

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA JOAN EVANS

Grievant,

v.

Docket No. 2018-0587-BerEd

BERKELEY COUNTY BOARD OF EDUCATION

Respondent.

DISMISSAL ORDER

Grievant, Pamela Evans, is employed by Respondent, Berkeley County Board of Education. On October 16, 2017, Grievant filed this grievance against Respondent stating, "Employee Handbook - 'Compensation' – based on experience & 'prior/advanced' training. Proof is required in 'other states/counties' to be compensated for. I am including my proof & copy of statement out of my handbook. There may be Employer violations in All other relevant sections of the contract.". For relief, Grievant seeks "To be 'credited & compensated for the 15 yrs of experience (in the same job classification) I brought to Berkeley County. I will have 16 yrs. With Berkeley this month. Experience is earned – daily – 'Credit Me' Please!"

A level one Hearing was held on November 9, 2017. On November 20, 2017, the hearing examiner issued a level one decision denying the grievance. Grievant appealed to level two on December 22, 2017, and a mediation session was held on February 12, 2018. Grievant appealed to level three of the grievance process on February 22, 2018. A level three hearing was held before Administrative Law Judge Joshua Fraenkel at the

Grievance Board's Westover office on June 11, 2018. Grievant appeared *pro se*.¹ Respondent was represented by Laura Sutton, Esq., Bowles Rice LLP. This matter became mature for decision on July 11, 2018, upon final receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant has been employed by Respondent as a bus operator since 2001. Grievant worked for the prior 15 years as a bus operator in Maryland. This grievance is premised on Respondent not crediting Grievant for any of her work experience in Maryland in calculating her pay. Respondent has a policy of crediting employees only for prior in-state experience. Grievant has known since she was hired that Respondent was not crediting her for her Maryland work experience. Respondent filed a motion to dismiss at level 1. Respondent proved by a preponderance of the evidence that the grievance was filed untimely. Grievant failed to prove that she had a proper basis to excuse her 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 has been employed by Respondent as a school bus operator since 2001.
2. Prior to working for Respondent, Grievant was employed for 15 years as a

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.

school bus operator in Maryland.

3. Upon hiring, Grievant was notified by Respondent that she would not be credited for her work experience in Maryland.

4. Grievant has known since the date she was hired that Respondent was not crediting her for her work experience in Maryland.

5. Grievant did not file a grievance challenging the calculation of her years of experience credit until October 16, 2017, which is almost 16 years after Respondent hired Grievant.

6. Respondent asserted at level one that the grievance was filed untimely.

7. Grievant is only paid under the salary schedule for her 16 years of in-state work experience as a school bus operator.

8. Grievant is not credited under the salary schedule with her 15 years of out-of-state work experience as a school bus operator.

9. Grievant did not present evidence as to the basis of her untimely filing.

Discussion

Respondent asserts that the grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and that the grievance must be dismissed. “[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. *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).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

The first issue which needs to be addressed is whether Respondent properly raised a timeliness defense. “Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1). Respondent asserted at level 1 that the grievance was untimely filed.

The next issue which needs to be addressed is whether Grievant timely filed her grievance. 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).

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). “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

Grievant knew at the time Respondent hired her that Respondent would not be crediting her with her Maryland work experience. Yet she waited almost 16 years until October 16, 2017, to file this grievance. “This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. See *Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996).” *Fleece v. Morgan Cnty. Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999). However, “when 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]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to CODE § 29-6A-4(a). See, *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).’ *Nutter v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). See also *Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure to receive a merit increase, not learning

that others have received merit increases).” *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001).

Respondent has proven by a preponderance of the evidence that the grievance contains no claim that is a continuing violation. Upon hiring Grievant, Respondent informed her that it would not credit her for her 15 years of experience as a school bus operator in Maryland. Even if Respondent was wrong to not attribute Grievant any credit for her out-of-state experience, this can only be classified as a wrongful act almost 16 years ago which resulted in continuing damage to Grievant with every paycheck. Respondent’s alleged violation almost 16 years ago is not a continuing violation.

The burden now shifts to the Grievant to prove a proper basis to excuse her untimely filing. “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. *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).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). Grievant has not provided a basis for her untimely filing.

This grievance was not timely filed. Respondent has proven by a preponderance of the evidence that this grievance was untimely filed. The Grievant has not proven by a preponderance of the evidence a proper basis for her untimely filing. The Board need not address the merits of this grievance. This grievance is hereby 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. *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).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. “Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1).

3. 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).

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 Empl Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff’d*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016).

5. “This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. See *Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.*, Docket No. 95-20-567 (May 30, 1996).” *Fleece v. Morgan Cnty. Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999). However, “when 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]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to CODE § 29-6A-4(a). See, *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990).’ *Nutter v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). See also *Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000) (the grievable event in merit increase grievances is ordinarily the failure

to receive a merit increase, not learning that others have received merit increases).”
Young v. Div. of Corr., Docket No. 01-CORR-059 (July 10, 2001).

6. “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

7. The grievance was not timely filed.

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: August 1, 2018

Joshua Fraenkel
Administrative Law Judge