

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES L. WERNTZ III,

Grievant,

v.

Docket No. 2018-1438-WVU

WEST VIRGINIA UNIVERSITY,

Respondent.

DISMISSAL ORDER

Grievant, Charles Werntz III, was employed by Respondent, West Virginia University. On June 25, 2018, Grievant filed this grievance against Respondent stating, “During out-processing I discovered that in the fall of 2017 my former department charged 6 days to annual leave when I was working and representing the University. This was not requested or authorized by me. Dates: October 6, 9, 10, and 13. November 16 and 17.” For relief, Grievant seeks to “[r]estore these 6 days of annual leave to my account. [I am a 0.9 FTE employee, so this totals 40.5 Hours]”.

A level one conference was held on July 12, 2018. A level one decision was rendered on July 27, 2018, finding the grievance to be untimely. Grievant appealed to level two on August 3, 2018, and a mediation session was held on November 27, 2018. Grievant appealed to level three of the grievance process on November 27, 2018, and changed relief sought to “Provide Compensation (\$3,865.69 + interest after December 15, 2018) to compensate me for the 6 days that were inappropriately charged, and thus not paid out when I left payroll”. Grievant appeared in person. Respondent appeared by Dr. Robert Gerbo and by Samuel Spatafore, Assistant Attorney General. This matter

became mature for decision on April 11, 2019, after receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed as an Associate Professor at West Virginia University's School of Public Health. On August 24, 2017, WVU informed Grievant he was required to use annual leave to attend outside conferences and meetings scheduled for six days that fall, because he had used up the five days allotted for that purpose. In September 2017, Respondent reiterated this directive and entered annual leave on Grievant's behalf into its timekeeping system. Grievant filed this grievance in June 2018, claiming WVU had entered his leave time without his knowledge. WVU moved for dismissal due to untimely filing, arguing the grievable event was in August when Grievant was directed to use his annual leave. Grievant contends that, in conjunction with his non-renewal and subsequent out-processing on June 4, 2018, he learned his leave payout was less than he had calculated and therefore checked the timekeeping system. He contends that the fifteen-day period to file a grievance was tolled until this discovery. He further contends WVU rescinded his required use of annual leave during a meeting on September 8, 2017, and there were multiple policy violations. WVU timely moved for dismissal and proved untimely filing. Grievant did not prove any basis to excuse untimely filing. Analysis of the merits is therefore unnecessary. 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 last employed by Respondent, West Virginia University (WVU), as an Associate Professor in Occupational Medicine in the School of Public Health. (Grievant's testimony)

2. Grievant was employed by Respondent for over 20 years. (Grievant's testimony)

3. In July 2016, Grievant entered into a new annual contract with Respondent, requiring Grievant to "[m]aintain active involvement in clinical practice, and regional, state or national specialty specific organizations." (Grievant's testimony & Grievant's Exhibit 1)

4. Under his July 2016, contract, Grievant was to report directly to the Director of Occupational Medicine and the Chair of Occupational and Environmental Health Services in the School of Public Health. (Grievant's Exhibit 1)

5. Dr. Robert Gerbo serves as Director of Occupational Medicine in the School of Public Health and was Grievant's supervisor for clinical duties. (Dr. Gerbo's testimony)

6. The Chair of Occupational and Environmental Health Sciences was Grievant's supervisor for non-clinical duties. (Grievant's testimony)

7. Julie O'Neil is the Clinical Director of Occupational Medicine in the School of Public Health. (Ms. O'Neil's testimony)

8. On August 19, 2017, Grievant notified Julie O'Neil and Dr. Gerbo that he would be attending conferences and outside meetings during the fall of 2017. (Grievant's Exhibit 10)

9. On August 24, 2017, Dr. Gerbo notified Grievant via email that he had exceeded the five days faculty are granted to attend conferences or other professional

development activities and that “vacation days will need to be used for the activities referenced below.” (Grievant’s Exhibit 10)

10. These referenced activities were the six days that Grievant had scheduled to attend meetings and conferences for the Fall of 2017, including October 6, 9, 10, and 13 & November 16 and 17. (Grievant’s testimony)

11. On September 1, 2017, Grievant knew that his annual leave¹ balance was less than a day. (Grievant’s testimony)

12. Grievant accrued annual leave at a rate of two days per month. (Grievant’s testimony)

13. On September 6, 2017, Ms. O’Neil notified Grievant via email that “you will have to take vacation days on all work days off.” She informed Grievant that he only had 6.85 hours of annual leave as of September 6, 2017, and requested Grievant to let her and Dr. Gerbo know the days he planned on taking vacation. (Grievant’s Exhibit 11)

14. A few hours later, Grievant emailed Ms. O’Neil and Dr. Gerbo, stating, “[a]lthough I disagree with the underlying premise, I understand the posited annual leave vs work days issue. Until I have confirmation of the deposition scheduling I cannot identify work vs other days. I will provide that information as soon as known. I will continue to accumulate annual leave days and will take unpaid leave if necessary.” (Grievant’s Exhibit 11)

15. My Access/MyTime is a portal through which employees keep track of leave time, including annual leave, and has been in existence for at least a few years. (Grievant’s testimony)

¹“Annual leave” is paid vacation.

16. In order for a WVU employee to utilize annual leave, prior approval is required. (Grievant's testimony)

17. On September 6, 2017, Julie O'Neil entered on Grievant's behalf a request of six days annual leave on Respondent's MyAccess/MyTime tracking system and approved it. (Grievant's Exhibit 14 & 15)

18. On September 8, 2017, Dr. Gerbo and Julie O'Neil met with Grievant. Grievant expressed frustration that he was being required to use annual leave for upcoming meetings and conferences he had already scheduled, even though he had not obtained permission from Dr. Gerbo, because these activities enhanced WVU's exposure. Dr. Gerbo informed Grievant that he did not have an unlimited number of days to attend outside events and needed to focus more on his targets for clinical and consulting charges, because, while other faculty had met and exceeded their goals regarding these charges, Grievant had fallen short. Grievant was required to make up the scheduled clinics he would be missing during the six days of outside meetings and conferences he had scheduled for the Fall of 2017. (Dr. Gerbo and Ms. O'Neil's testimony & Respondent's Exhibit 2)

19. The last communication regarding annual leave between Grievant and Respondent was the September 8, 2017, meeting. (Dr. Gerbo and Ms. O'Neil's testimony)

20. Grievant and Ms. O'Neil exchanged emails to reschedule the clinic days Grievant would be missing while attending six days of meetings and conferences during the Fall of 2017. (Grievant's Exhibit 12)

21. On September 29, 2017, Julie O'Neil emailed Grievant, "I have cc'd Veronica to help with this since we are traveling for Greer consulting work. She can provide some dates that would work best." (Grievant's Exhibit 12f)

22. Respondent notified Grievant that his annual employment contract would not be renewed for the 2018-2019 academic year.

23. On June 4, 2018, Grievant met with human resources for out-processing and, upon determining that his payout for unused annual leave was less than he expected, reviewed the MyAccess/MyTime system, which revealed the six days of annual leave that had been logged on his behalf for the Fall of 2017. (Grievant's Exhibit 14 & testimony)

24. Grievant did not check MyAccess/MyTime between at least September 1, 2017, and June 4, 2018. (Grievant's testimony)

25. Grievant had regular access to MyAccess/MyTime, knew how to navigate it, and had previously navigated it. (Grievant's testimony)

26. On July 2, 2018, prior to the level one conference, Respondent filed a motion to dismiss the grievance based on untimeliness. (Level one Dismissal Order)

27. Respondent renewed its motion to dismiss at the level three hearing.

Discussion

Respondent asserts that the grievance was not filed within the time period allowed by W. Va. Code § 6C-2-4 and that the grievance must be dismissed. "[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. *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).” *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

Respondent asserts that this grievance was untimely filed because it informed Grievant on August 24, 2017, that he would need to use annual leave to attend outside conferences and meetings he had scheduled for the Fall of 2017, yet Grievant waited until June 25, 2018, to file this grievance. The first issue which needs to be addressed is whether Respondent properly raised a timeliness defense. “Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. Va. Code § 6C-2-3(c)(1). Respondent asserted at level one that the grievance was untimely filed. The next issue which needs to be addressed is whether Grievant timely filed his grievance. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance 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).

For purposes of the grievance process, “[d]ays’ 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). The first day to be counted in calculating Grievant’s deadline for filing is August 25, 2017.

“[I]n computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). ...

Williamson v. W. Va. Dep’t of Tax and Revenue, Docket No. 98-T&R-275D (Sept. 30, 1998).” *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015). Fifteen working days from the August 24, 2017, is September 15, 2017.

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). It is undisputed that Respondent told Grievant on August 24, 2017, that he would have to use annual leave for the days he was at outside meetings and conferences in the Fall of 2017. Respondent has also proven that Grievant was unequivocally notified via email on September 6, 2017, and in person on September 8, 2017, that Grievant would be required to use annual leave to attend conferences for six days in the Fall of 2017. Grievant did not file this grievance until June

25, 2018, a span of almost ten months after Grievant was informed of the required use of leave. Respondent has proven that Grievant's filing was untimely.

The burden now shifts to the Grievant to prove a proper basis to excuse his untimely filing. Grievant contends that he did not know his annual leave had been logged until nine months after Respondent entered it without his permission on September 6, 2017. Respondent never informed Grievant that it entered his annual leave, even though it met with him two days later on September 8, 2017. Nevertheless, Grievant knew that Respondent was requiring him to use annual leave to attend his outside conferences and meetings that fall, but did not check his leave on MyAccess/MyTime until nine months later. Grievant testified that he knew how to use MyAccess/MyTime, had access to it at work, and was concerned about Respondent's decision requiring him to use annual leave to attend conferences he felt WVU was benefiting from and that were a part of his contract. In spite of his concerns regarding required use of leave, and in spite of having and knowing how to access MyAccess/MyTime, Grievant inexplicably waited nine months to check his leave usage. It seems opportunistic of Grievant to now argue that the timeline for filing his grievance should be tolled nine months beyond the date of the grievable event. The Grievance Board has previously held that the fifteen-day timeframe for filing is not tolled until Grievant is unequivocally notified that an event is grievable, but begins when he is "unequivocally notified of the decision being challenged." *Id.* Grievant was unequivocally notified of the decision he is grieving when Respondent first informed him on August 24, 2017, of its decision to charge him annual leave for the six days he had set aside to attend meetings and conferences in the Fall of 2017.

Grievant contends that during their September 8, 2017, meeting, Dr. Gerbo and Ms. O'Neil changed their minds about requiring him to use annual leave for the six days he would be at meetings and conferences. In support thereof, Grievant points to the fact that he was required to make up the clinics he missed during the six days in question. Grievant further submitted as proof of Respondent's change of mind an email Ms. O'Neil sent Grievant on September 29, 2017, stating, "I have cc'd Veronica to help with this since we are traveling for Greer consulting work. She can provide some dates that would work best." Ms. O'Neil's email was in response to clinic makeup dates Grievant had sent her. Grievant argues that Dr. Gerbo tacitly approved a reversal in the required use of annual leave by offering no response when Ms. O'Neil copied him on her email. Dr. Gerbo and Ms. O'Neil testified that they never told Grievant they had changed their minds. The undersigned can see nothing in Ms. O'Neil's email which insinuates a change in Respondent's requirement that Grievant use annual leave for the six days he submitted for meetings and conferences. However, through Grievant's assertion that Dr. Gerbo and Ms. O'Neil rescinded their initial requirement that Grievant use annual leave, the undersigned can infer Grievant's understanding subsequent to the August 24, 2017, and September 6, 2017, emails was that he was required to use annual leave. The burden is on Grievant to prove that Respondent subsequently rescinded this required use of annual leave.

In furtherance of his contention that Respondent rescinded its required use of annual leave, Grievant asserts that during the September 8, 2017, meeting with Dr. Gerbo and Ms. O'Neil, Dr. Gerbo told Grievant he did not need to use annual leave for the six days in question if he made up the clinic days he would be missing. Both Dr. Gerbo and

Ms. O'Neil denied such a conversation occurred. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Every credibility factor is not always available for analysis. In the instant case, consistency of prior statements and plausibility are in play for our credibility analysis. A review of Grievant and Dr. Gerbo's testimony reveals that the plausibility of Grievant's testimony is suspect. Up until the supposed conversation in which Dr. Gerbo informed Grievant he was rescinding the required use of annual leave for the six days at issue, every email exchanged between Grievant and Dr. Gerbo was copied by the sender to various other individuals. There were obvious tensions between the two during the hearing, and Grievant took gratuitous verbal jabs at Dr. Gerbo, commenting between his

questions to Dr. Gerbo, “fortunately you were not my supervisor at the time” and “I had a much more thoughtful and insightful supervisor.” Grievant testified that Dr. Gerbo was upset during their September 8, 2017, meeting. It was apparent that their relationship had soured long before this meeting. In this environment, it seems unlikely that Dr. Gerbo would have changed his mandate that Grievant use annual leave.

However, even if Dr. Gerbo had changed his mind, it seems implausible that none of the three individuals present at the meeting would have reduced that stated change to writing, either in the form of a contemporaneous note or a follow up email. Grievant had previously created a written trail in his communications with Dr. Gerbo and Ms. O’Neil. It defies credibility that Grievant would not then document a conversation in which Dr. Gerbo changed his directive to favor Grievant. Grievant did not make any contemporaneous notes or written confirmation of this conversation. However, Dr. Gerbo did make a contemporaneous note of this meeting, which included no mention of a change to the previously required use of annual leave. This contemporaneous written statement is consistent with Dr. Gerbo’s subsequent testimony. The undersigned therefore cannot find Grievant’s assertion of a change to be more credible than Dr. Gerbo denial.

As for Grievant’s claim that Respondent would not have required him to makeup his missed clinic days if it was also requiring him to use annual leave for those missed clinic days, Dr. Gerbo refuted this in testifying that Grievant could not afford to miss clinic days since clinics directly contributed to the targets that had been set for Grievant’s clinical and consulting charges, and that (unlike the other faculty) Grievant fell far short of his mandated financial goal. Professionals typically have tasks that must be

accomplished regardless of their leave utilization. Meeting goals for clinical charges is one of these indispensable tasks.

Grievant further contends that he did not give Respondent permission to enter annual leave on his behalf and did not know that Respondent had actually entered annual leave for the days he was out in the Fall of 2017, until nine months later. In conjunction with the non-renewal of his employment contract for the 2018-19 academic year, Grievant out-processed on June 4, 2018. Grievant contends he noticed that his payout for unused annual leave was less than he thought it should be when he was out-processing with human resources. He checked MyAccess/MyTime that same day and noticed the six days of annual leave that Respondent had entered on his behalf back on September 6, 2017.

Additionally, Grievant argues that in processing his annual leave without his permission, Respondent violated its annual leave usage policy which he says requires that annual leave be processed as unauthorized leave if a leave eligible employee does not follow established procedures for requesting leave. “[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). See also *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).” *Lynch v. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997) *aff’d*, Kanawha Co. Cir. Ct. Docket No. 97-AA-110 (Jan. 21, 1999). A strict reading indicates that Grievant had fifteen working days from August 24, 2017, to grieve. Yet, Grievant waited until June 25, 2018, to file a grievance, using June 4, 2018,

as the date of the grievable event. Grievant could have checked MyAccess/MyTime at any point to determine if Respondent had charged him annual leave as it had previously required, and had reasonable notice on August 24, 2017, and again on September 6 & 8, 2017, that he should check his leave time, not only because Respondent told him he would have to use it, but specifically because Grievant disagreed with the fact that Respondent was requiring him to use it.

Grievant could have addressed the issue head on by filing a grievance when he was given the mandate to use annual leave. The grievable event was Respondent's decision requiring Grievant to use annual leave. The entering of that annual leave by Respondent on Grievant's behalf was simply a consequence of that decision. "[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event." *Bailey v. McDowell Cnty. Bd. of Educ.*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 00-AA-168 (Aug. 12, 2003), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 032841 (Apr. 1, 2004). "[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive." *Reeves v. Wood Cnty. Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *Mills v. Wayne Cnty. Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 06-AA-92 (Jun. 16, 2009), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 081693 (Dec. 29, 2008).

Respondent informed Grievant on August 24, 2017, September 6, 2017, and September 8, 2017, that he would be required to use annual leave for the conferences he was scheduled to attend for six days that fall. Grievant should have reasonably

suspected, based upon Respondent 's representation that he would be required to use annual leave, that Respondent would enter Grievant's annual leave time for him if he failed to do so. At the very least, as each of those six days passed without any further communication between Respondent and Grievant, Grievant should have checked MyTime/MyAccess to see how his time for those days was processed. Instead, Grievant had no further communication with Respondent about annual leave for those days and inexplicably failed to at least check his annual leave usage on MyAccess/MyTime for the following nine months. By not timely filing, Grievant forfeited his right to argue that Respondent violated his rights and all claims surrounding the manner in which Respondent processed his annual leave. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001). This grievance was not timely filed. Respondent has proven by a preponderance of the evidence that this grievance was untimely. Grievant has not proven by a preponderance of the evidence a proper basis for his untimely filing. The undersigned need not address the merits of any aspect of this grievance. This grievance is hereby dismissed.

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. *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).” *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. “Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1).

3. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance 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).

4. For purposes of the grievance process, “[d]ays’ 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).

5. “[I]n computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). ... *Williamson v. W. Va. Dep't of Tax and Revenue*,

Docket No. 98-T&R-275D (Sept. 30, 1998).” *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015).

6. 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); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff’d*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016).

7. “[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event.” *Bailey v. McDowell Cnty. Bd. of Educ.*, Docket No. 07-33-399 (Nov. 24, 2008). *See also Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 00-AA-168 (Aug. 12, 2003), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 032841 (Apr. 1, 2004). “[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.” *Reeves v. Wood Cnty. Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *Mills v. Wayne Cnty. Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 06-AA-92 (Jun. 16, 2009), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 081693 (Dec. 29, 2008).

8. “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-

DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

9. Respondent has proven by a preponderance of evidence that the grievance was not timely filed.

10. Grievant has not proven by a preponderance of evidence that a proper basis exists to excuse his failure to file in a timely manner.

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 (2018).

DATE: May 9, 2019

Joshua S. Fraenkel
Administrative Law Judge