

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CHRISTOPHER KEVIN BURNETTE,**  
Grievant,

v.

**Docket No. 2024-0197-DHS**

**DEPARTMENT OF HOMELAND SECURITY/  
EASTERN REGIONAL JAIL AND CORRECTIONAL FACILITY,**  
Respondent.

**DISMISSAL ORDER**

Grievant, Christopher Kevin Burnette, filed this action directly to level three of the grievance procedure on September 11, 2023, challenging the termination of his employment with the Department of Homeland Security/Eastern Regional Jail and Correctional Facility. Grievant seeks to “be removed from the ineligible list of future employment and ask that this statement of ‘ineligibility’ be removed from my personnel files.”

Respondent filed a Motion to Dismiss on February 7, 2024, alleging that Grievant’s filing at level three was untimely filed. Grievant was given an opportunity to respond to the Motion to Dismiss, however, no response was provided. A hearing on the motion was held via Zoom video before the undersigned on February 20, 2024. Respondent appeared by its counsel, Jodi B. Tyler, Assistant Attorney General and by Superintendent Didymus Tate. Grievant failed to appear for the hearing. This motion became mature for consideration and a ruling at the conclusion of the hearing.

**Synopsis**

Grievant was previously employed by Respondent as a Correctional Officer II. Grievant was provided with a letter of termination dated June 2, 2023. Grievant filed this action on or about September 11, 2023, challenging his termination from employment. 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 was notified of his termination via letter dated June 2, 2023. Grievant acknowledged that he received this letter and was aware of the contents of the letter on the same date.

2. Grievant filed this action on September 11, 2023, approximately three months after the date upon which the termination became known to him.

3. Due to the undisputed fact that Grievant filed this grievance approximately three months after he was provided with his termination, Respondent asserts the affirmative defense of timeliness.

4. At the time of his filing in September and subsequent opportunity to respond to this motion, Grievant did not provide any documentation or other explanation for the late filing.

### **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 WEST VIRGINIA 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 elected to proceed directly to a level three hearing due to his dismissal from employment, which he contends was improper because he did not violate any of Respondent's policies regarding an alleged use of force incident. The record is clear that Grievant received notice of his termination on June 2, 2023, and did not file his grievance until September 11, 2023. Grievant's termination letter provided that

“[I]f you choose to exercise your grievance rights, you must submit your grievance, on the prescribed form, within fifteen (15) working days of this letter. . .” Grievant signed his termination letter on June 2, 2023, certifying that he received a copy and was aware of the contents of the letter. 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. 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.<sup>1</sup> Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order.

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<sup>1</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

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: March 1, 2023**

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**Ronald L. Reece**  
**Administrative Law Judge**

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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.