

**THE WEST VIRGINIA  
PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TAMIKA MICHELLE ROBERTSON,**

**Grievant,**

**v.**

**Docket No. 2016-1768-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
BUREAU FOR CHILDREN AND FAMILIES,**

**Respondent.**

**DISMISSAL ORDER**

On June 14, 2016, Tamika Michelle Robertson ("Grievant") filed this grievance directly at Level Three against "Wyoming County DHHR Social Services" which is part of the Bureau for Children and Families in the Department of Health and Human Resources ("DHHR" or "Respondent"), asserting her grievance as follows:

The basis for my termination was illegal, arbitrary, capricious, discriminatory and in retaliation (West Virginia Code 5-11-1 et seq., West Virginia Human Rights Act). The clients and foster parents made false allegations that I was intoxicated, "appeared high". The employer states that I falsified records, used profanity and conducted myself unprofessionally. Inaccurate statements are presented in the dismissal also.

For relief sought, Grievant stated:

The discipline was extreme and unbearably harsh. I am seeking restoration of employment, benefits, lost wages, plus interest and personnel file purged. I ask that my employment be transferred to another county in order (*sic.*) to remove myself from the harassment that I constantly endured.

On July 8, 2016, a Level Three hearing on this grievance was scheduled for August 23, 2016. Also on July 8, 2016, Respondent, by counsel, Michael E. Bevers,

Assistant Attorney General, filed a Motion to Dismiss the above-styled grievance. In its Motion, Respondent contends that the present grievance should be dismissed because it was not timely filed. Grievant was given an opportunity to respond to the motion, and submitted her opposition to Respondent's Motion to Dismiss, through counsel, James J. Palmer, III, Esquire, with the Palmer Law Firm, on August 3, 2016. Respondent filed a reply on August 9, 2016. Therefore, this matter is mature for consideration and a ruling.<sup>1</sup>

### **Synopsis**

Respondent established by preponderant evidence that Grievant failed to file her grievance challenging her termination within the time limits established by statute. Grievant failed to establish any circumstance excusing her failure to file a timely grievance. Therefore, Respondent's Motion to Dismiss must be granted.

The following Findings of Fact are undisputed, and accepted as true for purposes of ruling on the Motion to Dismiss.

### **Findings of Fact**

1. Grievant was employed by the West Virginia Department of Health and Human Resources, Bureau for Children and Families, ("DHHR" or "Respondent"), as a Child Protective Service Worker in its Wyoming County Office.
2. On May 4, 2016, Grievant was given correspondence dated May 4, 2016, and signed by Community Services Manager Jeanne Goan for Regional Director Joe

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<sup>1</sup> On August 16, Grievant sent an e-mail to the Grievance Board which stated, in part, "I have decided to withdraw my grievance." Inasmuch as Grievant obtained an attorney who entered an appearance in this matter, and the purported withdrawal notice was neither signed nor sent by her authorized legal representative, it is appropriate to provide a definitive ruling to the parties, and issue this Dismissal Order.

Bullington, terminating Grievant's employment for performance failures and misconduct.

The correspondence begins by stating:

The purpose of this letter is to inform you of my decision to dismiss you effective May 19, 2016 after 4 hours from your employment as a Child Protective Service Worker with the West Virginia Department of Health and Human Resources, Wyoming District. This action complies with The West Virginia Division of Personnel *Administrative Rule*, Section 12.2 and provides for the required fifteen (15)-calendar day notice period.

Appendix 1 to Respondent's Motion to Dismiss (*italics in original*).

3. This termination correspondence included the following notice:

For any appeal rights you may have, please refer to West Virginia Code, Chapter 6C-2-1 et seq., West Virginia Public Employees Grievance Procedure. Your appeal must be filed within fifteen (15) working days (Monday through Friday excluding official holidays and other days in which the office is legally closed as outlined by this statute) from the effective date of this action.

Appendix 1 to Respondent's Motion to Dismiss.

4. Grievant filed a grievance challenging her termination on a standard grievance form which was mailed on June 14, 2016. This form was received by the Grievance Board and date stamped on June 15, 2016.

5. Respondent filed a Motion to Dismiss this grievance as untimely on July 8, 2016.

6. Grievant responded to the motion on August 3, 2016, asserting that her delay in filing this grievance resulted from an "unsuccessful search for legal representation that she could afford." Grievant is now represented by James J. Palmer, III, Esquire, on a *pro bono* basis.

## **Discussion**

Respondent is asserting, through its Motion to Dismiss, that this grievance was not timely filed, and is thus barred from consideration on its merits. Under the grievance procedure, the undersigned Administrative Law Judge has “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.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 6.2 (2008). Timeliness is an affirmative defense, and the burden of proving an affirmative defense is upon the party asserting the grievance was not timely filed. *Weaver v. Dep’t of Health & Human Res.*, Docket No. 2014-0861-DHHR (Mar. 30, 2015). See *Butts v. Higher Educ. Interim Governing Bd.*, Docket Nos. 01-HE-021 & 01-HEPC-515 (Oct. 31, 2001), *aff’d*, Circuit Court of Jefferson County No. 01-C-314 (Sept. 9, 2002); *Harvey v. Bureau of Emp’t Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998). Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her 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). DHHR asserts this grievance was not timely filed at Level Three.

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 statute 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. *Weaver v. Dep't of Health & Human Res.*, Docket No. 2014-0861-DHHR (Mar. 30, 2015). If proven, an untimely filing will defeat a grievance and the merits of the grievance will not 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).

W. Va. Code § 6C-2-3(a)(1) provides that “[a]n employee shall file a grievance within the time limits specified in this article.” W. Va. Code § 6C-2-4(a)(1) specifies the timelines for filing a grievance and states;

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. . . .

“An employee may proceed directly to level three . . . when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits.” W. Va. Code § 6C-2-4(a)(4). “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 time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Whalen v. Mason County*

*Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998), *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997). 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 was unequivocally notified in writing that her employment with DHHR was being terminated, effective May 19, 2016. The termination notice went on to advise Grievant of her appeal rights, explicitly warning that “your appeal must be filed within fifteen (15) working days.” Grievant’s appeal, filed on June 14, 2016, was not submitted within the required 15-day statutory time limit.

In her response to Respondent’s Motion to Dismiss, Grievant does not claim that her grievance was filed within the 15-day limit. Grievant has not requested a hearing on the motion, nor has Grievant alleged any facts which are inconsistent with the facts set forth in Respondent’s Motion to Dismiss. It is therefore appropriate to decide this motion on the pleadings alone.

Further, Grievant does not assert any misunderstanding or confusion regarding her termination notice, simply explaining that she was not able to find legal representation that she could afford to retain within the statutory time limit. Grievant cites no authority for excusing her failure to file due to inability to obtain legal representation, and the undersigned Administrative Law Judge is not aware of any precedent which supports this proposition. There is no provision in the procedure that precluded Grievant from timely filing her grievance, and subsequently obtaining legal representation prior to the hearing. Accordingly, Grievant has not demonstrated any

meritorious reason why she should be excused from filing her grievance within the applicable time limits.

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.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 6.2 (2008).

2. 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. *Butts v. Higher Educ. Interim Governing Bd.*, Docket Nos. 01-HE-021 & 01-HEPC-515 (Oct. 31, 2001), *aff’d*, Circuit Court of Jefferson County No. 01-C-314 (Sept. 9, 2002); *Harvey v. Bureau of Emp’t Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998). Once an employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Rose v. Raleigh County Bd. of Educ.*, Docket No. 2012-0188-RaLED (Mar. 28, 2012). *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998), *aff’d*, Circuit Court of Kanawha County No. 98-AA-94 (Apr. 2, 1999).

3. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Rose, supra*. *See 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).

4. W. Va. 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-2-4(a)(1) specifies 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. . . .

5. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey, supra*; *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).

6. Respondent established by preponderant evidence that Grievant failed to properly file her grievance at Level Three within the time limits established by W. Va. Code § 6C-2-4(a)(1). Grievant has not met her burden of demonstrating a proper basis to excuse her failure to file in a timely manner.

7. This grievance was untimely filed.

Accordingly, Respondent’s Motion to Dismiss is hereby **GRANTED**. The Level Three hearing in this matter previously scheduled for August 23, 2016, is hereby **CANCELLED**, and this grievance is hereby **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.



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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: August 17, 2016**

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**LEWIS G. BREWER**  
**Administrative Law Judge**