THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FILOMENA M. D'ALESSIO,
Grievant,

v. **Docket No. 2018-1204-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

DISMISSAL ORDER

Grievant, Filomena M. D'Alessio, is employed by Respondent, Division of Motor Vehicles. On May 16, 2018, Grievant filed this grievance against Respondent stating:

> "In June of 2017, just before leaving for an extending vacation in Italy, I was informed my office was to be moved. When I returned to work, all of my work tools and personal items were stuffed in boxes and stacked in a cubical at the Help Center"…

For relief, Grievant sought:

> "I believe it is critical that I be returned to my old office. Since I was moved from it, that office has been used only a handful of times. That space is highly visible and accessible to employees. When we were suddenly moved last June, the reason given was there was an "emergency situation" involving Mr. Jamison. Since he is no longer employed at the DMV, that problem no longer exists! I need that office because in my HR capacity, I need to be easily accessible for our employees. As a member of HR Staff Development/EEO and Wellness coordinator, I have documents that needs to be protected. Also, sitting in this loud call room has created aggravated stress and health issues for me. My doctor wants to put me on medication for it that conflicts with my current medications for other health issues. I need to be moved as an accommodation to my health."

Following the June 19, 2018, level one hearing, a level one decision was rendered on July 12, 2018, dismissing the grievance as moot. Grievant appealed to level two on August 17, 2018. On August 23, 2018, Respondent, by counsel, filed a Motion to Dismiss asserting the grievance should be dismissed as untimely. By email dated August 27, 2018, Grievant opposed the motion to dismiss. On September 6, 2018, Respondent filed

a renewed Motion to Dismiss and Grievant filed her objection to the same on September 7, 2018. The Grievance Board issued a letter to both parties on October 22, 2018, stating that a level two mediation would proceed without a ruling on the pending motions. Grievant appealed to level three on December 3, 2018.

A phone conference was convened before the undersigned Administrative Law Judge, on December 12, 2018, where the parties were provided opportunity to fortify their position regarding the motion and their respective opinions regarding the proper disposition of this grievance. Respondent and Grievant had the opportunity to address the motion, theory of the grievance and any other relevant outstanding issue(s). Grievant appeared *pro se*.[1] Respondent appeared by counsel, David E. Gilbert, Assistant Attorney General. Both parties provided post conference written documentation in support of their respective positions.

Synopsis

Grievant is employed by Respondent as an Administrative Service Assistant 2, Wellness Coordinator. In June 2017, Grievant was informed that she would have to vacate her office and that she would be moving to a different workspace. Grievant did not file this grievance until May 2018, almost a year after she was informed and/or became unequivocally aware of her change in work location. Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Accordingly, Respondent's motion is granted, and this grievance is dismissed.

[1] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258.

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 an Administrative Service Assistant 2, Wellness Coordinator. Grievant has been employed with the Division of Motor Vehicles since May 1, 2000.

2. Until in or about June 2017, Grievant was assigned to a private office that she considered satisfactory and convenient for her personal comfort and job responsibilities.

3. On or about June 14, 2017, Grievant was informed that she would have to vacate her office and that she would be moving to a different workspace.

4. Two employees were moved by Respondent in June 2017. Both worked in Respondent's Human Resources Department. Both had offices in the same part of the building. Grievant was one of those employees. The other employee was Catherine Graceson.

5. Grievant was on annual leave from on or about June 26, 2017, until on or about July 21, 2017. She reportedly got sick during her vacation, so she extended her stay abroad and took sick leave from on or about July 24, 2017, until on or about August 2, 2017.

6. Grievant returned to work on or about August 11, 2017. Upon her return, she found that her office belongings had been boxed up and that her workspace had been moved to an area that was not private and that she did not consider satisfactory or convenient for her personal comfort or job responsibilities.

7. Ms. Graceson filed a grievance on or about June 16, 2017. Like Grievant, Ms. Graceson objected to the fact that her office was being moved. Ms. Graceson settled her grievance at level three on May 15, 2018.

8. Grievant filed this grievance the next day, May 16, 2018, the same day the *Dismissal Order* for Ms. Graceson's grievance was entered. Grievant waited until the day Ms. Graceson's grievance was dismissed to file this grievance.

9. Grievant objects to a change of office space that happened in or about June 2017. Grievant has provided various shifting and conflicting explanations for why she did not file a grievance in the summer of 2017.

10. Grievant has been moved to one or more other workspaces, none of which she has deemed satisfactory or convenient for her personal comfort and job responsibilities.

11. Grievant did not file a grievance until May 2018, approximately nine months after she returned to work and approximately eleven months after she found out that she was being moved to another workspace.

Discussion

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative

law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008).

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 should be dismissed as untimely in that Grievant filed her grievance significantly past the time period established by applicable statutory provisions. Grievant objects to a change of office that happened in or about June 2017. Grievant has provided various shifting and conflicting explanations for why she elected to file a grievance in May 2018. Nevertheless, Grievant filed this grievance approximately nine months after she returned to work from an extended absence from work and approximately eleven months after she found out that she was being moved to another workspace.

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).

Grievant found out that her workspace *was going to be moved* in June 2017; in August 2017, she found out that her office *had been moved*. Whether you calculate her time to file from the date she learned that the move was going to happen, from the date of the move, or from the date she learned that the move had happened, her time to file a grievance expired long before May 16, 2018. Grievant's wait-and-see approach is in direct opposition of an important statutory purpose: efficiency. W. Va. Code § 6C-2-1(b) ("Resolving grievances in a fair, *efficient*, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia."). Grievant admits that she knew she was going to be moved before she took her vacation. She surely found out that she *had been* moved when she returned from vacation and found her things in boxes.[2]

It is more than fair to assume that the clock started when Grievant returned from vacation. At that point, the change of offices was surely "known to the employee[.]" W. Va. Code § 6C-2-4(a)(1). Grievant did not file her grievance until on or about May 16, 2018. If the clock started on August 3, 2017, that means that she filed her grievance approximately nine-and-a-half months later, which is more than twelve times the amount of time allowed by the statute. That is fatal to her grievance. "[A]n untimely filing will

[2] Grievant returned from extended vacation on or about August 2, 2017. Grievant returned to work on August 11, 2017. *See* FOF 5 and 6.

defeat a grievance[,] and the merits of the grievance need not be addressed." *White v. Logan Bd. of Ed.*, Docket No. 2017-0899-LogED at 9 (May 9, 2018).

"Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse [her] failure to file in a timely manner." *White*, Docket No. 2017-0899-LogED at 8. The Supreme Court of Appeals has encouraged this approach by adopting a "substantial compliance" standard in grievance matters (*Duruttya v. Bd. of Educ. of Cty. of Mingo*, 181 W. Va. 203, 206, 382 S.E.2d 40, 43 (1989)) and by applying a "flexible interpretation" to grievance procedures (*Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990)).

Grievant objects to a change of offices that happened in or about June 2017. In her grievance, Grievant describes things that she considers ongoing consequences from the move—like "aggravated stress and health issues." But these consequences—assuming they exist—do not convert the June 2017 move into "a continuing practice." *See Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990) ("The current case, however, involves a single *act*-the inadvertent failure to include the teachers on a list-that caused continuing *damage,* i.e., the wage deficit. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice. Once the teachers learned about the pay discrepancy, they had an obligation to initiate the grievance procedure." (emphasis in original)). The *Spahr* Court rejected the notion that each separate paycheck could serve as "the most recent occurrence of a continuing practice."

The case at hand is a protest of an event, not a practice. The instant Grievant has failed to offer a consistent and credible explanation for her conduct that excuses her

delay. If she was mistaken about the legal effect of Ms. Graceson's grievance, her mistake is one of law, and it does not excuse. "'Ignorance of the grievance procedures does not excuse the untimely filing of a grievance.'" *Palmer*, Docket No. 2017-2308-DHHR at 5 (quoting *Payne v. Div. of Juvenile Serv.*, Docket No. 2017-1436-MAPS (May 8, 2017)).

According to the undisputed facts of this case, this grievance was not timely filed. Further, Grievant has failed to provide a legally acceptable excuse for her delay. Accordingly, her grievance must be, and hereby is, **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). 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 . . . .

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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. Respondent proved the grievance was not timely filed when it was filed approximately nine months after Grievant returned to work and approximately eleven months after she found out that she was being moved to another workspace.

7. Grievant has failed to provide a credible explanation which legally excuses her delay for filing this grievance.

8. Respondent has met its burden. Grievant filed this grievance outside the applicable time period for filling such a grievance.

Accordingly, based on the foregoing, Respondent's “Motion to Dismiss” is **Granted** and this grievance is **DISMISSED** from the docket of the Grievance Board**.**

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 (2018).

DATE: December 21, 2018

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Landon R. Brown
Deputy Chief Administrative Law Judge