

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRANDI RIZO,

Grievant,

v .

Docket No. 2025-0301-WVU

WEST VIRGINIA UNIVERSITY,

Respondent.

DISMISSAL ORDER

Grievant, Brandi Rizo, was employed as a Nursing Instructor at Highland-Clarksburg Hospital by Respondent, West Virginia University, under a contract expiring May 9, 2024. On May 6, 2024, Respondent informed Grievant that her annual contract would not be renewed. On October 4, 2024, Grievant grieved the non-renewal, alleging wrongful termination for reporting a patient safety violation. Grievant seeks reinstatement. Grievant filed directly to level three as permitted by West Virginia Code § 6C-2-4(a)(4).

On December 6, 2024, Respondent filed a motion to dismiss due to untimely filing. A hearing was scheduled on the motion for January 13, 2025, but was cancelled when Grievant and his attorney failed to appear. Grievant's attorney requested that another hearing be scheduled. The undersigned asked Grievant to file a written response to the motion to dismiss so it could be determined whether she disputed the untimely filing allegation or had a defense. On January 23, 2025, Grievant submitted a response. Whereupon the undersigned determined that a hearing was superfluous.

Synopsis

Respondent employed Grievant under an annual contract when it told her just before it expired that it would not be renewed. Five months later, Grievant filed this

grievance. Grievant argues that the 15-day statute of limitation for grievances is unfair and unreasonable considering the longer period for filing in other venues and the flexibility allowed under the Grievance Board rules. Respondent proved the grievance was untimely. Grievant did not prove her late filing was excusable. Accordingly, the grievance is DISMISSED.

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 was employed as a Nursing Instructor at Highland-Clarksburg Hospital by Respondent, West Virginia University.
2. Respondent employed Grievant under annual contracts subject to yearly renewal.
3. On May 6, 2024, Grievant was verbally informed by her supervisor that her contract would not be renewed past its expiration on May 9, 2024.
4. On October 4, 2024, Grievant filed this grievance requesting reinstatement.
5. On December 6, 2024, Respondent filed a motion to dismiss citing untimely filing.
6. On January 23, 2025, Grievant filed a response and did not dispute she filed her grievance five months after being notified of her non-renewal. Yet, Grievant argued therein that the 15-day statute of limitations should be extended because such a short period is unfair, the statute of limitations is much longer in other venues, and Grievance Board rules encourage a flexible application of the short period.

Discussion

Respondent asserts that the grievance was not filed within the time allowed by W. Va. Code § 6C-2-4 and that the grievance must be dismissed. “[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 preponderance¹ 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. *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).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2018).

The first issue which needs to be addressed is whether Grievant timely filed her grievance. “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). The Code further sets forth the time limits for filing a grievance as follows:

Within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the date

¹“The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

upon which the event became known to the employee, or within 15 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).

Grievant does not dispute that on May 6, 2024, Respondent verbally informed her of her non-renewal beyond the expiration of her annual contract on May 9, 2024, and that she filed her grievance five months later, on October 4, 2024. Respondent proved by a preponderance of the evidence that this grievance was untimely.

The burden now shifts to Grievant to prove a proper basis to excuse her untimely filing. Grievant failed to offer any factual excuse for her untimely grievance. Grievant did attempt to offer a legal excuse in arguing that a 15-day statute of limitation is extremely unfair given the emotions surrounding losing a job and given the fact that normally statutes of limitations are much longer, at least two years in many civil cases.

State employees generally have many rights that are unavailable to employees in the private sector. The legislature decided that the trade-off would entail a shorter filing period than that available in other venues. Grievant did not cite any legal authority for the implication that a 15-day statute of limitations is unconstitutional or that it otherwise conflicts with code or caselaw. Grievant also implies that the weight of the situation made it difficult to not only file within that short window, but also become familiar with this unorthodox and unusually short statute of limitations.

“‘[I]gnorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule.’ *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30,

1991); See also *Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001).” *Pisino v. Div. of Corr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008).

“If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001). Respondent proved the filing was untimely. Grievant failed to prove the untimely filing was excused. Therefore, this grievance is hereby DISMISSED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. “[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. *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).” *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

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). 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 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. “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

4. “[I]gnorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *See also Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep’t of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001).” *Pisino v. Div. of Corr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008).

5. Respondent proved by a preponderance of the evidence that the grievance was untimely filed.

6. Grievant did not prove by a preponderance of the evidence an excuse for her untimely filing.

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: January 28, 2025

Joshua S. Fraenkel
Administrative Law Judge