

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DAVID JOHN SUNT,  
Grievant,**

**v.**

**Docket No. 2015-1110-DOT**

**DIVISION OF HIGHWAYS  
AND DIVISION OF PERSONNEL,  
Respondents.**

**DISMISSAL ORDER**

Grievant, David John Sunt, is employed by Respondent, Division of Highways. On April 3, 2015, Grievant filed this grievance against Respondent stating, "I was denied the 5% co-op addition to my annual salary for experience after being hired full time. The Co-op 5% has been awarded to HETR's before and after my Employment. The result is that I am now underpaid in comparison to other HETR employees in the division. Division of personnel was notified of problem. Once notified, personnel stated I should have been awarded 5%, then changed their decision a month later. (see attachment)<sup>1</sup>. For relief, Grievant seeks "5% awarded to annual salary, and back-pay for time served."

By order entered May 15, 2015, Respondent Division of Highways properly waived the grievance to level two of the grievance process. By order entered May 27, 2015, the Grievance Board joined the Division of Personnel as a necessary party. On July 16, 2015, Respondent Division of Personnel, by counsel, filed a Motion to Dismiss. The motion was not addressed prior to mediation. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 28, 2015. As Grievant had filed no response to the motion to dismiss, the Grievance Board contacted Grievant by electronic

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<sup>1</sup> Grievant's statement of grievance is reproduced as it was written.

mail on September 23, 2015, attaching a copy of the motion and stating that if Grievant wished to respond to the motion he must do so in writing by October 7, 2015. Grievant has not filed a response to the motion to dismiss. Grievant is *pro se*. Respondent Division of Highways is represented by counsel, Rachel L. Phillips. Respondent Division of Personnel is represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General.

### **Synopsis**

Grievant was hired by Respondent as a Highway Engineer Trainee in 2012. Respondent had the discretion to appoint Grievant to his position at a rate higher than entry-level, but did not do so. The posting specifically notified Grievant of the availability of this discretionary pay at appointment to the position. The grievance was not timely filed. 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 hired as a Highway Engineer Trainee on November 13, 2012.
2. Respondent had the discretion to appoint Grievant to his position at a rate higher than entry-level by granting him a 5% increase for each three months of "Co-op experience," but did not do so.
3. The job posting specifically stated that "appointment above the entry level may be made" for the co-op experience.
4. Grievant is now challenging Respondent's failure to grant him that additional pay.

5. Grievant was unequivocally notified of the decision he is now challenging when he was hired in November 2012 and was not given credit for his Co-op experience in his rate of pay.

### **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. *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).

An employee is required to “file a grievance 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). “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). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(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); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

In this case, Grievant was hired as a Highway Engineer Trainee on November 13, 2012. Respondent, Division of Highways, has the discretion to appoint employees to the position with a pay rate above entry level by giving an employee a 5% increase for each three months of “Co-op experience.” This discretionary pay rate increase was available to Grievant at his appointment to the position in November 2012. It was at that time that Grievant was notified of his starting salary, which did not include credit for his co-op experience, and chose to accept the same. Further, the job posting specifically states that that “appointment above the entry level may be made” for the co-op experience. Grievant was unequivocally notified of the decision he is now challenging when he was hired in November 2012, almost two and a half years before he filed the instant grievance.

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. *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).

2. An employee is required to “file a grievance 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 . . . .

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extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

3. 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); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

4. As Grievant was unequivocally notified of the decision being challenged in November 2012, Respondent has proven that the grievance was untimely filed and must be dismissed.

Accordingly, the grievance is **DISMISSED** and the hearing scheduled in this matter for November 10, 2015 is cancelled and removed from the docket.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. See 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 so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: October 30, 2015**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**