

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LESLIE ELIZABETH BRAGG,
Grievant,**

v.

Docket No. 2021-0250-DOA

**PUBLIC EMPLOYEES INSURANCE AGENCY,
Respondent.**

DISMISSAL ORDER

Grievant, Leslie Elizabeth Bragg, was employed by Respondent, Public Employees Insurance Agency. On August 19, 2020, by email, Grievant filed this grievance against Respondent alleging harassment, conversion of resignation to resignation in lieu of termination with an earlier effective date, and refusal of access to PEIA computer systems in her new job. For relief, Grievant sought for her resignation to be corrected to voluntary, access to the PEIA computer system in her new job, cessation of harassment, removal of EPAs, payment of final wages, including two weeks of donated pay, payment for her prior suspension, and \$30 per month for telework costs. In addition, Grievant requested that her previously-filed grievances be consolidated into the instant grievance.

On the same date, by counsel, Respondent filed a motion to dismiss by email stating Grievant had no grievance rights as she had resigned and was no longer a state employee. A video conference was held on September 8, 2020, before the undersigned. Grievant appeared *pro se*¹. Respondent appeared by its Director, Ted Cheatham, and by counsel, William B. Hicks. This matter became mature for decision

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

on September 24, 2020, upon final receipt of the parties' written arguments. Following the conference, by letter dated October 25, 2020, Grievant requested an expedited hearing based on the loss of her new employment due to lack of access to Respondent's computer system and renewed her request to consolidate her previously-filed grievances. Grievant also appeared to request to amend her grievance to include the loss of her new employment.

Synopsis

Grievant was employed by Respondent and voluntarily resigned her position. Respondent, in accepting the resignation, noted it was in the process of dismissing Grievant for misconduct at the time of her resignation, and that she would, therefore, be barred from using Respondent's computer systems. Grievant asserts Respondent has harassed her in her new employment by denying her access to Respondent's computer systems and Respondent has failed to properly and timely pay her final wages. Grievant also protests several other issues predating her resignation. Grievant's claims regarding her resignation and from before her resignation are untimely and Grievant has failed to demonstrate a proper excuse for her untimely filing. The Grievance Board lacks jurisdiction to hear her claims of alleged harassment by Respondent in her new position or to address claims under the West Virginia Wage Payment and Collection Act. 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. By email dated July 20, 2020, Grievant notified Respondent, through its Director of Operations, Charlotte Stover, of her intent to resign effective August 1, 2020.

2. By letter dated July 22, 2020, Ms. Stover accepted Grievant's voluntary resignation "while in the process of being dismissed for misconduct," and that any request to withdraw the resignation "would not be considered." Ms. Stover stated that Grievant's separation from employment would be July 9, 2020, Grievant's last day of work, as Grievant had resigned during a leave of absence. Ms. Stover explained the reasons why dismissal was previously being sought and that, as a result, Grievant would be permanently prohibited from future access to PEIA records or systems.

3. The letter was sent to Grievant by email and by certified mail.

4. Grievant received the certified mail on July 27, 2020.

5. Due to the pandemic, Grievant did not open the certified mail until July 29, 2020.

6. Due to Respondent's change of Grievant's last day of employment to July 9, 2020, Grievant was not paid donated leave that she was to receive if she had been permitted to resign effective August 1, 2020.

7. Grievant left employment with Respondent to take another position but that position requires Grievant to have access to Respondent's computer systems, which access Respondent has denied.

8. Although Grievant dated her grievance form August 13, 2020, she did not file her form until August 19, 2020, when she emailed the same to the Grievance Board.

Discussion

During the video conference, Respondent withdrew its previous motion to dismiss and made an oral motion to dismiss the grievance for untimeliness and failure to state a claim upon which relief can be granted. 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). 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). “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).

The letter unequivocally notified Grievant her resignation was accepted, her resignation could not be withdrawn, her separation date would be July 9, 2020 instead of August 1, 2020, and Grievant would be permanently prohibited from future access to PEIA records or systems. Grievant does not dispute that she received the certified letter on July 27, 2020, but argues that she did not receive notice until July 29, 2020 because she did not open the certified mail due to the coronavirus pandemic. While Grievant may certainly choose to delay opening her mail, and such choice may even have been prudent under the circumstances, it does not change when she was notified of Respondent’s action or excuse her failure to file her grievance within the time limits. Otherwise, a grievant could simply refuse to open their certified mail and argue that they were never notified, which is an absurd result. Therefore, Grievant had fifteen days from July 27, 2020, in which to protest Respondent’s decisions as announced in the July 22, 2020 letter. Grievant was required to file by August 17, 2020, and did not file her grievance until August 19, 2020, so was untimely as to those issues. This also

includes the consequences of Respondent's decisions; that she did not receive donated leave or leave accrual for the period between July 9, 2020, when Respondent made her separation effective, and August 1, 2020, when Grievant had stated she would separate. Likewise, Grievant's protest regarding her employee performance evaluations and failure to pay telework costs, which occurred prior to her resignation, are untimely.

Grievant also grieved Respondent's alleged harassment of her following her separation from employment and for alleged failure to pay her final wages in a timely manner. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

"The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). "'Employer' means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section." W. VA. CODE § 6C-2-2(g).

"Grievance" means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including:

(i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;

(ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;

(iii) Any specifically identified incident of harassment;

(iv) Any specifically identified incident of favoritism; or

(v) Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee.

W. VA. CODE § 6C-2-2(i)(1).

Grievant alleges Respondent harassed her following her separation from employment. Grievant was not an employee, nor was Respondent her employer at the time she alleged Respondent harassed her. Therefore, the Grievance Board has no authority to address Grievant's claims of harassment.

Grievant alleges her final wages were not timely paid, citing the timelines and availability of liquidated damages under the West Virginia Wage Payment and Collection Act, W. VA. CODE § 21-5-1, *et seq.* The Grievance Board lacks the authority to adjudicate claims or award damages under W. VA. CODE § 21-5-1, *et seq.* W. VA. CODE § 6C-2-1, *et seq.* provides the Grievance Board with no authority to award damages pursuant to W. VA. CODE § 21-5-4. Not even the Division of Labor, which is otherwise charged to adjudicate claims pursuant to the West Virginia Wage Payment

and Collection Act, W. VA. CODE § 21-5-1, *et seq.*, has been granted the authority to award damages, that authority being reserved to the judiciary. See Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003).

Grievant's claim that her payment of final wages was not made timely is a claim under the West Virginia Wage Payment and Collection Act, for which the Grievance Board has no jurisdiction. Grievant's claim that Respondent improperly denied her payment for leave and leave accrual is time-barred as discussed above.

As to the requests Grievant made after the conference, they must be denied. Grievant's request to consolidate her previously-filed grievances is moot as the instant grievance is being dismissed but it is also noted, as was explained to Grievant during the video conference, neither of her previously-filed grievances are live as docket number 2020-1060-DOA was withdrawn on August 3, 2020 and docket number 2020-1501-DOA was denied at level one and not appealed. As with Grievant's claims of Respondent's alleged harassment of her after the termination of her employment and as discussed above, the Grievance Board does not have jurisdiction to remedy Grievant's allegation that Respondent has caused the loss of her subsequent employment.

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). 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). “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).

3. 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).

4. Grievant was unequivocally notified of Respondent's decisions regarding her resignation on July 27, 2020, when she received the certified mail.

5. Grievant's decision not to open the certified mail due to the coronavirus pandemic does not excuse her failure to file her grievance within fifteen days of her receipt of the certified mail notice.

6. Grievant's claims relating to her resignation and employment issues occurring prior to her resignation are untimely.

7. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

8. "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). "'Employer' means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional

educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-2-2(g).

"Grievance" means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including:

(i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;

(ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;

(iii) Any specifically identified incident of harassment;

(iv) Any specifically identified incident of favoritism; or

(v) Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee.

W. VA. CODE § 6C-2-2(i)(1).

9. The Grievance Board lacks jurisdiction to address Grievant's claims of Respondent's alleged harassment in her current position.

10. The Grievance Board lacks the authority to adjudicate claims or award damages under W. VA. CODE § 21-5-1, *et seq.* W. VA. CODE § 6C-2-1, *et seq.* provides the Grievance Board with no authority to award damages pursuant to W. VA. CODE § 21-5-4. Not even the Division of Labor, which is otherwise charged to adjudicate claims pursuant to the West Virginia Wage Payment and Collection Act, W. VA. CODE § 21-5-1, *et seq.*, has been granted the authority to award damages, that authority being reserved

to the judiciary. See Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003).

11. The Grievance Board lacks jurisdiction to address Grievant's claims related to Respondent's alleged failure to timely pay her final wages.

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: October 29, 2020

Billie Thacker Catlett
Chief Administrative Law Judge