limits specified

in this article." W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

"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. . ." W. VA. CODE § 6C-2-4(a)(1).

4. Respondent has proven by a preponderance of the evidence that the grievance was not timely filed.

5. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-1-6.11 (2018).

6. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

7. "Grievance" is a claim by an employee alleging a violation "applicable to the employee". W. VA. CODE § 6C-2-2(i)(1). "Grievant cannot grieve for another employee. *Super v. Randolph County Bd. of Educ.*, Docket No. 99-42-043 (Mar. 5, 1999)." *Joy v. Jefferson County Bd. of Educ.*, Docket No. 2016-1687-JefED (May 16, 2017).

8. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon

them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

9. “Damages such as medical expenses, mental anguish, stress, and pain and suffering are generally viewed as ‘tort-like’ damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).” *Stalnaker v. Div. of Corrections*, Docket No. 2013-1084-MAPS (Mar. 26, 2014); See *Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n. 11 (1995).

10. Respondent has proven by a preponderance of evidence that the relief Grievant requests is unavailable from the Grievance Board.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 6, 2019

Joshua S. Fraenkel
Administrative Law Judge