

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**GAYLA ADKINS,**  
**Grievant,**

**v.**

**Docket No. 2016-1062-DHHR**

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

**and**

**RUSSELL T. FRIDLEY JR.,**  
**Intervenor.**

**DISMISSAL ORDER**

Grievant, Gayla Adkins, is employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On December 28, 2015, Grievant filed this grievance against Respondent protesting her non-selection for a community services manager position.

Following the December 5, 2016 level one hearing, a level one decision was rendered on December 27, 2016, denying the grievance. Grievant appealed to level two on December 27, 2016. An Order of Unsuccessful Mediation was entered on May 18, 2017. Grievant appealed to level three of the grievance process on September 26, 2017. On October 5, 2017, Respondent, by counsel, filed a Motion to Dismiss Appeal, asserting the appeal to level three was untimely-filed. On October 19, 2017, Grievant, by representative, filed her Response to Respondent's Motion to Dismiss asserting that, on or about September 26, 2017, Grievant discovered that her representative had previously failed to file an appeal to level three and filed her appeal on that date. On November 1, 2017, Respondent, by counsel, filed its *Reply in Support of Motion to Dismiss Appeal*.

Grievant is represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent is represented by counsel, Michael E. Bevers, Assistant Attorney General.

### **Synopsis**

Grievant grieved her non-selection for a position with Respondent. Following unsuccessful mediation, an Order of Unsuccessful Mediation was entered from which Grievant had ten days to appeal to level three of the grievance process. Grievant's representative failed to file an appeal. Approximately four months later, Grievant discovered her representative had not filed an appeal and filed an appeal on her own behalf. Respondent moved to dismiss the appeal as untimely filed. Grievant does not dispute the grievance was untimely-filed. The failure of Grievant's representative to file her appeal does not excuse the untimely filing. 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. On December 28, 2015, Grievant grieved her non-selection for a position and her grievance was denied at level one on December 27, 2016.
2. Following her appeal to level two, mediation was conducted and an Order of Unsuccessful Mediation was entered on May 18, 2017.
3. The Order of Unsuccessful Mediation states that an appeal to level three must be filed within ten days of receipt of the order. On May 18, 2017, Grievance Board staff mailed the order by first class mail to both Grievant's representative and Grievant at the addresses they had provided to the Grievance Board.

4. Grievant's representative failed to file her appeal to level three.

5. Following a telephone conversation with Grievance Board staff in which staff informed Grievant no appeal had been filed, on September 25, 2017, Grievant sent an email to the Grievance Board questioning what she could do as she felt she was being penalized for her representative's mistake.

6. On the same day, Grievance Board staff responded to Grievant's email stating that, if she wished to appeal, she could do so, and that if Respondent moved to dismiss, she would be given an opportunity to argue why her untimely filing should be excused.

7. On September 26, 2017, Grievant filed her level three appeal, approximately four months after she received the *Order of Unsuccessful Mediation*.

### **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). “Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.” W. VA. CODE § 6C-2-4(a)(1).

Grievant does not dispute that her filing was untimely, but asserts that her untimely filing should be excused because her representative failed to file her level three appeal as she instructed. In support of her argument, Grievant argues that the grievance process is not to be a procedural quagmire and that the Grievance Board “has previously refused to hold grievants responsible for the failure of representatives in matters of timeliness if that could mean that the merits of the grievance would be forgotten rather than duly considered.” Respondent asserts that, because Grievant failed to file her appeal within the statutory timeframe, the Grievance Board lacks jurisdiction.

The grievance process is not “to be a procedural quagmire where the merits of the cases are forgotten.” *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990). The Supreme Court has repeatedly instructed the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. See *Duruttya v. Board of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W.

Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). Justice Starcher sums up the Court's philosophy in *Hale*:

In *Spahr, supra*, we upheld a circuit court's determination that a grievance was timely filed several months after the challenged grievable event because the employees did not initially know of the actual facts relating to their grievance. *Spahr*, 182 W.Va. 726, 391 S.E.2d 739 (1990). *Spahr* and *Duryutta, supra* teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.

*Hale*, n.10, 199 W. Va. at 393, 484 S.E.2d at 646.

Unlike *Spahr*, Grievant has not alleged that she was unaware of the event, the order to be appealed, she argues her untimely filing should be excused because her representative failed to file her appeal as she instructed. Requiring an appeal to be filed within the statutory timeframe is not a procedural quagmire or in any way unreasonable. There is no evidence of substantial compliance, the appeal simply was not filed.

Grievant also cites *Rutherford, et al. v. Bureau of Employment Programs*, Docket No. 03-BEP-040DEF (March 24, 2003) in support of her argument that her untimely filing should be excused because it was caused by her representative's mistake and not her own. *Rutherford* does not support the argument Grievant has made. In *Rutherford*, the grievants' representative had failed to forward a level two decision<sup>1</sup> to the grievants, so the grievants believed that the employer was in default. The ALJ refused to grant the

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<sup>1</sup> The *Rutherford* case occurred under the previous grievance procedure, in which there were four levels in the process. Level two was a proceeding before the employer.

default, stating that requiring the grievants receive individual copies when they had identified a representative would elevate form over substance. Although the ALJ stated that the level two administrator should not have denied the grievance as untimely at level two, granting the default for that reason would also elevate form over substance. This portion of the Rutherford decision is clearly not applicable as it involves a level of the grievance procedure that no longer exists and the authority of an administrator, not an ALJ.

Therefore, the failure of Grievant's representative to file her appeal does not excuse the untimely filing, and this matter must be 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. *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). "Within ten days of receiving a written report

stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.” W. VA. CODE § 6C-2-4(a)(1).

3. Grievant does not dispute the grievance was untimely filed and the failure of Grievant’s representative to file her appeal does not excuse the untimely filing.

Accordingly, the grievance is **DISMISSED**.

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: December 6, 2017**

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