

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**ROGER RUNION,  
Grievant,**

**v.**

**Docket No. 2024-0341-DHS**

**DEPARTMENT OF HOMELAND SECURITY/  
DONALD R. KUHN JUVENILE CENTER,  
Respondents.**

**DISMISSAL ORDER**

Grievant, Roger Runion, initially filed a grievance dated June 14, 2023, Docket No. 2023-0915, against Respondents, Department of Homeland Security and Donald R. Kuhn Center, challenging his dismissal and seeking reinstatement in his job and backpay.

A level two mediation hearing was held on September 20, 2023, before Administrative Law Judge, Landon R. Brown, at the Grievance Board's Charleston, West Virginia, office. The level two mediation was unsuccessful, and the administrative law judge hand delivered an Order of Unsuccessful Mediation on September 20, 2023, to the parties. The Order of Unsuccessful Mediation stated Grievant had ten (10) days of receiving the Order to file a level three appeal in accordance with W. VA. CODE § 6C-2-4(c)(1). Grievant did not file a level three appeal within 10 days and, instead, filed a new grievance, Docket No. 2024-0341-DHS, on October 16, 2023. Grievant's two grievances are based on identical facts and allegations.

Respondent filed a Motion to Dismiss Grievant's two grievances on February 16, 2024, arguing Grievant's appeal is untimely as the time to appeal has lapsed. Respondent also argues Grievant's second grievance is duplicative of his first grievance and is also untimely filed and, as such, the matter is concluded and should be *res judicata* as to the present case. A hearing on the Motion to Dismiss occurred on March 29, 2024. Grievant

appeared in person, *pro se*. Respondent was represented by Commissioner William K. Marshall and appeared by counsel, Jonathan Calhoun, Esquire, Assistant Attorney General. This matter is now mature for decision.

### **Synopsis**

Grievant was employed by Respondent as a Correctional Officer 3 and filed a grievance over his dismissal. An Order of Unsuccessful Mediation was hand delivered to Grievant on September 20, 2023, notifying Grievant he had 10 days to file for a level three appeal. Grievant did not file a level three appeal within 10 days and, instead, filed a new, identical grievance 23 days after being hand delivered the Order of Unsuccessful Mediation. Respondent moved for dismissal based upon untimeliness and *res judicata*. Respondent proved by a preponderance of the evidence that the grievance should be dismissed for untimeliness due to Grievant not filing an appeal within ten (10) days of being hand delivered an Order of Unsuccessful Mediation at the level two mediation hearing. Therefore, the grievance is DISMISSED.

The following Findings of Fact are made based upon a complete and thorough review of the record created in this matter:

### **Findings of Fact**

1. Grievant was employed by Respondent as a Correctional Officer 3.
2. On June 5, 2023, Grievant was dismissed from his employment.
3. On June 14, 2023, Grievant filed a level one grievance challenging his dismissal, Docket No. 2023-0915. A level one hearing was held on June 30, 2023, and a level one Decision was entered on July 21, 2023, denying the grievance.
4. Grievant appealed to level two on August 2, 2023.

5. A level two mediation occurred on September 20, 2023. Immediately after the mediation, the level two administrative law judge hand delivered an Order of Unsuccessful Mediation to the parties. A copy of the Order of Unsuccessful Mediation was attached to Respondent's Motion to Dismiss.
6. The Order of Unsuccessful Mediation stated Grievant had 10 days to file for a level three appeal.
7. Grievant did not file a level three appeal in 10 days and, instead, on October 16, 2023, filed a new, identical grievance, Docket No. 2024-0341-DHS. The identical grievance was filed 23 days after the Order of Unsuccessful Mediation was hand delivered.
8. On February 16, 2024, Respondent moved for dismissal based upon untimeliness and *res judicata*.
9. Grievant did not file a response to the Motion to Dismiss.
10. Respondent's Motion to Dismiss attached the Order of Unsuccessful Mediation, which stated Grievant had ten days to file an appeal. The Order was dated, September 20, 2023.

### **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 (2008). "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19 (2018). "Nonappealable dismissal orders may be based on

grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

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). West Virginia Code is clear regarding the time to file a level three appeal when there is unsuccessful mediation. Particularly, the Code states: "Within 10 days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance." W. VA. CODE § 6C-2-4(c)(1).

In this case, level two mediation occurred on September 20, 2023. Immediately after an unsuccessful mediation on September 20, 2023, the level two administrative law judge hand delivered an Order of Unsuccessful Mediation to the parties. The Order of Unsuccessful Mediation instructed Grievant to file a level three appeal no later than ten (10) days after September 20, 2023. At the Motion to Dismiss hearing, Grievant could not recall if he had received a copy of the Order of Unsuccessful Mediation. Grievant did not offer any argument regarding not receiving the Order on September 20, 2023. Respondent, in its Motion to Dismiss, attached a copy of the Order of Unsuccessful Mediation. The Order clearly included language requiring Grievant to file an appeal within 10 days of receiving the Order. The date on the Order was September 20, 2023. Respondent clearly established that Grievant failed to file an appeal within 10 days of receiving the Order.

The record reflects the Grievant has never filed a level three appeal in Docket No. 2023-0915-DHS. Instead of attempting to file a level three appeal in Docket No. 2023-0915-DHS, Grievant waited 23 days and filed an identical grievance, Docket No. 2024-0341-DHS. Grievant failed to establish any factual allegations to demonstrate that the two grievances should be treated differently. Grievant did not allege he mistakenly filed his level three appeal as a level one. Grievant did not offer any evidence or excuse as to why he did not file an appeal within 10 days of receiving the Order of Unsuccessful Mediation on September 20, 2023.

Grievant was required to file an appeal within 10 days. Grievant did not file an appeal within the required 10-day time requirement. The record is clear that Grievant waited 23 days after the Order of Unsuccessful Mediation was hand delivered to him and

merely filed a new grievance. Grievant failed to establish his burden of demonstrating a proper basis to excuse his failure to file in a timely manner. As such, Grievant's grievance Docket No. 2023-0915-DHS was untimely filed if it was meant to be a level three appeal and should be dismissed.

For the grievance Docket No. 2024-0341-DHS, Respondent argued the grievance should be dismissed under the doctrine of *res judicata*. *Res judicata* is a "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6<sup>th</sup> ed. 1990). An Order of Unsuccessful Mediation for Grievant's grievance Docket No. 2023-0915-DHS is not a final judgement. It merely indicates the mediation was unsuccessful and gives the parties notice of the 10-day time requirement to file an appeal to level three. Therefore, *res judicata* is inapplicable.

The Order of Unsuccessful Mediation gave a strict deadline to timely file a level three appeal. Grievant did not comply with the Order by waiting more than 10 days to file a new grievance. Grievant's second grievance is identical to his original grievance and does not restart the timeliness requirements of WEST VIRGINIA CODE § 6C-2-3(a)(1), which requires an employee to "file a grievance within the time limits specified in this article." 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 . . . .

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 the case here, Grievant was clearly past the 15 days following the occurrence of the event upon which the grievance is based due to missing the 10-day requirement to file a level three appeal after an unsuccessful mediation. As such, Grievant’s second grievance, Docket No. 2024-0341-DHS must be dismissed as untimely as well. 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 (2008).

2. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018).

3. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party’s failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may

be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge." W. VA. CODE ST. R. § 156-1-6.19.3.

4. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

5. 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).

6. West Virginia Code is clear regarding the time to file a level three appeal when there is unsuccessful mediation. Particularly, the Code states: "Within 10 days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance." W. VA. CODE § 6C-2-4(c)(1).

7. *Res judicata* is defined as a "Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and



their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.” BLACK’S LAW DICTIONARY 1305 (6<sup>th</sup> ed. 1990).

8. West Virginia Code requires an employee to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1).

9. 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 . . . .

10. 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).

11. Respondent proved by a preponderance of the evidence that its motion to dismiss should be granted for both Docket No. 2023-0915-DHS and Docket No. 2024-0341-DHS for untimeliness.

Accordingly, the grievance is **DISMISSED**.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed.” W. VA. CODE § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code 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: May 10, 2024.**

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**Wes White**  
**Administrative Law Judge**