

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MIA BROWN,
Grievant,

v.

Docket No. 2023-0386-WVU

WEST VIRGINIA UNIVERSITY,
Respondent.

DISMISSAL ORDER

Mia Brown, Grievant, was previously employed by West Virginia University as a Research Associate in the Office of Health Affairs. Ms. Brown filed a level one grievance form dated November 28, 2023, alleging discrimination and retaliation leading to the non-renewal of her employment. Grievant requested that she be reinstated with lost wages and any available remedy under the law. This grievance was dismissed as untimely at level one by order entered on February 3, 2023. Grievant appealed to level two. A level two mediation was held on April 10, 2023. Grievant subsequently appealed to level three. West Virginia University, through counsel, renewed its motion to dismiss the grievance as untimely on May 5, 2023. Grievant's counsel responded to this motion on May 11, 2023. West Virginia University appears by its counsel Samuel R. Spatafore, Assistant Attorney General. Grievant appears by her counsel Erika Klie Kolenich, Klie Law Offices, PLLLC. This matter is now mature for a ruling on the Motion to Dismiss.

Synopsis

The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed as untimely.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant filed the instant matter on November 28, 2022, following receipt of a Notice of Nonrenewal and Limited Term Appointment dated June 2, 2022.

2. The June 2, 2022, Notice of Nonrenewal and Limited Term Appointment informed Grievant that her annual contract would not be renewed for the 2022-2023 academic year, and she was provided a limited appointment from July 1, 2022 to September 30, 2022.

3. Grievant filed the instant matter on November 28, 2022. This occurred five months after she received the Notice of Nonrenewal and Limited Term Appointment.

4. Grievant asserted that the time to file a grievance should be tolled because the alleged discrimination is part of a continuing practice.

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 asserts that this grievance was not filed within the time allowed by W. VA. CODE § 6C-2-4 and, therefore, it must be dismissed. 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. See *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 also *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 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 Procedure, 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 timelines. 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(a)(1) sets forth the time limits for filing a grievance, stating 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). 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.*, 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 this matter, Grievant was aware on June 2, 2022, that her annual employment would not be renewed, but only extended until September 30, 2022. The grievance was not filed until six months later, well beyond the statutory timelines. 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 statute.

Grievant asserted that the time to file a grievance should be tolled because the alleged discrimination is part of a continuing practice. Grievant argues that the grievance is still timely because it is part of a continuing practice, that being an ongoing

discrimination against Grievant. The Public Employees Grievance Board has recognized that when there is a continuing practice, the timeline may be determined to begin to run with each new occurrence. *Anderson v. Hancock County Bd. of Educ.*, Docket No. 2015-1581-HanED (Oct. 20, 2016). Grievant's argument has no merit. There was no continuing practice giving rise to a grievance based on the Notice of Nonrenewal. There was only a single event. Even if the discrimination claim was determined to be an ongoing violation, Grievant's last day of employment was September 30, 2022. The instant grievance was not filed until approximately eight weeks later. Accordingly, the Motion to Dismiss is granted.

The following Conclusions of Law support the decision reached.

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. 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. *See 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 also *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. 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(a)(1) sets forth the time limits for filing a grievance, stating 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

4. 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.*, 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).

5. 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.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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: June 26, 2023

Ronald L. Reece
Administrative Law Judge

¹On 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 W. VA. 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.