

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**HEATHER LAYNE COOPER,
Grievant,**

v.

Docket No. 2023-0104-BVCTC

**BRIDGE VALLEY COMMUNITY AND TECHNICAL COLLEGE,
Respondent.**

DISMISSAL ORDER

Grievant, Heather Layne Cooper, was employed by Respondent, Bridge Valley Community and Technical College. On August 5, 2022, Grievant filed directly to level three of the grievance against Respondent stating, "The new president of the college decided to 'reorganize' and informed me in May that my position will no longer be recognized as of July 1, 2022." Grievant attached an additional page, which is incorporated by reference, in which she alleges that Respondent acted in violation of the Higher Education Policy Commission's procedural rules when she was offered a new position in a different department that would pay less than her previous contract. Grievant further stated, "Negotiations were never met and I was told to sign the contract within 5 days, even though I was off contract and on vacation." For relief, Grievant seeks "[t]o have the rest of my 11 month contract paid out plus one year of health benefits."

On August 25, 2022, a *Notice of Hearing* was entered scheduling the level three hearing to be held on October 27, 2022. On August 31, 2022, Respondent, by counsel filed *BridgeValley Community and Technical Colleges' Motion to Dismiss for Mootness and Lack of Standing* alleging lack of standing, mootness, and untimeliness. On October 13, 2022, the undersigned converted the scheduled level three hearing to a hearing on the motion to dismiss. On October 27, 2022, the parties appeared for hearing on the

motion to dismiss before the undersigned at the Grievance Board's Charleston, West Virginia office via videoconferencing. Grievant appeared *pro se*. Respondent appeared by its President, Dr. Casey K. Sacks, and was represented by counsel, Gretchen A. Murphy, Assistant Attorney General. This matter became mature for decision on December 2, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as its Corporate Education Faculty & Program Manager. Grievant's position was eliminated, and her contract ended June 30, 2022. Grievant grieved the terms of a new contract she was offered for a different position, which she declined to accept. Respondent moved for dismissal of the grievance alleging lack of standing, mootness, and untimeliness. As Grievant attempts to challenge the terms of a new contract she was offered after her employment had already ceased, the Grievance Board does not have jurisdiction to hear the claim. To the extent that the new contract could be related back to non-renewal of Grievant's prior contract, the grievance was untimely filed. Accordingly, the 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 was employed by Respondent as its Corporate Education Faculty & Program Manager.
2. Grievant was employed through an annual contract dated January 3, 2022, with the contract term ending on June 30, 2022.

3. In May 2022, Respondent's new President, Dr. Casey K. Sacks, decided to reorganize the administration of the college, which reorganization would be implemented at the advent of the new academic year. In that reorganization, multiple positions were eliminated, including Grievant's position.

4. Employees whose positions were to be eliminated were informed of other available positions within the college and asked to communicate their interest in any of those positions.

5. Dr. Sacks met with Grievant on June 20, 2022, to discuss the transition and what positions Grievant would be interested in filling.

6. On June 24, 2022, Dr. Sacks emailed Grievant to follow up on their conversation asking if Grievant had selected a position she was interested in filling and stating that she had heard that Grievant had told a colleague she was "finished working [at the college]."

7. On June 27, 2022, Grievant submitted her two choices of positions, including Career Services Specialist.

8. Neither party offered a copy of the contract as evidence, but the parties agreed that Respondent thereafter offered Grievant a contract for the Career Services Specialist position.

9. Grievant objected to the contract because the annual pay for the Career Services Specialist position was lower than her prior position so she did not accept the contract.

10. The Corporate Education Faculty & Program Manager annual pay was higher because it was an eleven-month position, and the Career Services Specialist position was a nine-month position.

11. In an undated letter, which Grievant acknowledges she received and which she appears to have received in July, Dr. Sacks memorialized that Grievant had declined the Career Services Specialist position and provided her information about the return of college property and COBRA benefits. This is the letter Grievant references as a “resignation letter.”

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). The administrative law judge may dispose of a grievance through an appealable dismissal order. W.VA. CODE ST. R. § 156-1-6.19.3.

"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)). “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.”

W. VA. CODE § 6C-2-1(a). "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). "'Employer' means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section." W. VA. CODE § 6C-2-2(g). "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . ." W. VA. CODE § 6C-2-2(i)(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).

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

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); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

Although Grievant’s statement of grievance references the non-renewal of her contract and a “resignation letter,” Grievant did not grieve the non-renewal of her contract and she did not resign. Grievant was employed by Respondent under a contract that ended June 30, 2022. Grievant was offered a new contract for a different position, which Grievant did not accept. The “resignation letter” Grievant references is instead a letter from Dr. Sacks simply memorializing that Grievant had declined the new contract and providing other information about the return of college property and COBRA benefits.

Grievant does not grieve the decision not to renew her contract. Grievant grieves the terms of the new contract she was offered that she declined to accept. Grievant

protests Respondent's action because Grievant's pay would be less under the new contract than her former contract. Grievant's original contract was for an eleven month per year position. The new contract was for a nine month per year position. In this grievance, Grievant seeks "[t]o have the rest of my 11 month contract paid out plus one year of health benefits." This relief refers to the new contract and not the prior contract. Grievant admits she received all the pay due her under the prior contract. She contends that Respondent was obligated to offer the new contract for an eleven-month position rather than an nine-month position.

The Grievance Board does not have jurisdiction to hear a challenge regarding the declined contract because Grievant was no longer employed by Respondent. Grievant's employment with Respondent ceased on June 30, 2022, when her original contract ended and Respondent was no longer using her services. As Grievant chose not to accept the new contract, she was not an employee when she filed her grievance on August 5, 2022. The Grievance Board may only hear claims of an employee against her employer.

Of course, the grievance procedure allows a grievant who has been terminated from employment to file a grievance challenging the termination. This grievance is not analogous to the termination of employment. Grievant is not challenging the decision not to renew her contract. Grievant challenges the terms of a new contract she was offered after her employment had already ended. To the extent that Grievant attempts to relate her grievance back to the non-renewal of her original contract, her grievance would be untimely. Grievant was unequivocally notified in May 2022 that her position would be eliminated. Grievant's contract then ended on June 30, 2022. Grievant did not file her grievance until August 5, 2022, well past the fifteen-day timeframe even with the latest

date of June 30, 2022. Therefore, Respondent has met its burden of proof that the grievance must be dismissed.

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). The administrative law judge may dispose of a grievance through an appealable dismissal order. W.VA. CODE ST. R. § 156-1-6.19.3.

2. "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)).

3. "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a).

4. "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1).

5. "'Employer' means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county

board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-2-2(g).

6. “‘Grievance’ means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee. . . .” W. VA. CODE § 6C-2-2(i)(1).

7. 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).

8. 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

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9. 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); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

10. As Grievant attempts to challenge the terms of a new contract she was offered after her employment had already ceased, the Grievance Board does not have jurisdiction to hear the claim.

11. To the extent that the new contract could be related back to non-renewal of Grievant’s prior contract, the grievance was untimely filed.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

¹ 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

§ 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: January 18, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

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.