

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DANIEL LEE FROST,  
Grievant,**

**v.**

**Docket No. 2016-1073-BSC**

**BLUEFIELD STATE COLLEGE,  
Respondent.**

**DISMISSAL ORDER**

Grievant, Daniel Lee Frost, is employed by Respondent, Bluefield State College. On December 22, 2015, Grievant filed this grievance against Respondent attaching a lengthy grievance statement alleging Respondent had discriminated against him and retaliated against him for previous grievance activity by removing his teaching responsibility for the BSCS 100 class and removing recruiting duties. For relief, Grievant seeks, "Correct funding of position as it relates to the job duties required of the PIQ as should have been done when position was first created. (i.e. X amount tuition and fees & X amount Title III) Thereby allowing me to teach BSCS 100 in addition to being allowed to travel and recruit students as I WAS doing since January of 2012!!!".

Following the March 22, 2016 level one hearing, a level one decision was rendered on April 25, 2016, denying the grievance. Grievant appealed to level two on April 28, 2016. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on September 14, 2016. A level three hearing was scheduled for November 30, 2016. On November 10, 2016, Respondent, by counsel, filed a *Motion to Dismiss* asserting the grievance must be dismissed, "as the issue grieved has become moot, the Grievance Board does not have the authority to grant the relief requested, and the grievance was not timely filed." On November 28, 2016, Grievant, by representative,

responded to the motion by email admitting that the issue of the BSCS 100 class was moot as Grievant had been assigned to teach the class again, but asserting that the grievance was timely filed and that the Grievance Board does have authority to grant relief. A *Notice of Telephone Conference* was issued on November 28, 2016, converting the level three hearing to a telephone conference and instructing the parties to exchange any documentary evidence by close of business November 29, 2016. The telephone conference was held on November 30, 2016, before the undersigned. Grievant was represented by Ben Barkey and Kathy H. Martin, both of the West Virginia Education Association. Respondent was represented by counsel, Candace Kraus, Deputy General Counsel. The undersigned took testimony and entered documentary evidence. The parties were instructed to submit any additional written argument by January 4, 2017. Grievant did not submit any additional written argument. Respondent filed a *Memorandum in Support of Motion to Dismiss* on January 4, 2017. This matter became mature for decision on January 5, 2017, upon receipt of Respondent's written argument.

### **Synopsis**

Grievant is employed by Respondent as a Counselor II. Grievant protests the removal of recruitment from his duties. Grievant was unequivocally notified on July 2, 2015, that he would no longer be permitted to recruit. The grievance was not filed until five and one half months later. The decision to remove the recruiting duty was a single act that has had continuing damage and was not a continuing practice. Respondent proved the grievance was untimely filed and Grievant failed to demonstrate a proper basis to excuse his 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. Grievant is employed by Respondent as a Counselor II.
2. Grievant's duties included teaching a class, BSCS 100, and performing travelling recruitment.
3. Grievant's position is funded through Title III grant funds.
4. At some unspecified time prior to the filing of the grievance, Grievant was no longer being assigned to teach the BSCS 100 class, but Grievant was again assigned to teach the class after the grievance was filed.
5. In June 2015, Grievant's supervisor, Jo-Ann Robinson, PhD, Vice President for Student Affairs & Enrollment Management, reviewed with Title III Coordinator, Dr. Guy Sims, a potential problem with the recruitment activity of staff funded by Title III.
6. Dr. Sims, in turn, contacted a representative from the U.S. Department of Education, Wendy B. Lawrence, M.Ed., Senior Education Program Specialist, for clarification and was informed that "[r]ecruitment for admitting students at an institution is an unallowable activity" for staff funded by Title III.
7. On July 2, 2015, Dr. Robinson notified Grievant by email that he would no longer be allowed to recruit. Dr. Robinson stated, "Upon review and consultation, Dr. Guy Sims and a representative from Title III, have confirmed that staff paid by Title III funds are prohibited from recruitment activities as defined by Title III. Due to this information and to follow the Title III guidelines, you will no longer be allowed to participate in BSC recruitment activities during your regular work hours."

8. Grievant agreed that Title III funds cannot be used for recruitment activities, but believed that the funding for his position should be changed so that another source of funding was used for his recruitment activities.

9. Grievant had some conversations about this issue with Dr. Robinson, the President of the college, and members of the Board of Directors following the email, but he did not ask the President or the Board to change Dr. Robinson's decision.

10. Grievant last travelled for recruitment purposes on June 18, 2015.

### **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).

Grievant argues Respondent’s removal of the recruiting duty is a continuing practice. The decision to remove the recruiting duty was a single act that has had continuing damage, not a continuing practice. “Continuing damage ordinarily 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). In *Spahr*, teachers were left off a list, resulting in a loss of pay, which the teachers grieved several years later. The Court stated that this was not a continuing practice because it “involves a single act -- the inadvertent failure to include the teachers on a list -- that caused continuing *damage*, i.e., the wage deficit. . . Once the teachers learned about the pay discrepancy, they had an obligation to initiate the grievance procedure.” 182 W. Va. at 729, 391 S.E.2d at 742.

Respondent's one-time decision to remove a duty from Grievant is not a continuing practice.

Grievant was unequivocally notified that he would no longer be allowed to participate in recruitment activities on July 2, 2015. On that date, Grievant's supervisor, Jo-Ann Robinson, PhD, Vice President for Student Affairs & Enrollment Management, sent Grievant an email explaining that she had reviewed the issue with the Title III Coordinator, who, in consultation with the United States Department of Education, had determined that "staff paid by Title III funds are prohibited from recruitment activities as defined by Title III." Dr. Robinson stated, "Due to this information and to follow the Title III guidelines, you will no longer be allowed to participate in BSC recruitment activities during your regular work hours." Grievant did not file his grievance until December 22, 2015, five and one half months later, well outside of the fifteen day time limit.

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).

Dr. Robinson admitted in the telephone conference that she did have further conversations with Grievant regarding the issue after the email and she believed he followed up with Dr. Sims. However, there was no evidence to indicate Grievant had any

reasonable expectation that the decision was not final. Although Grievant talked to the President of the college and to members of the Board of Governors, he testified that he did not expect to get a response back from the President and that he did not try to get the President or the Board to change Dr. Robinson's decision. Further, Grievant's own exhibits show that the last time he travelled for recruitment purposes was June 18, 2015. The grievance was not timely filed and Grievant has demonstrated no proper basis to excuse the untimely filing.

It is unnecessary to address Respondent's argument that the Grievance Board lacks authority to order the relief requested, as the grievance was not timely filed.

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:

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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. “Continuing damage ordinarily 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).

5. The decision to remove the recruiting duty was a single act that has had continuing damage and was not a continuing practice.



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. Respondent proved the grievance was untimely filed and Grievant failed to demonstrate a proper basis to excuse his untimely filing as Grievant had no reasonable expectation the decision would be changed.

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: March 8, 2017**

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