

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MICHELLE MARKOVICH,
Grievant,**

v.

Docket No. 2017-1361-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL and
DIVISION OF PERSONNEL,
Respondents.**

DISMISSAL ORDER

On or about December 2, 2016, Grievant, Michelle Markovich, filed a Level One grievance against her employer, Department of Health and Human Resources/Sharpe Hospital, contesting her starting salary and the classification of the position she occupies. The matter was waived from Level One to Level Two by the Department of Health and Human Resources' grievance evaluator. The Division of Personnel was joined as an indispensable party by Order of Joinder entered on December 27, 2016. A Level Two mediation session was conducted on February 3, 2017. This case was placed in abeyance on July 17, 2017, until October 2017. Scheduling of the case was delayed due to finding agreeable dates for all of the parties. A Level Three evidentiary hearing was convened before the undersigned on December 13, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by her counsel, Erika Kolenich. The Department of Health and Human Resources appeared by Ginny Fitzwater, Human Resources Director for Office of Health Facilities, and by its counsel, James "Jake" Wegman, Assistant Attorney General. The Division of Personnel appeared by Wendy

Campbell, Assistant Director Division of Personnel, and by its counsel, Karen O'Sullivan Thornton, Assistant Attorney General.

The matter did not conclude at the end of the first day of hearing, and a second day of hearing was calendared for March 21, 2019; however, after the filing of a motion to withdraw as counsel and then a notice of withdrawal of the motion to withdraw, the second day of hearing was continued at the request of the Grievant. Respondents both filed motions to dismiss based on timeliness prior to the Level Two mediation. The undersigned took both motions under advisement. Additionally, the Division of Personnel filed a second motion to dismiss as an indispensable party after day one of the Level Three hearing. The undersigned gave the parties an additional cutoff date of March 21, 2019, to file any pleadings addressing the motions to dismiss. The undersigned notified the parties that a ruling would be issued on the motions to dismiss that had previously been taken under advisement.

Synopsis

The record developed in 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. In addition, as it relates to any purported classification issues, the relief sought has been provided and, as such, that issue is moot.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Michelle Markovich, Grievant, is employed by Sharpe Hospital as an Assistant Chief Executive Officer.

2. On December 9, 2016, the Grievant filed a grievance stating “[w]hen I was offered position, Salary was not calculated correctly. I tried to informally approach internal and external HR Leadership without any change. Our internal HR Director said I would have qualified for the DHHR Average of \$61,729.60, but” . . . [the rest of the statement is illegible].

3. The Grievant seeks her “Salary to reflect my education and training, I would like back pay with interest. I would like my classification to be reviewed as well, ASM III really does not reflect the job I am doing. As Asst. CEO, the responsibility I carry is the same as the CEO. If he is not here then I must act in his place. We are a great team and share the workload the only difference is how much he is paid compared to me. He makes 267% of my salary or I make 37.5% of his, however the court would like to look at it.”

4. The job posting for the position to which Grievant was hired, listed the salary range for the position with a minimum starting salary of \$41,736.00. Grievant was hired at a salary of \$45,912.00.

5. On approximately April 18, 2016, the Grievant began employment at Sharpe as an Assistant CEO, with a job title of Administrative Services Manager III. (Department Exhibit 1). The Grievant was an external hire from the employment register. The Grievant was offered a salary which she accepted and began employment.

6. Sometime in July or August 2016, during a Behavioral Health Care accreditation survey conducted by the Joint Commission, the Grievant observed an email in her personnel file discussing her salary. After viewing this email, the Grievant felt she

was entitled to a higher salary and spoke to human resources at Sharpe and Bureau for Behavioral Health and Health Facilities.

7. The Department reviewed the Grievant's salary and forwarded the information to the Division of Personnel. However, the Division of Personnel did not review the Grievant's request because the Grievant had already accepted her salary and been employed for several months.

8. The Division of Personnel reviewed the Grievant's job classification, and reclassified it as an Assistant Administrator, Acute Care Hospital; however, the paygrade remained the same. (Department Exhibit 5).

9. Grievant did not file a grievance challenging her starting salary when she was hired, nor at any point up and until she filed the present grievance nearly eight months later on or about December 2, 2016.

Discussion

The first issue to be addressed is whether or not the grievance was filed at Level One in a timely manner. "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.*" Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 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. 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 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). 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).

It is undisputed, based on the record of this case, that Grievant seeks an increase in her starting salary, and she seeks a review of the classification of the position she occupies. By filing her grievance, Grievant sought to have the agreed starting salary increased. The record established that Grievant unequivocally knew her starting salary even prior to her first day of work on April 18, 2016. Grievant waited to file her grievance until on or about December 2, 2016, approximately eight months after she accepted the position.

Grievant’s counsel argued and presented evidence, throughout the first day of hearing, that she believed her case was one relating to discrimination. The Grievance Board has ruled that “the timeliness statute is not triggered by a grievant’s discovery of a legal theory to support her claim, or the success of another employee’s grievance, but by the event or practice which is the basis of the grievance.” *Pryor, et al. v. W. Va. Dept of*

Trans/Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). Grievant's claim of discrimination, based on the fact that she discovered a document in another employee's personnel file that showed her starting salary was below that of the former employee, is a legal theory discovered well after the actual decision with regard to her starting salary was made and was unequivocally known to her. The grievance was filed untimely even if the undersigned considers the grievable event to be when Grievant reviewed the personnel file in July or August, 2016. Respondents have proven by a preponderance of the evidence that this grievance is untimely and Grievant is without reasonable excuse for the untimely filing.

This case is also moot because the Division of Personnel did review the Grievant's job classification and reclassified the position to a newly created classification. The Grievance Board will not hear issues that are moot. "[m]oot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004). In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion." This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994).

The following Conclusions of Law support the decision reached.

Conclusions of Law

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.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 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. 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 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). 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. Respondents have established by a preponderance of the evidence that this grievance was untimely filed. Grievant has not demonstrated any reason for excusing her from filing within the applicable timeliness.

5. This case is also moot because the Division of Personnel did review the Grievant's job classification and reclassified to a newly created classification.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: April 15, 2019

Ronald L. Reece
Administrative Law Judge