

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL BROWN, et al.,

Grievants,

v.

Docket No. 2021-1474-CONS

**DIVISION OF CORRECTIONS AND REHABILITATION/
PAROLE SERVICES AND DIVISION OF PERSONNEL,**

Respondents.

DISMISSAL ORDER

The above-styled matter is a consolidated grievance. Grievants,¹ individually filed grievances while employed by the Division of Corrections and Rehabilitation/Parole Services, Respondent (DOC), challenging the application of State Personnel Board action #2697 that called for, among other things, graduated salary increases for Probation and Parole Officers. The grievances filed are virtually identical stating:

On October 14, 2020, we were notified that as of October 15, 2020, the 7% pay raise granted to those employees whom fall under SPB #2697 was not going to occur as originally designed. It seems as though, the grieving parties were only going to receive an amount to which in total would place them at the highest range for salary of their given position. This directly violates SPD # 2697 which was sought as an exception to the rule and was to be utilized for retention and recruitment for Parole Services.

For relief, Grievants sought:

We are requesting that the original 7% increase in salary be implemented as originally designed and that such relief also be carried forward to all of those employees who qualify under SPB #2697, we are also seeking back pay plus interest, and all attorney fees.²

¹ The grievances of sixteen (16) individual employees were individually filed and collectively consolidated into the instant Docket No. 2021-1474-CONS: David Toler, Michael Brown, Joseph Hall, Bryan Ware, Bryan Thompson, Jeremy Napier, Wesley Aaron Linn, Rebecca Harrison, Jordan McKinley, Clarissa Hill, Shari Wince, Jill Bryant, Kristi Shockey (Weasenforth), Jessica Marsh, John Smith and Calvin Lease, III. See Grievance Board December 3, 2020, Order of Consolidation.

² WEST VIRGINIA CODE § 6C-2-6 (2018) is entitled, Allocation of expenses and attorney's fees. It specifically states: (a) Any expenses incurred relative to the grievance

On November 5, 2020, Respondent filed a level one waiver regarding the issue. Subsequently the Public Employees Grievance Board consolidated all the recognized grievances to the instant Docket No. 2021-1474-CONS by order dated December 3, 2022. A level two mediation was scheduled for May 11, 2021. Thereafter, Respondent DCR, by counsel, requested a continuance and further requested to join the Division of Personnel (hereinafter “DOP”) as a party. Such requests were granted and DOP was joined as a necessary party and the level two mediation was rescheduled for September 20, 2021. A level two mediation session was conducted on Sept 20, 2021. An “Order of Unsuccessful Mediation” was entered by this Grievance Board on September 22, 2021. On May 17, 2022, approximately seven (7) months after the level two mediation, Grievants filed a level three appeal.

On May 31, 2022, Respondent DOC, by counsel, filed a Motion to Dismiss asserting the grievance should be dismissed as untimely. Counsel for Grievants filed a Response to Respondent’s Motion to Dismiss dated June 14, 2022, opposing the Motion to Dismiss. A level three hearing was scheduled for September 1, 2022. Further, this Grievance Board issued a letter to all parties on August 8, 2022, acknowledging that there are unresolved issues in dispute and requested Grievants individually clarify their standing and identify their representation. A phone conference was convened before the undersigned Administrative Law Judge on August 19, 2022, where the parties were

procedure at levels one, two or three shall be borne by the party incurring the expense. It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep’t of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep’t*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep’t of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). Also see *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001). Further, this Grievance Board does not award tort-like or punitive damages. Thus, this issue will not be addressed further in this decision.

provided an opportunity to fortify their position regarding the motion and their respective opinions regarding the proper disposition of this grievance. The respective legal representatives for the parties had the opportunity to verbally address the motion, theories regarding notice, and any other relevant outstanding issue(s). Grievants appeared via their legal counsel, Phil Isner, Isner Law Office. Respondent DOC appeared by counsel, Jodi Tyler, Assistant Attorney General. Respondent DOP appeared by Wendy Mays, Assistant Director of the Classification and Compensation (Class and Comp) section and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. Further, all parties were granted until August 29, 2022 to provide post conference written documentation in support of their respective positions regarding dismissal of the grievance as untimely.

Synopsis

Respondent DOC's *Motion to Dismiss* 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). Grievants are employed by Respondent DOC as Parole Officers. On September 20, 2020, Grievants, and Respondents, via legal counsel, participated in an unsuccessful mediation session. Grievants filed their level three appeal in May 2022. Approximately seven (7) months after the notice of the *Order of Unsuccessful Mediation*, entered on September 22, 2021. Counsel for Grievants presents for consideration the contention that proper notice was not established. The *Order* was mailed to the addresses of sixteen individual Grievants, and to the address of Grievants' legal counsel.

An Order of Unsuccessful Mediation was addressed and sent by U. S. Mail service to each individual Grievant, and to the law office recognized as providing legal representation to the Grievants. Grievants had specific and/or constructive notice of the

unsuccessful mediation. The argument that one or two individual Grievants may not have received his/her notice is not found to be an acceptable justification to remedy a seven (7) month lapse of time for the entire group of Grievants to appeal to level three.

It is established by a preponderance of the evidence that the level three appeal of the instant grievance was untimely filed. Accordingly, Respondent's motion is **GRANTED**, and 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. All sixteen (16) of the identified and known Grievants³ are employees of the Division of Corrections and Rehabilitation/Parole Services, Respondent and are employed as Parole Officers.

2. On October 14, 2020, Grievants were notified that they would not be receiving the full 7% pay raise granted to employees who fall under SPB #2697, but would only receive an amount which in total would place them at the highest range for salary of their given position.

3. Grievants timely filed their respective level one grievance on or about October 27, 2020.

4. On November 5, 2020, Respondent DOC filed a level one waiver positioning the issue for a level two mediation. A level two mediation was scheduled for May 11, 2021.

³ David Toler, Michael Brown, Joseph Hall, Bryan Ware, Bryan Thompson, Jeremy Napier, Wesley Aaron Linn, Rebecca Harrison, Jordan McKinley, Clarissa Hill, Shari Wince, Jill Bryant, Kristi Shockey (Weasenforth), Jessica Marsh, John Smith and Calvin Lease, III

5. Respondent DOC, by counsel, requested a continuance of the scheduled mediation and further requested to join the Division of Personnel (“DOP”) as a necessary party. DOP was thereafter joined as a necessary party and the level two mediation was rescheduled for September 20, 2021.

6. The *Notice of Mediation* was mailed to all Grievants and to all counsel of record at the time the mediation was scheduled. Prior to the level two mediation, Grievants were represented by David C. Fuellhart, III of Isner Law Office. The mailing address for Isner Law Office is 44 S. Randolph Avenue, P.O. Box 1878, Elkins, WV 26241. The record does not indicate that any party did not receive adequate notice of the mediation.

7. On September 20, 2021, the parties and their counsel participated in mediation, which proved to be unsuccessful.

8. During the level two mediation, Grievants were represented by Phillip Isner of Isner Law Office. Attorney Isner is the managing partner of Isner Law Office and he personally attended and participated in the September 20, 2021 mediation on behalf of Grievants.

9. An *Order of Unsuccessful Mediation* was entered on September 22, 2021, and a copy was mailed to all sixteen (16) Grievants and to counsel of record (David C. Fuellhart of Isner Law Office).⁴ The Order was mailed to the same addresses where the *Notice of Mediation* was sent, including Isner Law Office.⁵

⁴ A notice of appearance on behalf of the Grievants was filed by David C. Fuellhart, III with this Grievance Board on or about January 13, 2021.

⁵ At an unclear date in June 2021, David C. Fuellhart, Esquire left employment with Isner Law Office. At some unspecified time, Attorney Phillip Isner, the managing partner of Isner Law Office, took over representation of Grievants.

10. On May 17, 2022, approximately seven (7) months after the unsuccessful mediation, Grievants, through counsel, filed a level three appeal. WEST VIRGINIA CODE § 6C-2-4(c)(1) sets forth the time limits for appealing a grievance from level two, providing the appeal should be filed **within ten days of receiving a written report stating that level two was unsuccessful.**

11. On May 17, 2022, the managing partner of Isner Law Office, Phillip Isner filed the notice of Grievants' appeal to level three. The same legal counsel in attendance of the unsuccessful level two mediation held on September 20, 2021.

12. On or about August 8, 2022, efforts were made to contact all sixteen (16) Grievants by email and postal services. Each were requested to self-identify and clarify which are represented by legal counsel or *pro se*.⁶ In a written format, 15 of the 16 Grievants identified Isner Law Office as their representative.⁷

13. This Grievance Board timely an *Order of Unsuccessful Mediation* sent by U. S. Mail service addressed to each individual Grievant, and to the law office recognized as providing legal representation to the Grievants. Grievants, individually and collectively, had specific and/or constructive notice of the unsuccessful mediation in September, 2021.

14. Grievants' appeal to level three, approximately seven (7) months after the notice of unsuccessful mediation, is not recognized as being within the applicable timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1).

⁶ "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258

⁷ The vast majority of Grievants identified Isner Law Office, not a specific attorney-at-law as providing representation. Only one Grievant specifically identified Attorney Phil Isner, the managing partner of Isner Law Office, *per se*, as legal counsel.

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. “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 (2008).

The issue before the undersigned is Respondent DOC's *Motion to Dismiss*. Respondent DOC contends that this grievance matter is untimely because the level three appeal was not initiated within the timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(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 their 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).

Respondent DOC asserts the grievance should be dismissed as untimely in that Grievants filed their appeal significantly past the time period established by applicable statutory laws. Grievants oppose the Motion to Dismiss. Among a variety of scenarios, Grievants, by counsel, assert lack of proper notice and, accordingly, the appeal was not untimely. On May 17, 2022, approximately seven (7) months after the notice of unsuccessful level two mediation was sent to all Grievants and their counsel, Grievants filed a level three appeal.

An employee is required to file a grievance and pursue such in accordance with applicable statute. 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

W. VA. CODE § 6C-2-4(c)(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). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

Grievants counsel argues that the filing should not be viewed as untimely in that the statute clearly provides for receiving written notice and, in that, he and perhaps four

of the Grievants never properly received the written *Order of Unsuccessful Mediation*. Grievants are arguing the window to appeal to level three is open due to lack of proper notice.⁸ The technicality of this position is not marginalized. Grievants allege a statutory indiscretion. The undersigned will address the contention presented. However, also be mindful that counsel's argument, if taken on face value, at best, would provide an arguable excuse for a limited number of the sixteen (16) Grievants (ones which did not specifically receive individual notice), not provide a blanket extension for all.

The September 22, 2021, Certificate of Service attached to the *Unsuccessful Mediation Order* indicates that it was mailed to all Grievants at their home addresses and to the law office of Grievants' counsel. Grievants present legal counsel, Phillip Isner, highlights with great emphasis that the envelope was addressed to David C. Fuellhart, III, Esquire at Isner Law Office. This distinction is duly noted. It is also recognized that Grievants counsel is the managing partner of Isner Law Office. The same legal counsel in attendance of the unsuccessful level two mediation on September 20, 2021.

Assuming everyone is familiar with the letter of the law and the spirit of the law arguments, good points have been made for each over the course of time. Nevertheless,

⁸ 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 Emp't 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). "[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). See also *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997)." *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997) aff'd, Kan. Co. Cir Ct. Docket No. 97-AA-110 (Jan. 21, 1999). "[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event." *Bailey v. McDowell County Board of Education*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000).

Grievants' contentions are found to be lacking. Grievants explanation for their delay in filing or requesting level three proceedings is not found to be a sufficient justification for a seven-month tardy filing of this grievance appeal. The grievance process is not designed to be a procedural quagmire. An *Order of Unsuccessful Mediation* was entered on September 22, 2021, and a copy was mailed to all sixteen (16) Grievants. It is more than fair to assume that the clock started when a dozen of the sixteen Grievants received written notice. It is hard to imagine that a legal document delivered to twelve to fourteen Grievants employed by the same employer was never a topic of discussion at the work site or that none of the Grievants communicated with counsel for over six months. Further, Grievants' counsel, Isner is the managing partner of Isner Law Office, he personally attended and participate in the September 20, 2021 mediation on behalf of Grievants. While the Order may have been addressed to Mr. Fuellhart, it was mailed to Isner Law Office. In a written format fifteen (15) out of sixteen (16) Grievants identified Isner Law Office as their representative.⁹

Grievants' argument that two or more of them did not receive a written unsuccessful Order is not persuasive. Grievants, individually and collectively, had specific and/or constructive notice of the unsuccessful mediation in September 2021. Further, Grievants legal counsel had knowledge of the same. The clock started to run in October 2021, meaning that Grievants filed their grievance approximately seven (7) months later than the time period allowed by the statute. That is fatal to Grievants' grievance. "[A]n untimely filing will defeat a grievance[,] and the merits of the grievance need not be addressed." *White v. Logan Bd. of Ed.*, Docket No. 2017-0899-LogED (May 9, 2018).

⁹ Overwhelmingly, Grievants identified Isner Law Office, not a specific attorney as providing representation. Only one Grievant specifically identified Attorney Phillip Isner, the managing partner of Isner Law Office, per se, as legal counsel.

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.**” An *Order of Unsuccessful Mediation* was entered on September 22, 2021, and a copy was mailed to all sixteen (16) Grievants and to counsel of record. The Order was mailed to the same addresses where the *Notice of Mediation* was sent, including Isner Law Office. On May 17, 2022, approximately seven (7) months after the unsuccessful mediation, Grievants, through counsel, filed a level three appeal. Respondent DCR asserts the grievance should be dismissed as untimely in that Grievants filed their appeal significantly past the time period established by applicable statutory law. This Grievance Board timely sent by U. S. Mail service an *Order of Unsuccessful Mediation* addressed to each individual Grievant, and to Isner Law Office. Grievants, individually and collectively, had specific and/or constructive notice of the unsuccessful mediation in September 2021. Grievants explanation for their delay in filing or requesting level three proceedings in not found to be sufficient justification. Grievants’ appeal to level three of the instant grievance, approximately seven (7) months after the notice of unsuccessful mediation, is not viewed as being within the applicable timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1).

According to the undisputed facts of this case, this grievance was not timely appealed. Further, Grievants have failed to provide a legally acceptable excuse for a seven-month delay. Accordingly, this grievance must be, and hereby is, **DISMISSED**.

The following Conclusions of Law support the decision reached.

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. 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

W. VA. CODE § 6C-2-4(c)(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). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

3. “[A]n untimely filing will defeat a grievance[,] and the merits of the grievance need not be addressed.” *White v. Logan Bd. of Ed.*, Docket No. 2017-0899-LogED (May 9, 2018).

4. “[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event.” *Bailey v. McDowell County Board of Education*, Docket No. 07-33-399 (Nov. 24, 2008). *See also Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000).

5. Respondent DOC proved the grievance was not timely filed when it was filed approximately seven months after Grievants were provided notice or should have had notice that mediation was unsuccessful.

6. Grievants explanation for their delay in filing or requesting level three proceedings is not found to be a sufficient justification for a seven-month tardy filing of the grievance appeal.

7. Respondent has met its burden. Grievants filed their appeal of this grievance outside the applicable time period for filing such a proceeding.

8. Grievant’s appeal to level three of the instant grievance, approximately seven (7) months after receiving notice of unsuccessful mediation, was not within the applicable timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1).

Accordingly, based on the foregoing, Respondent’s “Motion to Dismiss” is **GRANTED** and this grievance is **DISMISSED** from the docket of the Grievance Board.

Any party may appeal this decision to the Intermediate Court of Appeals.¹⁰ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: August 31, 2022

Landon R. Brown
Administrative Law Judge

¹⁰ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.