

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AARON D. BIRTCHER,
Grievant,

v.

Docket No. 2025-0077-NCC

**WEST VIRGINIA NORTHERN
COMMUNITY COLLEGE,**
Respondent.

DISMISSAL ORDER

Aaron Birtcher, Grievant, filed this action on or about August 14, 2024, alleging that he “was terminated from his position as an adjunct professor of welding at West Virginia Northern Community College, Wheeling Campus, after reporting the sexual assault of a student by C. S.,¹ a welding technician employed by WVNCC. He was terminated under the pretext that he had failed a required welding certification examination and that all of the students in his Welding II course had failed their final examinations. These failing grades were fraudulently issued, and there is evidence that C. S. sabotaged the test welds produced by Grievant and Grievant’s students prior to their evaluation.” Grievant further alleges that his “termination was retaliatory and in violation of West Virginia Community College Rule NC – 1004, the ‘Sexual Assault Rule,’ which incorporates the West Virginia Human Rights Acts by reference. His termination was in violation of policies and procedures, was arbitrary, and was in violation of the law.” Grievant seeks reinstatement, back pay, attorney fees and emotional distress damages and other relief the Board deems just and proper.

¹The undersigned has used only initials in the Statement of Grievance in the interest of privacy.

This action was filed directly to level three of the grievance process. On or about August 29, 2024, Respondent filed a Motion to Dismiss the Grievance Based on Timeliness and Lack of Jurisdiction. This motion was set for a hearing by the undersigned to be conducted by Zoom conference on October 31, 2024. Grievant filed a Response in Opposition to the Motion to Dismiss on or about October 29, 2024. Respondent appeared for the hearing by College President, Dr. Mosser, Director of Human Resources and Development, Robert Brak, and by its counsel, Kristi A. McWhirter, Assistant Attorney General. Grievant failed to appear in person, but was represented by his counsel, Erika Klie Kolenich, Esquire. This motion became mature for a ruling at the conclusion of the hearing.

Synopsis

West Virginia Northern Community College formerly employed Grievant under the terms of an Agreement for Professional Service to teach welding. Grievant's term of employment was December 2, 2022, to December 16, 2022, for the limited period of twenty hours. By email dated March 24, 2023, Respondent confirmed with Grievant that his employment was at an end. Grievant filed this grievance on August 14, 2024. 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 limited record of this case.

Findings of Fact

1. Grievant was employed by West Virginia Northern Community College under the terms of an Agreement for Professional Services to teach MIG Welding I and

MIG Welding II, continuing/community education courses, in the Economic Workforce Development Department.

2. Grievant's term of employment was December 2, 2022, to December 16, 2022, for twenty hours. Grievant was compensated \$750.00 for his services.

3. Respondent notified Grievant by email dated March 24, 2023, that his services with Respondent were no longer needed and his employment had come to an end pursuant to the terms of employment.

4. On August 14, 2024, Grievant filed this action at level three of grievance process. Grievant claims Respondent retaliated against him in violation of the West Virginia Human Rights Act by terminating his employment after he reported the alleged sexual assault of a student.

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, § 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).

Grievant, through counsel, argues that the timeframe in which Grievant was required to file this action should be tolled under the principles of equitable estoppel. In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. *Ara v. Erie Insurance Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989). *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-233D (Jan. 17, 2001). *Kanehl v. Dep’t of Env’tl Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010). “Estoppel is an equitable remedy available only when the untimely filing ‘was the result either of a deliberate design by the employer

or actions that an employer should have unmistakably understood would cause the employee to delay filing this charge.’ *Naylor v. W.Va. Human Rights Comm’n*, 180 W.Va. 634, 378 S.E.2d 843 (1989). (citing, *Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982).” *Wolford v. Hampshire County Board of Education*, Civil Action No. 19-AA-35 (Kanawha Cnty. Cir. Ct. Oct. 11, 2019).

“‘[T]wo general types of equitable modification are generally recognized: “(1) equitable tolling, which often focuses on the plaintiff’s excusable ignorance of the limitations period and on lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant.”’ *Naylor*, 378 S.E.2d at 846 (citing *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981) (citations omitted).” *Wolford*. “Among other factors, the granting of equitable estoppel should be premised upon (1) ‘a showing of the plaintiff’s actual and reasonable reliance on the defendant’s conduct or representations’ and (2) ‘evidence of improper purpose on the part of the defendant or of the defendant’s actual or constructive knowledge of the deceptive nature of its conduct.’” *Id.* at 846-847 (citing, *Naton*, 649 F.2d at 696[)] (Footnote omitted).” *Id.* Based on the limited record of this case there was insufficient evidence to establish estoppel.

Counsel for Grievant also argued that due to the relatively short duration of his tenure as a public employee, he was unaware of the time requirements to file a grievance until he consulted with counsel. This argument has no merit. The undersigned was without any evidence to support this contention, only the proffer of counsel.

Grievant did not timely file this grievance. By the terms of his employment agreement, Grievant’s employment ended on December 16, 2022. Respondent notified Grievant that the college would not be extending another offer of employment on March

14, 2023. Grievant's filing on August 14, 2022, is some 519 calendar days after he received notice that the college would not be extending him another employment offer. This 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.²

The following Conclusions of Law support the dismissal of this grievance.

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-

² Counsel for Respondent is correct in asserting the undersigned lacks jurisdiction to hear protected class retaliation claims. That argument was not developed during the hearing and is of no consequence given the untimeliness of the case.

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, § 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**.

“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).

Date: November 14, 2024

Ronald L. Reece
Administrative Law Judge