

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**AMANDA SEESE,**

**Grievant,**

**v.**

**Docket No. 2018-0015-DHHR**

**DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES/BUREAU FOR  
CHILDREN AND FAMILIES,**

**Respondent.**

**DISMISSAL ORDER**

Grievant, Amanda Seese, filed this expedited level three grievance against her employer, Respondent, Department of Health and Human Resources, Bureau for Children and Families (“DHHR”), on July 8, 2017, stating as follows: “Grievant had been demoted based on a CPS referral filed on her family. On or about June 21, 2017, Grievant informed that no CPS open case or investigation still exists.”<sup>1</sup> As relief sought, Grievant seeks, “[t]o be made whole in every way including restoration to previous pay and position including back pay with interest.”

The level three hearing in this matter was scheduled to be conducted on October 3, 2017. The parties participated in the scheduling of this hearing, and were, thereafter, notified of the hearing date and time by Notice of Hearing entered and issued on August 2, 2017. On September 20, 2017, Respondent, by counsel, submitted a Motion to Dismiss to the Grievance Board by email, copying Grievant’s representative on the same.

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<sup>1</sup> The statement of grievance form was mistakenly dated June 7, 2017, when it should have been July 7, 2017. This was a typographical error. The statement of grievance was received and clocked-in at the Grievance Board on July 8, 2017. Accordingly, this is the date recited herein.

At the direction of the undersigned administrative law judge, Grievance Board staff informed Grievant, by her representative, that if he wished to file a response, such was to be filed before close of business on September 29, 2017. Grievant, by her representative, submitted her Response to Respondent's Motion to Dismiss on September 25, 2017. Given the issues raised in the parties' motion and response, and given that the level three hearing was only days away, the ALJ held the Motion to Dismiss in abeyance and informed the parties that they would be allowed to present their arguments regarding the same on the record at the commencement of the level three hearing. Further, the parties were informed that they should be prepared to go forward with the presentation of evidence on the merits of the case on the date of the level three hearing.

The level three hearing was held as scheduled on October 3, 2017, at the Grievance Board's Charleston, West Virginia, office. Respondent appeared by counsel, James "Jake" Wegman, Assistant Attorney General. Grievant appeared in person, and with her representative, Gordon Simmons, UE Local 170 West Virginia Public Workers Union. At the commencement of the hearing, the undersigned heard the Respondent's Motion to Dismiss and Grievant's response to the same. Whereupon, the undersigned ALJ held this motion in abeyance, allowing the parties to address it further in their post-hearing submissions, and proceeded to hear evidence in this action. This matter became mature for decision on December 4, 2017, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

## **Synopsis**

Grievant was employed by Respondent as a Child Protective Services Worker. Respondent informed Grievant in writing that she was being demoted because of her inability to perform the functions of her position. Grievant was then demoted and continued to work for Respondent in the new position. Nearly nine months after being informed of her demotion, Grievant filed a grievance challenging the same. Respondent proved by a preponderance of the evidence that this grievance was untimely filed. Grievant failed to demonstrate any proper bases for excusing her untimely filing. Therefore, 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 by Respondent as a Child Protective Services Worker ("CPSW") in the Bureau for Children and Families ("BCF") Region 1. Grievant was so employed for twelve years.
2. Cree Lemasters is the Regional Director for BCF in Region 1. Ms. Lemasters is not Grievant's direct supervisor, but she is in Grievant's chain of command.
3. Joe Johnson is the Community Services Manager ("CSM") for BCF in the office where Grievant is stationed. Mr. Johnson is not Grievant's direct supervisor, but he is in her chain of command.
4. Evidence presented suggested that Erin Norman, a Child Protective Service Supervisor, may be Grievant's direct supervisor. However, the record with respect to this fact is unclear.

5. CPSWs have a number of duties and responsibilities with respect to dealing with allegations of child abuse and neglect, and ensuring the safety of children. Some CPSWs duties and responsibilities include receiving referrals alleging abuse and neglect, investigate these allegations, interviewing people involved, providing services to those involved, and filing petitions in the court system to intervene in abuse and neglect situations. Further, CPSWs are frequently called to testify in court and are subject to cross examination. CPSWs frequently work with children, families, attorneys, guardians ad litem, law enforcement, and judges.

6. On July 18, 2016, a CPS referral was made against Grievant and her family. It was alleged that domestic violence occurred in the household while children were present. Thereafter, CPS began an investigation. The investigation found that Grievant had not committed domestic violence herself, but that there was an impending danger to the children because she was found to place her own needs above that of the children. As such, services were needed, and Grievant signed an in-home safety plan prepared by CPS on September 8, 2016, and agreed to follow its terms.<sup>2</sup>

7. Grievant did not contest or appeal the findings of the CPS investigation.

8. Given that Grievant was herself an experienced CPSW, the results of the investigation were troubling to management, and brought into question Grievant's ability to perform the functions of her job, as well as her credibility. As such, management scheduled a predetermination conference with Grievant to allow her to speak to these issues.

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<sup>2</sup> See, Respondent's Exhibit 2, Family Functioning Assessment.

9. A predetermination conference was conducted on August 29, 2016. In attendance were Joe Johnson, Erin Norman, and Grievant. During this conference, the July 2016 incident and subsequent CPS referral were discussed, along with Grievant's ability to perform the duties of her job. Grievant submitted a twelve-page handwritten statement regarding such to management following the predetermination.

10. By letter dated September 16, 2016, Ms. Lemasters informed Grievant of her decision to demote Grievant from her CPSW position to an Economic Service Worker position, which would result in a reduction in her pay. Ms. Lemaster stated in the letter that the demotion was "with prejudice." Further, she stated, in part, as follows:

On August 29, 2016 you participated in a pre-determination conference with Joe Johnson, Community Service Manager[,] and Erin Norman, Child Protective Service Supervisor. This conference was to discuss your ability to perform your duties as a Child Protective Service Worker. You were advised during the pre-determination conference that a result of this matter could lead to dismissal. Attached is a copy of your twelve pages written statement you provided after your determination conference. While off the job conduct of employees is generally not subject to the Department scrutiny, it should not reflect adversely upon an employee's ability to perform their job, nor should it impair the efficient operation of the Department. In those instances disciplinary actions might be appropriate.

Due to the significance of your personal situation, it is determined that you no longer have the ability to perform the essential duties as a Child Protective Service Worker, as described above.

After consideration of the information made available to me and your response during the predetermination conference, I have decided to proceed with your demotion with prejudice.

You will also no longer be able to work any position with the Bureau for Children and Families that would require a social work license. The Social Work Licensure Board will be notified.

Should you incur another violation or exhibit behavior of a similar nature, that failure on your part will be grounds for further disciplinary action up to and including dismissal from employment. . . .<sup>3</sup>

11. No where in the September 16, 2016, letter does Ms. Lemasters state or imply that the demotion was temporary. Further, the letter contained the required paragraph explaining Grievant's right to grieve the demotion, which included the following language:

[f]or any appeal rights you may have, please refer to West Virginia Code, Chapter 6C-2-1 et seq., West Virginia Public Employees Grievance Procedure. Your appeal must be filed within fifteen (15) working days (Monday through Friday excluding official holidays and other days in which the office is legally closed by the Chief Administrator as outlined by this statute) from the effective date of this action. Grievance forms are located at <http://pegb.wv.gov>. . . You may proceed directly to Level Three of the procedure upon the agreement of the chief administrator, or when dismissed, suspended without pay, or demoted/reclassified resulting in a loss of compensation or benefits.

12. Grievant was demoted to the Economic Service Worker "ESW") position as set forth in the September 16, 2016, letter. Grievant has worked as an "ESW" since her demotion.

13. Grievant filed this grievance on or about July 8, 2017, nearly nine months after she was demoted.

### **Discussion**

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered

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<sup>3</sup> See, Respondent's Exhibit 4, demotion letter dated September 16, 2016.

appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W. VA. CODE ST. R. § 159-1-6.2 (2008). Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. “The 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). As Respondent is asserting the affirmative defense of timeliness, it bears the burden of proof herein. 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. *See 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 also 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).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See* W. VA. CODE § 6C-2-1 *et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits

of the grievance need not be addressed. See *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). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. See *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating 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). 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).

Grievant was unequivocally notified of the decision to demote her to an ESW position on September 16, 2016. Grievant took the demotion and worked in that position for months. Nine months after she was unequivocally notified of the decision to demote



her, Grievant filed this grievance challenging the same. Grievant has alleged that her grievance was timely filed because she filed within fifteen days of learning that her child protective services case had been closed. However, that has nothing to do with the occurrence of the event on which this grievance is based. The demotion was the triggering event, not the notification of the closure of her CPS case.

The September 16, 2016, letter unequivocally informed Grievant that she was being demoted without prejudice, and informed her of the exact reduction in her pay that would result. Nothing in this letter suggests that this demotion was temporary, or in any way, conditional. In fact, the letter states that Grievant would no longer be allowed to work in any position with BCF that required a social work license. Such would include her former CPSW position. Therefore, Respondent made it clear that Grievant would not be returning to her CPSW position. Additionally, the letter clearly advised Grievant of her right to file a grievance and the timelines for filing the same. It is noted that Grievant points out that she still has a valid social worker license, and that such was not revoked or suspended. Such is irrelevant. She was not demoted for lack of a social work license. Respondent never said it was revoking or suspending her license, or that the license had been revoked. The letter simply states that the Social Work Licensing Board would be notified of the action Respondent was taking.

Based upon the evidence presented, Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Grievant has not demonstrated any proper basis to excuse her failure to file her grievance in a timely manner. As this grievance was untimely filed, there is no need to address the merits of Grievant's claim. Therefore, this grievance is dismissed.

The following Conclusions of Law support the dismissal of this grievance:

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W. VA. CODE ST. R. § 159-1-6.2 (2008).

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. 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. *See 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 also 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).

3. If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *See 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). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

4. “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).

5. 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).

6. Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Grievant has not demonstrated a proper basis for excusing her from filing within the applicable timelines.

Accordingly, this Grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this 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 (eff. July 7, 2008).

**DATE: January 22, 2018.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**