

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KEITH McCracken,
Grievant,**

v.

Docket No. 2024-0625-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DISMISSAL ORDER

Grievant, Keith McCracken, is employed as a Program Manager I by Respondent Division of Highways. On March 26, 2024, Grievant filed this grievance asserting, in pertinent part, that “[t]here were a number of glaring procedural omissions and misguided interpretations of the policy relating to [Grievant’s] EPA.” For relief, Grievant sought “[t]he immediate rescindment of the Employee Performance Appraisal (EPA) filed with the human resources division,” as well as a series of suggested policy changes for conducting EPAs in the future. The matter was dismissed at Level One following a settlement; however, Grievant filed a request for Level Two mediation. Respondent moved to dismiss the matter at Level Two.

Synopsis

Grievant, a Program Manager I at the Division of Highways, filed a grievance challenging his evaluation under an EPA. The Level One Grievance Evaluator entered a “Dismissal Order” on June 11, 2024, pursuant to a settlement. Grievant filed a Level Two request for mediation on July 31, 2024. Respondent filed a motion to dismiss that request on August 6, 2024, arguing that 1) the appeal is untimely, 2) the Level One “Dismissal

Order” is not appealable,¹ and 3) the relief sought by Grievant cannot be granted by the Grievance Board. The request for mediation was not timely filed, and the remedy that Grievant seeks is unavailable. Accordingly, “Respondent Division of Highways’ Motion to Dismiss” is GRANTED.

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 filed a Level One grievance on March 26, 2024.
2. On June 11, 2024, the Level One Grievance Evaluator entered a “Dismissal Order,” citing the “mutual resolution” of the matter, pursuant to which “the Grievant’s Employee Performance Appraisal (EPA) dated March 20, 2024, will be rescinded.” The Level One Grievance Evaluator also noted that the remaining relief requested by Grievant (relating to policy changes) “is not a remedy available through the grievance process.”
3. On June 28, 2024, Grievant filed a “Response to Dismissal Order,” in which he took issue with the fact that the “Dismissal Order” “fails to address key elements of the grievance” and “ask[s] for the Dismissal Order to be revised [to] include all of the elements of the grievance and relief sought.”
4. On July 12, 2024, Grievant emailed Respondent to ascertain whether the Level One Grievance Evaluator intended to amend her Order. Respondent indicated that the Order was final.

¹ Respondent’s argument is grounded in W. VA. CODE ST. R. § 156-1-6.19.2; however, that rule only applies to dismissals at Level Three. Thus, the Grievance Board will not address that argument.

5. On July 31, 2024, Grievant filed a Level Two request for mediation by an Administrative Law Judge.

6. On August 6, 2024, Respondent filed “Respondent Division of Highways’ Motion to Dismiss.

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. *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); *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).

West Virginia Code § 6C-2-4(b)(1) states: “Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration.” “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).

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). Here, the certificate of service accompanying the Level One “Dismissal Order” notes that Grievant and other interested parties were served by email on June 11, 2024. Grievant’s June 28, 2024, email opens with, “Please find my response to the Dismissal Order received June 11, 2024.” So, Grievant acknowledged that he was unequivocally notified of the decision on June 11, 2024. Therefore, any request for mediation of that “Dismissal Order” had to be filed on or before June 27, 2024.²

Moreover, the “Relief Sought” by Grievant at Level Two, which references his June 28, 2024, “Response to Dismissal Order,” would serve no real purpose and offers no meaningful relief. Grievant states in his “Response to Dismissal Order” that he “understands that not all items asked for in the ‘Relief Sought’ document will be awarded,” but he still seeks for the “Dismissal Order to be revised [to] include all of the elements of the grievance and relief sought,” specifically certain policy changes that he suggests Respondent make going forward with EPAs. Indeed, as the Level One Grievance Evaluator correctly noted in her Order, the policy changes requested in Grievant’s Level One grievance form are not a remedy that is available to Grievant.

“[I]t is not the role of this Grievance Board to change agency policies. . . . The [Grievance Board] has no authority to require an agency to adopt a policy or to make a

² June 19, 2024, and June 20, 2024, were official holidays in the intervening period following the entry of the “Dismissal Order.”

specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed.” *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. See *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009); *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003). The Grievance Board does not issue advisory opinions. See *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

Grievant was “unequivocally notified” of the decision in this matter on June 11, 2024. Therefore, his July 31, 2024, Level Two request for mediation was not timely filed. Additionally, the relief sought in Grievant’s Level Two request would result in a merely advisory opinion, which is not the function of the Grievance Board. Accordingly, the “Respondent Division of Highways’ Motion to Dismiss” is GRANTED. The following Conclusions of Law support the decision reached.

Conclusions of Law

1. An employer who seeks to have a grievance dismissed on the basis that it was not timely filed has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated untimeliness, 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); *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). On June 11, 2024, The Level One Grievance Evaluator entered a "Dismissal Order," citing the "mutual resolution" of the matter, pursuant to which "the Grievant's Employee Performance Appraisal (EPA) dated March 20, 2024, will be rescinded." The Level One Grievance Evaluator also noted that the remaining relief requested by Grievant (relating to policy changes) "is not a remedy available through the grievance process."

2. "Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration." West Virginia Code § 6C-2-4(b)(1).

3. "'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).

4. 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).

5. Furthermore, “it is not the role of this Grievance Board to change agency policies. . . . The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed.” *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted).

6. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *See Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009); *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003).

7. The Grievance Board does not issue advisory opinions. *See Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

Accordingly, the “Respondent Division of Highways’ Motion to Dismiss” is **GRANTED**, and it is hereby **ORDERED** that this matter be **DISMISSED** and **STRICKEN** from the Grievance Board’s docket.

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: August 13, 2024

Lara K. Bissett
Administrative Law Judge