

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAUL GULLET,
Grievant,

v.

Docket No. 2019-1781-DHHR

DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/WELCH COMMUNITY
HOSPITAL and DIVISION OF PERSONNEL,
Respondents.

DISMISSAL ORDER

Paul Gullett, Grievant, is employed by Respondent, Department of Health and Human Resources (“DHHR”) and assigned to Welch Community Hospital in the HVAC Technician classification. Mr. Gullett filed a level one grievance form dated June 17, 2019, alleging that he has been working as an HVAC technician since October 2017, even though his position was classified as a plumber. In the “Relief Sought” section Mr. Gullett wrote:

I feel I have been worked out of my classification since early October 7, 2017 to April 24, 2019. I was classified as a Plumber and have since been upgraded to HVAC Technician. I am seeking financial compensation/backpay from October 7, 2017 to April 24, 2019.¹

The Division of Personnel, through its counsel, Karen O’Sullivan Thornton, Assistant Attorney General, filed a *Motion to Dismiss* on December 11, 2019, alleging that the grievance was untimely filed. Grievant, Paul Gullett, appearing *pro se*² filed a

¹ This statement is written unchanged herein as it appears on the grievance form.

² “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

response to the motion on December 18, 2019. This matter is mature for a decision on the motion.

Synopsis

Respondent moved to dismiss this grievance alleging that it was not filed within fifteen days of the date Grievant was notified that his reallocation did not include granting of backpay. Grievant argues that his filing was timely because it was simply part of the reallocation process with DOP. Respondent proved that a grievance for backpay is not part of the reallocation process and that Grievant's claim was not filed within the mandatory time period set out in statute.

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. Paul Gullett, Grievant, is employed by Respondent, Department of Health and Human Resources ("DHHR") and assigned to Welch Community Hospital in the HVAC Technician classification.
2. Grievant's position was originally classified as a Plumber. The position was reallocated HVAC Technician classification in April 27, 2019.
3. Grievant Gullett, filed the above reference grievance against Respondent DHHR on June 17, 2019. The remedy sought backpay for the period from October 7, 2017, through April 24, 2019, the period Grievant alleges his position was misallocated to the Plumber classification. The grievance form was received by the Grievance Board on June 19, 2019, without a postmark.

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 appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” W.VA. CODE ST. R. § 156-1-6.2 (2018). The administrative law judge may dispose of a grievance through an appealable dismissal order. W.VA. CODE ST. R. § 156-1-6.19.3.

When, as in this case, a respondent seeks to have a grievance dismissed on the basis that it was not timely filed, the respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the respondent has demonstrated a grievance has not been timely filed, the grievant 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 Employment 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).

In this matter Grievant is solely seeking backpay for the time his position was classified as Plumber before it was reallocated to the HVAC Technician classification. Respondent, Division of Personnel (“DOP”), provides documentation demonstrating that Grievant’s position was reallocated on April 27, 2019, but Grievant did not file a grievance until June 17, 2019, yet he did not file his grievance until more than thirty (30) days after he received the reallocation. Respondent argues that the filing of the grievance is outside the fifteen (15) days allowed for the filing of a grievance. Grievant argues that his claim for backpay is part of the “ongoing process with Division of Personnel” and should not be dismissed.

The process for seeking reallocation of a position is established in the DOP Administrative Rule which 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 allocation action by submitting a written request to the Director within fifteen (15) working days of the effective date of the action. The Director shall not reallocate a position based on temporary changes in the duties and responsibilities assigned to the position.

W. VA. CODE ST. R. § 143-4.7. A claim for backpay is not part of this process.

Grievant's position was reallocated on April 27, 2019. Assuming that he was not notified about the reallocation until May 1, 2019, more than 30 days passed before the grievance was filed. Grievant was unequivocally notified when his position was reallocated that backpay was not included in the reallocation. He was required by statute to file his grievance within fifteen (15) days of that date. See W. VA. CODE § 6C-2-4(a)(1). Grievant did not file his claim within that time. Accordingly, the Motion to Dismiss is **GRANTED**.

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.*" W.VA. CODE ST. R. § 156-1-6.2 (2018). The administrative law judge may dispose of a grievance through an appealable dismissal order. W.VA. CODE ST. R. § 156-1-6.19.3.

2. When, as in this case, a respondent seeks to have a grievance dismissed on the basis that it was not timely filed, the respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the respondent has demonstrated a grievance has not been timely filed, the grievant 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).

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. “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).

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 Employment 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).

6. Grievant did not file his claim within fifteen days of the time he was unequivocally notified that his position was reallocated without the inclusion of backpay.

Accordingly, the Motion to Dismiss is **GRANTED**.

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 (2018).

DATE: January 23, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE