

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HANNAH FLUHARTY,
Grievant,

v.

Docket No. 2025-0098-WetED

WETZEL COUNTY BOARD OF EDUCATION,
Respondent.

ORDER AFFIRMING LEVEL ONE DISMISSAL ORDER

On October 16, 2024, the level one chief administrator's designee entered an order dismissing the grievance as untimely filed and for lack of standing. On October 22, 2024, Grievant appealed to level two of the grievance process. As the appeal of a level one dismissal order is to be made to level three, the appeal was accepted at level three of the grievance process.

Synopsis

Grievant grieved Respondent's alleged failure to post an ECCAT/Aide Kindergarten position. Respondent posted an ECCAT/Aide Kindergarten position, which Grievant applied for but then declined on March 26, 2024. Grievant alleged the position she wanted was never posted and then was filled with another person. Grievant failed to timely file her grievance after she was notified of the decision being challenged. The discovery rule exception does not apply because Grievant failed to reasonably investigate the grievable event. Accordingly, the level one dismissal order is upheld.

Findings of Fact

The following Findings of Fact are adopted from the Order Granting Motion to Dismiss Grievance:

1. On March 15, 2024, the Board posted job number 2024-061, an ECCAT/Aide Kindergarten position at Short Line School ("the Position"). See Respondent's Exhibit A (copy of posting for job # 2024-061 and Grievant's bid). The posting for the Position did not specify in which Kindergarten classroom the successful applicant would be placed.
2. No other ECCAT/Aide Kindergarten positions at Short Line School were posted between March 15, 2024 and June 30, 2024.
3. On March 21, 2024, Grievant placed an electronic bid on the Position.
4. On March 26, 2024, Respondent's Chief Personnel Officer, Ben McPherson, determined that Grievant was the most qualified applicant for the Position.
5. That same day, Mr. McPherson telephoned Grievant and offered her the Position.
6. Grievant declined the Position.
7. In the statement attached to her Level One grievance form, Grievant admitted that she was offered the Position but declined it. See Respondent's Exhibit B, statement of Grievant.
8. During the Level One Conference, Grievant again confirmed that she was offered the Position but declined it.
9. Grievant knew conclusively on March 26, 2024[,] that she was not hired for the Position because she declined it that day.
10. On April 1, 2024, Mr. McPherson telephoned the next most qualified applicant for the Position, Savannah Smallwood, and offered her the Position. See Respondent's Exhibit C (Smallwood bid form for the Position).

11. Ms. Smallwood accepted the Position.
12. At the Level One Conference, Grievant stated she first learned that Ms. Smallwood was hired for the Position on August 12, 2024.
13. On August 15, 2024, over one hundred working days after she declined the Position, Grievant filed the instant grievance claiming that the Position was filled without having first been posted. See Level One Grievance Form dated August 15, 2024

The following additional findings of fact are based on the undersigned review of the record below:

14. The ECCAT/Aide Kindergarten position that Grievant wanted was the one that had been occupied by Denise Poling.
15. When she declined the position on March 26, 2024, Grievant knew that the position she was offered was not the position that had been occupied by Ms. Poling and that Ms. Poling's position had not been posted "yet."
16. Grievant was aware that Ms. Poling had received another position on April 9, 2024, and Grievant watched for Ms. Poling's position to be posted.
17. Although Ms. Poling's position was not posted, Grievant took no further action to inquire about the position or to grieve the alleged failure to post the position.

Discussion

A level one "decision [to dismiss] may be appealed to level three, and an administrative law judge shall review the order. If the dismissal is upheld an order shall be issued and the grievance shall be removed from the grievance board's docket. If the dismissal is overturned an order shall be entered stating with particularity the facts and the law found to be in error in the order below. The grievance will be returned to level one

for disposition. An administrative law judge will decide an appeal of a dismissal for untimeliness within 30 days. W. VA. CODE § 6C-2-3(c)(1) (2023).

"Each grievant shall file a grievance form, signed by the grievant, within the time limits specified in this article" W. VA. CODE § 6C-2-3(a)(1) (2023). 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, 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). "'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 specified time limits may be extended to a date certain by mutual written agreement or the grievance evaluator, mediator, or administrative law judge at the request of any party. The specified time limits shall be extended for cause whenever an agency representative, intervenor, or a grievant is not working because of accident, sickness, death in the immediate family, or other cause for which the agency representative or grievant has approved leave from employment." W. VA. CODE § 6C-2-3(a)(2).

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 Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *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).

The level one chief administrator's designee found that "Grievant knew conclusively on March 26, 2024[,] that she was not hired for the Position because she declined it that day." The designee appears to have concluded that the grievable event was March 26, 2024, stating that the grievance was filed "[o]ver one hundred working days after she declined the Position." The designee concluded that Grievant's discovery that Ms. Smallwood was hired on August 12, 2024, was irrelevant and that the grievance was untimely filed.

Although the decision to dismiss the grievance as untimely is ultimately correct and should be upheld, it is noted that the designee failed to properly address what is essentially an assertion of the discovery rule. "[The statute] contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." *Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990) (discussing W. Va. Code 18-29-4(a)(1), the current statute's predecessor containing the same language).

Grievant's allegation is that there were two positions, and that Respondent failed to post the second position. Grievant alleged that Mr. McPherson told her that the posting she had applied for was for a "3rd room" and that it was not what Grievant termed "Denise Poling's job," which is why she declined the position. Grievant alleged the Mr. McPherson told her that he had not posted "Denise Poling's job" yet. Grievant asserts that she did

not know that Savannah Smallwood had received "Denise Poling's job" until Grievant saw Ms. Smallwood at Ms. Poling's desk on August 12, 2024.

Grievant was unequivocally notified on March 26, 2024, that the posting she applied for was not "Denise Poling's job" and that "Denise Poling's job" had not been posted 'yet.' Although Grievant admitted in her September 26, 2024, statement that Ms. Poling had received another position on April 9, 2024, and that Grievant watched for Ms. Poling's position to be posted, Grievant took no further action to inquire about the position or to file a grievance protesting Respondent's failure to post the position. "[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event." *W. Va. Div. of Highways v. Powell*, 243 W. Va. 143, 149, 842 S.E.2d 696, 702 (2020) (citing *Wolford v. Hampshire County BOE*, Docket No. 2018-0549-HamED (Mar 1, 2019)).

The following Conclusions of Law support the decision to uphold the level one dismissal order.

Conclusions of Law

1. A level one "decision [to dismiss] may be appealed to level three, and an administrative law judge shall review the order. If the dismissal is upheld an order shall be issued and the grievance shall be removed from the grievance board's docket. If the dismissal is overturned an order shall be entered stating with particularity the facts and the law found to be in error in the order below. The grievance will be returned to level one for disposition. An administrative law judge will decide an appeal of a dismissal for untimeliness within 30 days. W. VA. CODE § 6C-2-3(c)(1) (2023).

2. "Each grievant shall file a grievance form, signed by the grievant, within the time limits specified in this article" W. VA. CODE § 6C-2-3(a)(1) (2023). 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, 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).

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). "The specified time limits may be extended to a date certain by mutual written agreement or the grievance evaluator, mediator, or administrative law judge at the request of any party. The specified time limits shall be extended for cause whenever an agency representative, intervenor, or a grievant is not working because of accident, sickness, death in the immediate family, or other cause for which the agency representative or grievant has approved leave from employment." W. Va. Code § 6C-2-3(a)(2).

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 Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *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).

5. "[The statute] contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." *Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990).

6. "[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event." *W. Va. Div. of Highways v. Powell*, 243 W. Va. 143, 149, 842 S.E.2d 696, 702 (2020) (citing *Wolford v. Hampshire County BOE*, Docket No. 2018-0549-HamED (Mar 1, 2019).

7. Grievant was unequivocally notified of the decision being challenged on March 26, 2024, and failed to file her grievance within fifteen days of that date.

8. The discovery rule exception does not apply because Grievant failed to reasonably investigate why the alleged position was not posted.

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. Any such appeal must be filed within thirty (30) days of receipt of this decision. 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).

Entered this 5th day of December, 2024.

Billie Thacker Catlett,
Chief Administrative Law Judge