

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONATHAN P. TERRY,
Grievant,

v.

Docket No. 2018-0206-DOT

PARKWAYS AUTHORITY,
Respondent.

DISMISSAL ORDER

Grievant, Jonathan Terry, was employed by Respondent, Parkways Authority, as a Toll Collector on the West Virginia Turnpike. Mr. Terry filed an expedited grievance¹ dated August 9, 2017, contesting the termination of his employment by Respondent.² Grievant did not list the relief he was seeking, but it may reasonably be inferred that he seeks to be reinstated.

On August 22, 2017, Respondent filed a Motion to Dismiss the grievance as untimely. Grievant was notified that the motion was filed and given an opportunity to respond by September 11, 2017. No response was received.³

Synopsis

Respondent asserts that the grievance filed in this matter was not filed within fifteen days of the date Grievant was unequivocally notified of Respondent's action. Grievant was given an opportunity to respond to the Motion to Dismiss and chose not to

¹ See, W. VA. CODE § 6C-2-4(a)(4).

² Grievant wrote an explanation of the reason he was dismissed and attached it to his grievance form. That statement is Incorporated herein by reference.

³ For administrative reasons, the Chief Administrative Judge, assigned this matter to the undersigned for decision on the Motion.

do so. Respondent filed sufficient documentarian evidence to demonstrate that this grievance was not timely filed. Accordingly, the grievance is DISMISSED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Jonathan Terry, was employed by Respondent, Parkways Authority until his employment was terminated.

2. Mr. Terry filed an expedited grievance dated August 9, 2017, contesting the termination of his employment by Respondent.

3. Respondent filed a Motion to Dismiss on August 22, 2017. Respondent filed the following exhibits with the motion:

- Exhibit A - A certified letter dated July 14, 2017, by Respondent's General Manager, Gregory C. Barr, notifying Grievant that his employment with Respondent was terminated. Also attached is a post office certified receipt demonstrating that Grievant signed for this letter on July 18, 2017.
- Exhibit B - A copy of the grievance form filed by Mr. Terry. The form is date stamped as hand-delivered to the Grievance Board on August 9, 2017.

4. Grievant was notified by the West Virginia Public Employees Grievance Board, on August 25, 2017, that a Motion to Dismiss the grievance had been filed. A copy of the Motion was attached to the notice and Grievant was given until September 11, 2017, to respond. Grievant did not respond.

5. Grievant was unequivocally notified on July 18, 2017, that his employment had been terminated.

6. Fifteen working days from July 18, 2017, ended on August 8, 2017.

Discussion

When a respondent seeks to have a grievance dismissed on the basis that it was not timely filed, the respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the respondent has demonstrated a grievance has not been timely filed, the grievant 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). If proven, an untimely filing will defeat a grievance and the merits of the grievance need 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).

An employee is required to file a grievance within the time limits specified in the statute. W. VA. CODE § 6C-2-4(a)(1). The Code further sets forth the time limits for the initial filing a grievance is as follows:

- (1) 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).

“File’ or ‘filing’ means to place the grievance form in the United States Postal Service mail, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard, East, West Virginia 25311, and (2) the agency’s chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark.” W. VA. CODE R. § 156-1-2.1.4.

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 Employment 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).

The certified mail receipt attached to Respondent’s motion demonstrates that Grievant was unequivocally notified on July 18, 2017, that his employment had been terminated. To file a timely grievance contesting the termination of his employment Grievant must have filed the grievance form on or before August 8, 2017. Unfortunately, the grievance was hand-filed in August 9, 2017. Accordingly, the grievance is DISMISSED.

Conclusions of Law

1. When a respondent seeks to have a grievance dismissed on the basis that it was not timely filed, the respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the respondent has demonstrated a grievance has not been timely filed, the grievant 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. If proven, an untimely filing will defeat a grievance and the merits of the grievance need 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).

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and the relief requested and request either a conference or a hearing.

W. VA. CODE § 6C-2-4(a)(1).

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). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

5. “‘File’ or ‘filing’ means to place the grievance form in the United States Postal Service mail, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard, East, West Virginia 25311, and (2) the agency’s chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark.” W. VA. CODE R. § 156-1-2.1.4.

6. 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 Employment 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).

7. Grievant did not file the grievance within the mandatory statutory time limit.

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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 19, 2017.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE