

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY FRAZIE,
Grievant,

v.

Docket No. 2019-0047-DOR

OFFICES OF THE INSURANCE COMMISSIONER,
and DIVISION OF PERSONNEL,
Respondents.

DISMISSAL ORDER

Grievant, Tammy Frazie, is employed in the Paralegal 1 classification by the Offices of the Insurance Commissioner ("OIC") in the Office of Judges ("OOJ"). Ms. Frazie filed a level one grievance form dated July 5, 2018, alleging:

Grievant was employed as an Employment Programs Specialist Senior. On June 23, 2018, she was demoted to Paralegal 1. Grievant contends that her demotion was inappropriate, arbitrary and capricious, retaliation for filing a grievance, and discrimination/favoritism.

As relief:

Grievant seeks reinstatement to her previous classification or to an alternative classification that is a fit for her duties, but does not entail loss of salary in the present and in the future or loss of opportunities for salary increases in the future. Grievant also seeks any relief necessary to make her "whole."

A level one conference was held on August 21, 2018, and a decision denying the grievance was rendered on August 29, 2018. Grievant appealed to level two on September 6, 2018. On October 25, 2018, an order was entered to join the Division of Personnel ("DOP") as a party and a mediation was conducted on November 28, 2018. Grievant appealed to level three on December 7, 2018.

Respondent OIC filed a Motion to Dismiss dated November 15, 2018, alleging that the grievance was not filed within the mandatory time limit set out in W. VA. CODE § 6C-2-

4. Grievant filed a Response to the Motion to Dismiss dated November 30, 2018. A hearing on the motion was conducted at the Charleston office of the West Virginia Public Employees Grievance Board. On March 1, 2019. Grievant personally appeared and was represented by John E. Roush, Esquire, AFT-WV, AFL-CIO. Respondent OIC appeared by its Human Resources Director, Debbie Hughs and was represented by William C. Ballard, Esquire, Assistant Attorney General. Respondent DOP appeared through Assistant Director for Classification and Compensation, Wendy Campbell, and was represented by Karen O'Sullivan Thornton, Esquire, Senior Assistant Attorney General. The parties asked to submit supplements to their prior arguments which were received on March 15, 2019. The matter became mature for a decision on the motion on that date.

Synopsis

Grievant received notice that her position was reallocated on June 4, 2018. She was subsequently required to submit an application containing her credentials to verify that she met the minimum qualifications for the new classification of her position. She met those qualifications, was reassigned to the position as reallocated. The process was completed on or around June 23, 2018. The grievance contesting the reallocation of this position was filed on July 5, 2018.

Respondents argue that the grievance is untimely because Grievant received unequivocal notice that her position was reallocated on June 4, 2018, and did not file her grievance until several days after the fifteen working days-time limit. Grievant argues that the date for filing the grievance does not start until she was reassigned to the reallocated position. The position was reallocated to the Paralegal 1 classification. Grievant disagrees with that classification and wishes her position to be allocated differently. The date of

notice of the reallocation was June 4, 2018, and that reallocation was going to remain the same even if Grievant did not meet the minimum qualifications. Respondents proved that the grievance was untimely filed.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Tammy Frazie, is employed by Respondent, Offices of the Insurance Commission, and is assigned to the Office of Judges. She has worked in the OOJ for eighteen years. Grievant's position is allocated to the Paralegal 1, classification.

2. On Friday June 1, 2018, Dreama Gibson, DOP, Administrative Secretary, sent an email to Grievant and OIC Human Resources ("HR") Director, Debbie Hughs, attaching a copy of a response to an appeal of the reallocation of Grievant's position to Paralegal 1. After discussing the process and factors considered, the DOP Director concluded that the position was properly allocated to the Paralegal 1 classification and denied the appeal. The DOP Director specifically noted that the "allocation action is for the position, not the employee. You must meet the minimum training and experience qualifications for the recommended classification." (Respondent OIC Exhibit 1)

3. HR Director Hughs sent an email to Grievant the same day attaching the communication from DOP and informed Grievant:

In order to complete the personnel transaction to change your title, HR must first review a completed DOP application outlining your education and work experience to determine that you meet the minimum qualifications for the new title. Please complete the attached application and return it to me by June 8th.

4. Grievant was on leave June 1, 2018. She sent an email to HR Director Hughs on Monday, June 4, 2018, acknowledging receipt of the two emails and the attached documents from the DOP Director and HR Director Hughs.

5. Grievant completed the application on June 8 and attempted to email it to HR that day. There was some confusion about the application so Grievant emailed it to HR Director Hughs again on June 12, 2018.

6. By email dated June 14, 2018, OIC Benefits Coordinator, Chrystal Cunningham, informed Grievant that the agency had “received the approved personnel transaction on your reallocation to a Paralegal 1, effective June 23, 2018.” (Grievant Exhibit 2). The personnel transaction related to Grievant qualifying for the reallocated Paralegal 1 position became effective June 23, 2018.

7. The level one grievance form submitted by Grievant was dated July 5, 2018.

DISCUSSION

Respondent OIC has raised the affirmative defense that the grievance was not filed within the mandatory time limit for raising claims set out in the grievance statute. Because this is an affirmative defense, Respondent has the burden of proving by a preponderance of the evidence that the grievances were not timely filed. W. VA. CODE R §156-1-3. *Burden of Proof*.

To be considered timely, and, therefore, within the jurisdiction of the grievance procedure, a grievance must be 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 to be addressed. *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).

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).

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).

The issue in this matter is the date when Grievant was unequivocally notified that the position she held was reallocated to the paralegal classification. Grievant's statement mentions a demotion but her remedy is for her position to be returned to her previous classification or given a different classification that fits her duties and doesn't have a reduced pay grade.

Respondents argue that Grievant was unequivocally notified that her position was being reallocated on June 4, 2018. On that day, she received the letter from the DOP Director confirming the reallocation had been reconsidered as requested and the reallocation of her position to Paralegal 1 was final.

Grievant argues that the personnel transaction was not complete until June 23, 2018. She believes that is when the classification became final and thus the starting date for the time limit to file the grievance. This interpretation is not consistent with the nature of a reallocation.

Reallocation is controlled by the *DOP Administrative Rule*. In that rule, the terms

3.6. Allocation. -- The assignment of a position to a class by the Director of Personnel based on the duties performed and responsibilities assigned.

3.72. Reallocation. -- Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties.

W. VA. CODE ST. R. § 143-1-1 *et seq.* In both definitions, it is clear the action relates to a position not an employee. Regarding the procedure for reallocation The DOP rule states:

4.7. Position Reallocation. -- Whenever significant changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may

seek a reconsideration of the decision by submitting a written request to the Director within fifteen (15) working days of the notification of the decision.

4.7.b. When a position is reallocated to a different class, the incumbent shall not be considered eligible to continue in the position unless he or she meets the minimum qualifications for the classification.

Id.

The DOP Director allocates the position based upon an examination of the duties and responsibility involved in its performance.¹ If the incumbent (the employee in the position) or the agency disagree with the initial reallocation, either may make a written appeal for the DOP Director to reconsider the initial finding. Once that decision is rendered by the DOP Director, the reallocation to a classification is final unless overturned by a separate tribunal such as a Grievance Board Administrative Law Judge (“ALJ”) or a Circuit Judge.

The next step is set out in subsection 4.7.b. Once the reallocation is final a second process is started to determine if the incumbent holds the minimum qualifications of the position’s new classification. Unlike reallocation which focuses solely on the position, this process focuses on the employee and his or her proper assignment. As pointed out by DOP Assistant Director Campbell, these are two separate procedures resulting in to different, but related, actions: 1) the allocation of the position and 2) the job placement of the incumbent depending upon meeting the minimum qualifications of the new classification.

¹ In practice, the DOP staff specialists and the Assistant Director for Classification and Compensation perform the examination, make the initial class determination.

In the case *sub judice*, Grievant was notified on June 4, 2018, by the DOP Director that the position she was holding had been reallocated to the Paralegal 1 classification. The reconsideration appeal process had been exhausted and the reallocation decision was final. At this point Grievant's only recourse was to file a grievance or seek a remedy in Court if appropriate. Grievant was unequivocally notified on June 4, 2018, that her position was reallocated to the Paralegal 1 classification. The time period for contesting the reallocation in the grievance procedure started then.

Grievant argues that the decision was not final because a determination still had to be made about Grievant meeting the minimum qualification of the position and the time line should start when that was decided. That is a separate process. The new classification for the position would be final regardless of whether Grievant qualified for it. If she had not and was transferred or dismissed a grievance might be appropriate to contest that action. However, the remedy would not include reallocating the position which is what Grievant seeks.

Respondents proved by a preponderance of the evidence that Grievant was unequivocally notified that her position was reallocated to the Paralegal 1 classification on June 4, 2018. Grievant did not file a grievance within fifteen working days of that date. Accordingly, the Motion to Dismiss is **GRANTED**.

Conclusion of Law

1. Respondent OIC has raised the affirmative defense of that the grievance was not filed within the mandatory time limit for raising claims set out in the grievance statute. Because this is an affirmative defense, Respondent has the burden of proving

by a preponderance of the evidence that the grievances were not timely filed. W. VA. CODE R §156-1-3. *Burden of Proof*.

2. To be considered timely, and, therefore, within the jurisdiction of the grievance procedure, a grievance must be 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 to be addressed. *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).

3. 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).

4. 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).

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. Respondents proved by a preponderance of the evidence that Grievant was unequivocally notified that her position was reallocated to the Paralegal 1 classification on June 4, 2018.

7. Grievant did not file a grievance within fifteen working days of that date as required by W. VA. CODE § 6C-2-4(a)(1).

Accordingly, the Motion to Dismiss is **GRANTED** and the 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 (2008).

DATE: April 11, 2019.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE