

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**HELEN BRADLEY,
Grievant,**

v.

Docket No. 2017-1538-OhIED

**OHIO COUNTY BOARD OF EDUCATION,
Respondent.**

DISMISSAL ORDER

Grievant, Helen Bradley, is employed by Respondent, Ohio County Board of Education. On January 23, 2017, Grievant filed this grievance against Respondent stating, "Grievant is not being properly paid "Years of Experience" as an English as [a] Second Language teacher. In violation of WV Codes § 18A-4-1, § 18A-4-1(1) and § 18A-4-2. For relief, Grievant seeks "[t]o be compensated in experience increment pay, back pay and related benefits."

Following the February 14, 2017 level one conference, a level one decision was rendered on February 28, 2017, denying the grievance as untimely filed. Grievant appealed to level two on February 28, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 24, 2017. On August 1, 2017, Respondent, by counsel, filed *Respondent's Motion to Dismiss (Untimely)*, asserting the grievance must be dismissed as untimely filed. On August 10, 2017, Grievant, by representative, filed *Grievant's Response to Respondent's Motion to Dismiss* asserting the grievance was not untimely filed. A telephone conference was held on October 4, 2017, to hear testimony on the issue of timeliness. Grievant was represented by Jeremy Radabaugh, West Virginia Education Association. Respondent was represented by counsel, Jason S. Long, Dinsmore & Shohl LLP. This matter became mature for decision

on October 9, 2017, upon final receipt of the parties' written arguments on the issue of timeliness.

Synopsis

Grievant is employed by Respondent as a full-time teacher. Upon her hire as a full-time employee in 2010, Grievant requested, but was denied, certain experience credit in her salary determination. At the time, Grievant was unaware she had a right to file a grievance, and also struggled with serious personal issues. Grievant filed her grievance after she joined her union and became aware of her grievance rights. Respondent moved to dismiss the grievance as untimely. Grievant argued the grievance was timely as a continuing practice. The grievance does not involve a continuing practice, but, rather, continuing damage from the original salary determination. Grievant's untimely filing of her grievance almost seven years later cannot be excused by her ignorance of her grievance rights or her personal issues. 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 is employed by Respondent as a full-time teacher.
2. Grievant was hired as a full-time regular employee in 2010.
3. From October 2004, until her hire as a full-time employee in 2010, Grievant was an English as a Second Language teacher, which Respondent did not consider a full-time position.
4. When Grievant was hired as a full-time employee in 2010, she attempted to get experience credit for her time as an English as a Second Language teacher, but

Respondent's Personnel Director at the time denied the credit, telling Grievant that the experience did not qualify as it was hourly work, not full-time.

5. Grievant was unaware she had the right to file a grievance at the time the credit was denied in 2010. Grievant also did not further pursue the matter because she was struggling with serious personal issues.

6. Grievant later became aware of her right to file a grievance when she joined her union and filed her grievance through her union representative at that time.

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 Empl. 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).

Respondent argues Grievant was unequivocally notified that the experience credit was denied upon her hire as a full-time employee in 2010 and is, therefore, untimely. Grievant argues that her grievance is timely-filed because Respondent’s failure to award her experience credit is a continuing practice. Grievant also testified that she was unaware that she had a right to file a grievance.

A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990); *Straley v. Putnam County Bd. of Educ.*, Docket No 2014-0314-PutED (July 28, 2014), *aff’d*, *Straley v. Putnam County Bd. of Educ.*, No. 15-1207 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision). “[W]hen a grievant challenges a salary determination which was made in the past, which the

grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in the past.” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001). Respondent’s decision to deny Grievant the experience credit in her salary in 2010 was a single act that has caused alleged continuing damage for Grievant in the form of a lower salary than she believes she is entitled. Grievant was unequivocally notified of the decision in 2010, and was required to file her grievance within fifteen days of that date.

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).

Grievant testified that she was unaware she had a right to file a grievance in 2010, and that she also did not further pursue the matter because she was struggling with serious personal issues. “[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.’ *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). ‘[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). See

also *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997)." *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997) *aff'd*, Kan. Co. Cir. Ct. Docket No. 97-AA-110 (Jan. 21, 1999). A grievant's "failure to timely file his grievance is not excused by the fact that he did not know he could or should file one." *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001). While a personal tragedy could be grounds to warrant an extension of time in which to file a grievance, in this case, Grievant is almost seven years late in filing her grievance. Neither Grievant's lack of awareness of her grievance rights nor her personal circumstances excuse the untimely filing of her 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

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).

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 Empl. 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. A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990); *Straley v. Putnam County Bd. of Educ.*, Docket No 2014-0314-PutED (July 28, 2014), *aff’d*, *Straley v. Putnam County Bd. of Educ.*, No. 15-1207 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision). “[W]hen a

grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in the past.” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001).

5. Respondent has proved that the grievance was untimely-filed.

6. 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).

7. “[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). “[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). See also *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).” *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997) *aff'd*, Kan. Co. Cir. Ct. Docket No. 97-AA-110 (Jan. 21, 1999).

8. A grievant's "failure to timely file his grievance is not excused by the fact that he did not know he could or should file one." *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001).

9. Grievant has not demonstrated a proper basis to excuse her untimely grievance 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: November 6, 2017

Billie Thacker Catlett
Chief Administrative Law Judge