

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LOVE OAKLEY SABATINI,

Grievant,

v.

Docket No. 2022-0210-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,**

Respondent.

DISMISSAL ORDER

Grievant, Love Oakley Sabatini, filed this expedited level three grievance against her employer, Respondent, Department of Health and Human Resources, Bureau for Public Health ("DHHR"), on September 15, 2021, stating as follows: "I was accused of several reasons, one in particular of not showing up for work and told months later. I have been also harassed and belittled on email from the supervisor, prior to after the first grievance incident i had already had with Mrs. Shaffer, and she kept putting me on improvement plans, etc."¹ As relief sought, Grievant seeks, "I would like for her and or any coworker, from making me feel like i can not do my job, and to get my job back. I really think i have been severely harassed, and they do not care about my mental health issues. So, i had been discriminated, and they knew i had been harassed, should i mention sexually in the past."²

The level three hearing in this matter is scheduled to be conducted on February 22, 2022. On October 12, 2021, Respondent, by counsel, submitted a Motion to Dismiss

¹ The statement of grievance bears a signature date of September 13, 2021. However, it was received electronically by the Grievance Board on September 15, 2021. This is a direct quotation from the "statement of grievance" section on the Grievance Form.

²This is a direct quotation from the "relief sought" section of the Grievance Form.

to the Grievance Board by email, copying Grievant's representative on the same. At the direction of the undersigned administrative law judge, Grievance Board staff informed Grievant, by her representative, that if she wished to file a response, such was to be filed before close of business on October 26, 2021. Grievant failed to submit a response to the Motion to Dismiss. Grievant appears *pro se*. Respondent appears by counsel, Katherine A. Campbell, Esquire, Assistant Attorney General. The Motion to Dismiss is mature for decision.

Synopsis

Grievant was employed by Respondent as a Office Assistant 2. Approximately three months after being informed of her dismissal, Grievant filed a grievance challenging the same. Respondent proved by a preponderance of the evidence that this grievance was untimely filed. Grievant failed to demonstrate any proper bases for excusing her untimely filing. Therefore, the grievance is DISMISSED. The level three hearing currently scheduled to be held on February 23, 2022, is canceled.

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 employed by Respondent as an Office Assistant 2 in the Bureau for Public Health.
2. Grievant was notified of her dismissal from her employment on June 9, 2021, to be effective June 24, 2021.³

³ See, Respondent's Motion to Dismiss, Exhibit 1, June 9, 2021, Notice of Dismissal Letter.

3. Grievant submitted this expedited grievance on September 15, 2021.

4. Respondent submitted its Motion to Dismiss on October 12, 2021, serving the same upon Grievant by email.

5. On October 12, 2021, the Grievance Board emailed both Grievant and Respondent, attaching Respondent's Motion to Dismiss, stating, in part, as follows: "Ms. Sabatini, should you wish to respond to the pending motion, please do so in writing, before close of business on October 26, 2021. Filing a written response is encouraged. The administrative law judge will decide whether to dismiss the grievance based on a review of the file, the submissions of the parties, and applicable law. . . Failure to respond may or may not result in the above referenced grievance being dismissed. . . ."

6. Grievant failed to submit a response to Respondent's Motion to Dismiss.

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). Therefore, Respondent has the burden of proving its claims by a preponderance of the evidence. "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 argues that this grievance should be dismissed as being untimely filed because Grievant was notified of her dismissal on June 9, 2021, and she filed this grievance on September 15, 2021. Grievant has been provided the opportunity to respond to the Motion to Dismiss, but she has failed to do so.

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018). “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

“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 Grievance Board's authority is granted by W. VA. CODE § 6C-2-1, *et seq.*, to resolve grievances, which are defined and limited by that statute.

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).

If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. See *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

timelines. See *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997).

Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Grievant was unequivocally notified of her dismissal by letter dated June 9, 2021; however, she did not file this grievance until September 15, 2021. This was well outside the fifteen-day statutory timeframe for filing a grievance. Grievant has made no argument, or otherwise demonstrated, that her untimely filing should be excused. Therefore, this grievance is DISMISSED.

The following Conclusions of Law support the dismissal of this grievance:

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).

2. 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).

3. 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. 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).

5. If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. See *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).

6. Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Grievant has not demonstrated a proper basis for excusing her from filing within the applicable timelines.

Accordingly, this 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 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 (eff. July 7, 2018).

DATE: December 10, 2021.

Carrie H. LeFevre
Administrative Law Judge