

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DAVID L. MAGERS,
Grievant,**

v.

Docket No. 2017-2139-MarED

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

DISMISSAL ORDER

Grievant, David L. Magers, employed by the Marshall County Board of Education as a bus operator, filed this action at Level One on or about May 1, 2017, contesting the failure of Respondent to hire him for a 2016 summer bus operator position. Grievant did not list any relief being sought. A Level One hearing was conducted on July 12, 2017. This grievance was denied by Respondent's Superintendent, Dr. Jeffery Crook, by decision dated August 30, 2017. A Level Two mediation was conducted on December 1, 2017.

A Level Three hearing was scheduled before the undersigned on March 1, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Richard McGervey, West Virginia School Service Personnel. Respondent appeared by Corey Murphy, Assistant Superintendent, and its counsel, Richard S. Boothby, Bowles Rice LLP. Grievant chose not to proceed with the Level Three hearing. Thereafter, the parties agreed to submit this matter on the Level One record and to supplement that record with fact/law proposals. This matter became mature for consideration upon receipt of Respondent's proposals on June 13, 2018. Grievant did not file proposals.

Synopsis

The record of this matter demonstrates by a preponderance of the evidence that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed as untimely.

The following Findings of Fact are based upon the lower level record.

Findings of Fact

1. Grievant is employed by Respondent as a regular bus operator.
2. The bus operator position in question, one of six summer school positions for the summer of 2016, was posted and filled in April of 2016. Grievant applied for one of these six positions.
3. Grievant was not awarded a summer bus operator position for the 2016 summer school program.
4. Grievant became aware of the fact that he did not drive a bus during the 2016 summer school program at some time during the summer of 2016.
5. Grievant filed his grievance about this matter on May 2, 2017, complaining that had he been awarded the 2016 summer school job, that he would have been entitled to a 2017 summer school job. May 2, 2017, is more than one year after the position at issue was filled by Respondent.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd.*

of Educ., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The only issue to be addressed is whether or not the grievance was filed at Level One in a timely fashion. Respondent has maintained throughout the process that this grievance be dismissed as untimely filed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). 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).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

Within fifteen days¹ 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. . . .

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). See *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm’n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

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.*

¹Pursuant to W. VA. CODE § 6C-2-2(c) “[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny 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.”

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).

Grievant claims that had he been hired for the 2016 summer school program, he would have been entitled to a 2017 summer school bus operator position. However, Grievant did not file this grievance about the 2016 summer bus operator position until more than a year after that position was awarded. The Respondent proved by a preponderance of the evidence that this grievance is untimely and Grievant is without reasonable excuse for the untimely filing. Grievant acknowledged this important procedural argument during the Level One hearing.

The following Conclusions of Law support the dismissal of this case.

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

2. A grievance must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant. WEST VIRGINIA CODE § 6C-2-4(a)(1).

3. Respondent has proven by a preponderance of the evidence that this grievance was not initiated within fifteen days of the grievable event.

Accordingly, this grievance is **DISMISSED** as untimely.

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* 156 C.S.R. 1 § 6.20 (2008).

Date: July 3, 2018

Ronald L. Reece
Administrative Law Judge