

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CLINTON T. DRAINER,**

**Grievant,**

**v.**

**Docket No. 2022-0179-DOT**

**DIVISION OF HIGHWAYS,**

**Respondent.**

**DISMISSAL ORDER**

Clinton Drainer, Grievant, is employed by Respondent, Division of Highways ("DOH") in the Transportation Worker 2, Equipment Operator ("TW2") classification. Mr. Drainer filed a level one grievance form dated September 2, 2021, alleging "I was denied a promotion to the TW3 position based on discriminating against me because of my age." As relief, Grievant sought "[T]o receive back pay, and be promoted to the TW3 position, along with other damages and remedies available." This grievance was given the docket number 2022-0179-DOT.

Mr. Drainer filed a second level one grievance form dated April 5, 2022, alleging:

I have been denied a promotion to a TW3 position based on the employer discrimination against me because of my age. Training for TW3 positions (bulldozer and boom max operator) were posted and I applied. WV DOH selected younger and less experienced individuals for said positions on March 28<sup>th</sup> and March 31<sup>st</sup>, 2022.

For relief, Grievant sought "to receive back pay, and be promoted to the TW3 position, along with other damages and remedies available." The second grievance was given the docket number 2022-0706-DOT. Both Grievances were denied at level one and were mediated unsuccessfully at level two.

Respondent, by counsel, Regenia L. Mayne, Esquire, filed a motion to dismiss the first grievance (with the docket number 2022-0179-DOT) as being untimely filed. The same day, the Grievance Board sent a copy of the motion to counsel for Grievant, Erika Klie Kolenich, Esquire, Klie Law Offices PLLC. The Grievance Board notified Grievant's counsel that she had until the close of business August 1, 2022, to file a written response, if she chose to do so. On August 2, 2022, Grievant's counsel filed a Motion to Consolidate the two grievances.

A level three hearing had been scheduled for August 10, 2022. The undersigned cancelled the hearing and used that day for a hearing on the Motion to Dismiss. The hearing on the motion was conducted via the Zoom video platform. Counsel for both parties appeared to argue the motion. The parties submitted written arguments the last of which was received at the Grievance Board on August 29, 2022. This matter is now mature for a ruling on the Motion to Dismiss.

### **Finding of Facts**

1. Clinton Drainer, Grievant, is employed by Respondent, Division of Highways ("DOH") in the Transportation Worker 2, Equipment Operator ("TW2") classification.

2. Grievant interviewed for a position in the Transportation 3, Equipment Operator (TR3) classification on February 23, 2021. Grievant was not the successful applicant for that position.

3. The selection of the other applicant was made official on March 4, 2021, and that person assumed the position effective March 13, 2021.

4. It is more likely than not that Grievant was aware that he had not been selected for the position no later than March 13, 2021, when the successful applicant started the position.<sup>1</sup>

5. Grievant Drainer filed a level one grievance form dated September 2, 2021, alleging, “I was denied a promotion to the TW3 position based on discriminating against me because of my age.” The only remedy sought in that grievance is “[T]o receive back pay, and be promoted to the TW3 position, along with other damages and remedies available.” This is the first of two grievances filed by Mr. Drainer and was given the docket number 2022-0179-DOT.

### **Discussion**

“Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W. VA. CODE ST. R. § 156-1-6.2 (2018). It is within an administrative law judge’s discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

Respondent DOH asserts that this grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and, therefore, it must be dismissed. When an employer

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<sup>1</sup> In an EEOC complaint related to this position Grievant stated that he was informed on February 25, 2021, that he was not selected for the TW3 position. During the hearing on the Motion to Dismiss there was some discussion related to other actions which may be pending in other forums related to the facts raised in this grievance. Obviously, whether there are actions pending in other forums has no relevance to the determination of whether this grievance was timely filed ,and, as such, is not considered in this ruling.

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).

W. VA. CODE § 6C-2-4(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 timelines 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. . . (Emphasis added)

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 *W. Va. Div. of Highways v. Powell*, 243 W. Va. 143, 144, 842 S.E.2d 696, 697, (2020), The West Virginia Supreme Court of appeals specifically addressed the application of W. VA. CODE § 6C-2-4(a)(1) to selection grievances. The Court wrote:

The time period for filing an employment selection grievance under W.Va. Code § 6C-2-4(a)(1) (2008) begins when the grievant is unequivocally notified of the selection decision by the employer, not when the grievant discovers facts about the person selected for the position.

*Id. at Syl. Pt. 3.*

In this matter, Grievant notified that he was not selected for the TW3 position at the end of February, 2021. The most generous date would be March 13, 2021, when the successful applicant began performing the duties of the position in question. The grievance was dated September 2, 2021, months after Grievant was informed that he was not selected for the TW3 position. There is no doubt that the grievance was not filed “within fifteen days following the occurrence of the event upon which the grievance is based” as required by the statute.

Grievant argues that this grievance is still timely because it is part of continuing practice, i.e., ongoing discrimination against Grievant based upon his age. W. VA. CODE § 6C-2-3(a)(1) does contain an exception regarding the time for filing grievances based upon continuing practices such as discrimination. As set out above, regarding this exception, the statute requires that the grievance must be filed, “or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance...”<sup>2</sup> Grievant only mentions one occurrence, his nonselection for the TW3 position. For the continuing practice rule to, apply the grievance had to be filed within fifteen days of that occurrence

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<sup>2</sup> W. VA. CODE § 6C-2-4(a)(1)

which would have allowed previous occurrences to be considered. The grievance was not filed within “fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance.” Thus, the continuing practice exception does not apply, and the grievance is still not timely filed. Accordingly, the Motion to Dismiss is GRANTED and this specific grievance is DISMISSED.

### **Conclusions of Law**

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W. VA. CODE ST. R. § 156-1-6.2 (2018). It is within an administrative law judge’s discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

2. Respondent DOH asserts that this grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and therefore it must be dismissed. 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. W. VA. CODE § 6C-2-4(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 timelines 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. . .

4. "The time period for filing an employment selection grievance under W.Va. Code § 6C-2-4(a)(1) (2008) begins when the grievant is unequivocally notified of the selection decision by the employer, not when the grievant discovers facts about the person selected for the position." *Syl. Pt. 3. W. Va. Div. of Highways v. Powell*, 243 W. Va. 143, 144, 842 S.E.2d 696, 697, (2020).

5. In this matter, the grievance was not filed "within fifteen days following the occurrence of the event upon which the grievance is based" as required by the statute.

6. W. VA. CODE § 6C-2-3(a)(1) contains an exception regarding the time for filing grievances based upon continuing practices such as discrimination, which requires that the grievance must be filed, "or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance...."

7. This grievance was not filed within "fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." Thus, the continuing practice exception does not apply, and the grievance is still not timely filed.

Accordingly, the Motion to Dismiss is GRANTED. The grievance is DISMISSED.

Any party may appeal this decision to the Intermediate Court of Appeals.<sup>3</sup> 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: September 27, 2022.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**

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<sup>3</sup> 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.