**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TIMOTHY RYAN ICKES,**
**Grievant,**

**v.** **Docket No. 2024-0561-DHF**

**DHF/BATEMAN HOSPITAL,**
**Respondent.**

## ORDER AFFIRMING "L1 RULING ON MOTION TO DISMISS"

Grievant, Timothy Ryan Ickes, is employed as a Physical Therapist by Respondent, Department of Health Facilities, through Mildred Mitchell Bateman Hospital. On February 16, 2024, Grievant filed this grievance[1] against Respondent stating, "Was told and presented with offer of 38.2341 and accepted it to work as P.T. Upon the day before was told Charleston called and said was not able to pay that and would only allow 36.02. Upon calling Charleston told was reduced by MMBH." For relief, Grievant seeks "[b]ack pay and pay grade brought to 38.2341."

Respondent moved to dismiss the grievance on March 1, 2024, arguing that the grievance was untimely because Grievant was hired at his then-current rate of pay in October 2020. Grievant responded to the motion on March 6, 2024. On March 14, 2024, Grievance Evaluator Christina M. Bailey issued a Ruling, dismissing the grievance pertaining to Grievant's salary.[2]

[1] Grievant also filed a separate grievance, 2024-0560-DHF, challenging his classification/pay grade. The two grievances were consolidated into 2024-0573-CONS on March 7, 2024; however, following the dismissal of 2024-0561-DHF at level one, the two grievances were separated to allow Grievant to pursue his claim in 2024-0560-DHF.

[2] Because this appeal only addresses the salary/back pay claim raised in 2024-0561-DHF, the undersigned will not address the Grievance Evaluator's findings of fact

Grievant attempted to file a request for level two mediation. However, a level one "decision [to dismiss] may be appealed to level three, and an administrative law judge shall review the order." W. VA. CODE § 6C-2-3(c)(1). Accordingly, the level one Ruling was reviewed at level three by the undersigned.[3]

## Discussion

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

and conclusions of law regarding the classification/pay grade claim raised in 2024-0560-DHF.

[3] The grievance was reassigned to the undersigned for administrative reasons.

> 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." *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff'd*, Kanawha Cnty Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff'd*. W. Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011); *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998). Though Grievant did not make the argument, the Grievance Evaluator addressed the issue of a "continuing practice" and the impact that would have on the timeliness of the grievance. But as the Grievance Evaluator pointed out,

> when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to CODE § 29-6A-4(a). See, *Spahr v. Preston Co. Bd. of Educ*., [182 W. Va. 726,] 391 S.E.2d 739 (1990)." *Nutter v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning that others have received merit increases).

*Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001).

Here, it is undisputed that Grievant received a letter from Tamara Kuhn, Human Resources Director at Bateman Hospital, indicating that Grievant was the preferred candidate for the permanent position of "Physical Therapist" at the hospital. Ms. Kuhn proposed a salary of "$38.2341 per hour," but she made clear that the letter did not constitute "an offer" and was "conditioned up on final approval of the West Virginia Division of Personnel, State Budget Office, and the State Auditor's Office." Furthermore, Oasis salary records indicate that Grievant's rate of pay was changed from $37.1250 per hour as a temporary employee to $33.6875 per hour as a permanent employee on October 24, 2020, which was reflected in his paychecks. Moreover, Grievant acknowledged that "[he] was told of the pay decrease the day before and needed a job. I could not go without a paycheck so I had to accept."

Regarding Grievant's claim at level one that he was unaware of his right to file a grievance until February 15, 2024, the Grievance Evaluator pointed out that, as a State employee, Grievant would have been apprised of the grievance system as part of his orientation program. Grievant does not dispute that on appeal.

Grievant was "unequivocally notified" of his rate of pay in October 2020, and, by his own admission, he accepted it. Therefore, his February 2024 grievance challenging his rate of pay was not timely filed. Accordingly, the dismissal of the grievance at level one as untimely filed is **AFFIRMED**, and it is hereby **ORDERED** that this matter be **DISMISSED** and **STRICKEN** from the Grievance Board's docket with prejudice.

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure.

W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

**DATE: June 25, 2024**

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**Lara K. Bissett**
**Administrative Law Judge**