

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DARLA JEAN GUY,
Grievant,**

v.

Docket No. 2016-1700-KanED

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

DISMISSAL ORDER

Grievant, Darla Jean Guy, is employed by Respondent, Kanawha County Board of Education. On June 1, 2016, Grievant filed this grievance against Respondent stating, "Site, seniority, or position." For relief, Grievant sought "[p]osition at Sharon Dawes Elementary summer cook" and "[b]ack pay for 2015 loss of wages."

Following the July 25, 2016 level one conference, a level one decision was rendered on August 10, 2016, denying the grievance. Grievant appealed to level two on August 23, 2016. In her appeal to level two, Grievant's counsel amended the grievance statement and requested relief stating, "Grievant contends that the Respondent violated W. Va Code 18-5-39 by failing to return her to the summer cook position at Sharon-Dawes in the summers of 2015 and 2016" and that, "Grievant seeks compensation and benefits with interest for the summer of 2015. (Grievant received the position for the summer of 2016, when another employee declined the position.)" Following unsuccessful mediation, Grievant appealed to level three of the grievance process on November 18, 2016. A level three hearing was held on January 30, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent was represented by counsel, James W. Withrow, General Counsel. This matter became

mature for decision on March 3, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a full-time cook. Grievant was not offered a summer cook position for the summer of 2015. Grievant did not file her grievance challenging her non-selection for the position until approximately one year later, on June 1, 2016, claiming she was unaware of who had been selected or how or why Respondent had made its selection decision until May 2016. Respondent proved the grievance was not timely filed when it was filed approximately a year after Grievant was not selected to fill the position. Grievant's discovery of the identity of the person selected to fill the position does not extend her time limit to file the grievance. 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 cook.
2. Grievant had worked as a summer cook since 2011 and had worked as a summer cook at Sharon Dawes Elementary School since 2012.
3. For the summer of 2015, there was a reduction in the number of summer cooks for Kanawha County Schools.
4. Grievant was not offered a summer cook position for the summer of 2015.
5. Jennifer Lester was awarded the summer cook position at Sharon Dawes.

6. The employment term for the Sharon Dawes summer cook position was June 22, 2015 through July 31, 2015.

7. Grievant did not file her grievance challenging her non-selection for the position until approximately one year later, on June 1, 2016.

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).

Respondent asserts the grievance was not timely filed as Grievant was unequivocally notified that she would not be returned to the summer cook position at Sharon Dawes elementary in the summer of 2015 and she did not file her grievance until June 2016. Grievant argues that, although she was aware she did not receive the position in the summer of 2015, she was not aware of who had been selected or how or why Respondent had made its selection decision until May 2016.

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 Emp’t 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). “[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 may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event." *Bailey v. McDowell County Board of Education*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000).

The Grievance Board has consistently held that, in a selection grievance, the time period to file the grievance begins when the grievant learns of the selection decision, not when the grievant discovers facts about the person selected. *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); *Shay v. Monongalia County Board of Education*, Docket No. 01-30-024 (July 23, 2001); *Tuttle v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-298 (Feb. 1, 2006); *Goodwin v. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011). Although there is some dispute exactly when Grievant was informed she would not have a summer cook position in 2015, Grievant admitted that she knew she had not been selected for the summer cook position at Sharon Dawes in the summer of 2015. Obviously, when Grievant did not work as a summer cook in 2015, she was aware she had not been selected for a summer cook position. At the latest, Grievant was aware she had not been awarded the position when the employment term began on June 22, 2015, and Grievant was not working in the position. Grievant was required to file her grievance within fifteen days of that date. Grievant did not file her grievance until approximately a year later, on June 1, 2016. Grievant's assertion that she was not aware of who had been selected or how or why Respondent had made its selection decision until May 2016 does not extend the time period in which to file 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. “[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).

5. “[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event.” *Bailey v. McDowell County Board of Education*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000).

6. The Grievance Board has consistently held that, in a selection grievance, the time period to file the grievance begins when the grievant learns of the selection decision, not when the grievant discovers facts about the person selected. *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); *Shay v. Monongalia County Board of Education*, Docket No. 01-30-024 (July 23, 2001); *Tuttle v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-298 (Feb. 1, 2006); *Goodwin v. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

7. Respondent proved the grievance was not timely filed when it was filed approximately a year after Grievant was not selected to fill the position.

8. Grievant's discovery of the identity of the person selected to fill the position does not extend her time limit to file the grievance.

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: April 24, 2017

Billie Thacker Catlett
Chief Administrative Law Judge