

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**HEATHER R. KESSEL,
Grievant,**

v.

Docket No. 2020-1031-DOC

**DIVISION OF NATURAL RESOURCES,
Respondent.**

DISMISSAL ORDER

Grievant, Heather Kessel, filed this action against her employer, Division of Natural Resources, on or about March 10, 2020. Grievant alleges that Respondent violated equal opportunity employment requirements, committed unethical hiring procedures, acted with favoritism prior to and during the hiring process, and acted unlawfully in an arbitrary fashion during the hiring process.

This case was waived from Level One by Respondent's designee on April 1, 2020, because he reported that he did not have authority to decide the grievance. Prior to this action, Respondent filed a Motion to Dismiss the case with the Grievance Board on March 23, 2020. Grievant was provided notice of this filing by the Grievance Board and given an opportunity to respond to the Motion to Dismiss. Grievant provided a response to this motion on March 25, 2020, expressing her opposition to the request. Grievant appeared *pro se*. Respondent appeared by its counsel, Jane Charnock, Assistant Attorney General. This case was assigned to the undersigned on April 15, 2020, to issue a ruling on the Motion to Dismiss.

Synopsis

Grievant alleges irregularities regarding the filling of a position by her employer. Grievant did not apply for this position. Given the circumstances of this case, Grievant lacks standing to pursue her grievance. In addition, the record established that the grievance was not timely filed. Accordingly, Respondent's Motion to Dismiss is granted.

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

Findings of Fact

1. Grievant is employed by the Division of Natural Resources as an Administrative Services Assistant I.
2. This grievance relates to alleged hiring illegalities regarding the filling of an Administrative Services Assistant I position, which was posted on April 8, 2019, and filled on June 8, 2019.
3. Grievant did not apply for this position.
4. Grievant asserts that after the position was filled, a reallocation was made and the hired employee's position became that of a Procurement Specialist. The reallocation resulted in a pay raise for the employee.
5. Grievant asserts that the reallocation was effective February 1, 2020.
6. Grievant filed this action on or about March 10, 2020.

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). When the employer asserts an affirmative defense, it

must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent states the Grievant does not have standing to pursue this grievance. The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); See *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). Where a grievant does not apply for a vacant position she does not have a sufficient personal stake in the selection to hold standing to file a grievance contesting the selection or the propriety of the posting. *Barber v. Mercer County Bd. of Educ.*, Docket No. 2008-0001-MerED (Aug. 26, 2008); *Sanders v. Pocahontas County Bd. of Educ.*, Docket No. 06-38-430 (May 10, 2007). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

A grievant “must allege an injury in fact, either economic or otherwise, which is a result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.” *Shobe v. Latimer*, 162 W.Va.779, 253 S.E.2d 54 (1979).

A general claim of unfairness or an employee’s philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996); *McDonald v. Hancock County Bd. of Educ.*, Docket No. 15-88-055-3 (Sept. 30, 1988). Even if the employer has misapplied a statute or its own policies, where the grievant is not personally harmed, there is no cognizable grievance. *Elliott v. Randolph County Bd. of Educ.*, Docket No. 98-42-304 (May 26, 1999).

In the instant case, Grievant does not dispute that she did not apply for the posted position of Administrative Services Assistant I. While Grievant did not apply for the posting, she now asserts that had she known of the reallocation she would have applied for the position. The fact remains that this grievance is based upon Grievant’s current desire to hold a position for which she never applied. Under this set of facts, it is clear that Grievant does not have a personal stake in the employment term of this position.

Respondent also asserts that the grievance is untimely. 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).

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).

Assuming arguendo Grievant's assertion that the position was reallocated on or about February 1, 2020, and it being undisputed that the position was filled on June 8, 2019, this grievance was clearly not timely. The grievance was filed on March 10, 2020, well outside of the 15 days following the occurrence of either event upon which the grievance is based. The undersigned rules that Grievant lacks standing to pursue this action and that it was not timely filed.

The following Conclusions of Law support the dismissal of this case.

Conclusions of Law

1. Rules of Practice and Procedure of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.2 provides that an "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.*"

2. The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). Where a grievant does not apply for a vacant position she does not have a sufficient personal stake in the selection to hold standing to file a grievance contesting the selection or the propriety of the posting. *Barber v. Mercer County Bd. of Educ.*, Docket No. 2008-0001-MerED (Aug. 26, 2008); *Sanders v. Pocahontas County Bd. of Educ.*, Docket No. 06-38-430 (May 10, 2007). The Grievance

Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

3. 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

4. Respondent established by a preponderance of the evidence that Grievant lacks standing to pursue this action, and the grievance was not filed in timely manner.

Accordingly, 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 § 6.19 (2018).

Date: May 6, 2020

Ronald L. Reece
Administrative Law Judge