

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SARDER E. SADIQUE,
Grievant,**

v.

Docket No. 2017-1932-MU

**MARSHALL UNIVERSITY,
Respondent.**

DISMISSAL ORDER

Grievant, Sarder E. Sadique, was employed as a probationary tenure-track Assistant Professor by Respondent, Marshall University. On March 13, 2017, Grievant filed this grievance against Respondent protesting his non-retention.

Following the April 3, 2017 level one hearing, a level one decision was rendered on April 27, 2017, denying the grievance. Grievant appealed to level two on May 3, 2017. An *Order of Unsuccessful Mediation* was entered on October 24, 2017. Grievant appealed to level three of the grievance process on December 19, 2017. On January 10, 2018, Respondent, by counsel, Kristi A. McWhirter, Assistant Attorney General, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed as untimely. On January 11, 2018, the Grievance Board notified Grievant by electronic mail that any response to the motion to dismiss must be made in writing by January 26, 2018, and that “[f]ailure to respond may result in the grievance being dismissed.” By email dated January 18, 2018, Grievant appointed Sarder Sadid as his representative. By letter dated January 22, 2018, the undersigned sent a letter to Grievant’s representative enclosing the motion to dismiss and extending the time to file a response to February 12, 2018. On Sunday, February 12, 2018, Grievant’s representative sent a letter requesting the deadline to file a response be extended until May as he was “engaged in the Spring semester of Senior

level classes.” On February 13, 2018, Respondent, by counsel, filed Respondent’s Objection to Grievant’s Request for an Extension of Time to File a Response asserting Grievant’s representative had not demonstrated good cause or a proper basis for extending the time to file a response to the motion to dismiss.

Synopsis

Grievant was employed as a probationary tenure-track Assistant Professor by Respondent. Grievant grieved his non-retention in that position. Grievant filed his appeal to level three more than a month late, and Respondent moved to dismiss the grievance as the appeal was untimely. Grievant did not respond to Respondent’s motion to dismiss, but had sought an extension to file his level three appeal because he was out of the country. Grievant’s presence outside of the country is not a proper basis to excuse his failure to file in a timely manner. 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 was employed as a probationary tenure-track Assistant Professor by Respondent, Marshall University and grieves his non-retention in that position.
2. Grievant filed to level one of the grievance process *pro se*¹, but later retained an attorney, Anthony Nortz, to represent him.

¹ For one’s own behalf. BLACK’S LAW DICTIONARY 1221 (6th ed. 1990).

3. Following the denial of the grievance at level one, Grievant filed a level two appeal. Although Grievant's counsel was listed on the level two appeal form, the appeal was signed by Grievant and appeared to have been written by Grievant.

4. Prior to mediation, Mr. Nortz withdrew as counsel, and Grievant retained new counsel, J. Anthony Spenia.

5. Mediation was conducted on August 22, 2017, and the grievance was held in abeyance in order to allow the parties additional time to attempt settlement of the matter. The matter was placed in abeyance until September 22, 2017 by Order Placing Grievant in Abeyance. The order further stated that if there were no settlement agreement or response from the parties on that day, that an order would be entered reflecting the unsuccessful mediation.

6. By email dated September 22, 2017, Respondent, by counsel, requested a ten-day extension of the abeyance period, which was granted and the matter held in abeyance until October 6, 2017.

7. Grievance Board staff requested the status of the matter from the parties by email dated October 19, 2017.

8. By email dated October 23, 2017, Respondent, by counsel, advised that the settlement attempt was unsuccessful.

9. An *Order of Unsuccessful Mediation* was entered on October 24, 2017, which clearly stated that an appeal to level three must be made within ten days of receipt of the order. The order was mailed to Grievant at the address he had provided on his level two appeal form and to his counsel, Mr. Spenia, at the address provided on his notice of appearance.

10. By email dated November 2, 2017, Grievant stated that he would be “out of town for another two months” and requested to extend the deadline for the level three appeal.

11. Grievance Board staff responded by email informing Grievant that the appeal must be filed within ten business days from receipt of the *Order of Unsuccessful Mediation* to appeal and that the time limit may be extended by mutual written agreement. The email further informed Grievant that Grievance Board records indicated he was still represented by counsel, who could file on his behalf or obtain an agreement for extension, but that if he was no longer represented, the Grievance Board would accept an electronic copy of the grievance form for filing. The email attached Grievant’s level two appeal for reference and provided a link to the electronic grievance form available on the Grievance Board’s website.

12. By email dated November 14, 2017, Grievant emailed the Grievance Board, attaching a letter in which he states he had not received any response from his attorney and that he would be looking for another attorney. He further stated, “I would like to request for an extension up to the last week of December 2017 via a mutual agreement.”

13. By email dated November 14, 2017, Grievance Board staff responded to Grievant’s email explaining again that the time to file could only be extended by mutual written agreement, which Grievant had not provided. The email provided contact information for Respondent’s counsel. The email explained that Grievant’s deadline would not be accepted unless the Grievance Board received written confirmation of agreement from Respondent’s counsel. The email further explained that if Grievant did

not obtain a proper extension and filed his grievance outside of the time limit, Respondent would have the right to move to dismiss the grievance.

14. Grievant appealed to level three of the grievance process on December 19, 2017.

15. On January 10, 2018, Respondent, by counsel, Kristi A. McWhirter, Assistant Attorney General, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed as untimely.

16. On January 11, 2018, the Grievance Board notified Grievant by electronic mail that any response to the motion to dismiss must be made in writing by January 26, 2018, and that “[f]ailure to respond may result in the grievance being dismissed.”

17. By email dated January 18, 2018, Grievant appointed Sarder Sadid as his representative.

18. By letter dated January 22, 2018, the undersigned sent a letter to Grievant's representative enclosing the motion to dismiss and extending the time to file a response to February 12, 2018.

19. On Sunday, February 12, 2018, Grievant's representative sent a letter requesting the deadline to file a response be extended until May as he was “engaged in the Spring semester of Senior level classes.”

20. On February 13, 2018, Respondent, by counsel, filed Respondent's Objection to Grievant's Request for an Extension of Time to File a Response asserting Grievant's representative had not demonstrated good cause or a proper basis for extending the time to file a response to the motion to dismiss.

21. The request to extend the deadline to file a response to the motion to dismiss was not granted and Grievant did not file a response to Respondent's motion to dismiss.

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).

An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). "Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance." W. VA. CODE § 6C-2-4(c)(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 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).

It is unclear when Grievant actually received the Order of Unsuccessful Mediation, however, he had unequivocal notice of it at the latest by November 2, 2017, as evidenced by his request for extension to file a level three appeal on that date. Therefore, Grievant was required to file his level three appeal no later than November 16, 2017. Although Grievant sought an extension to file, the time limit to file could only be extended upon the mutual written agreement of the parties, which Grievant did not obtain. Grievant did not file his level three appeal until December 19, 2017, more than a month late.

Although Grievant did not respond to Respondent’s motion to dismiss, based on his previous communications with the Grievance Board it appears he believes that being out of the country would excuse his failure to file. This is not a proper excuse for Grievant’s failure to timely file his level three appeal. Grievant was clearly instructed by Grievance Board staff regarding the requirements for filing, Grievance Board staff included electronic documents to assist Grievant in filing, and Grievant was permitted to file the form by electronic means as an accommodation to Grievant’s presence outside of the country. Grievant clearly had the ability to file the level three appeal himself as he had completed the previous two grievance filings and continued to communicate with Grievance Board staff electronically.

Therefore, the matter must be dismissed as Grievant's level three appeal was untimely and he has not demonstrated a proper basis to excuse his untimely-filing.

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). "Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance." W. VA. CODE § 6C-2-4(c)(1).

3. "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).

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); *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).

5. Respondent proved Grievant’s level three appeal was not timely filed and Grievant failed to demonstrate a proper basis to excuse his untimely filing.

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: March 16, 2018

Billie Thacker Catlett
Chief Administrative Law Judge