

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHAWNA MARIE CARSON,
Grievant,**

v.

Docket No. 2020-1058-MAPS

**DIVISION OF ADMINISTRATIVE SERVICES
and DIVISION OF PERSONNEL,
Respondent.**

DISMISSAL ORDER

Grievant, Shawna Marie Carson, is employed by Respondent Division of Administrative Services ("DAS"). Her position is in the HR Generalist 2 classification. Ms. Carson filed a level one grievance form dated March 17, 2020, alleging:

This grievance is being filed against the Division of Administrative Services and the Division of Personnel. This is in response to a denied Appeal in my efforts to increase my classification from an HR Generalist 2 to an ASM 1. Throughout the process I have repeatedly provided extensive materials to support my increase to an ASM 1. . .

As relief Grievant seeks:

I want the Division of Personnel to accept my revised application with proper review with the provided affidavits confirming the performed work listed. I want to be promoted to the ASM 1 position including all back pay dated back to the original effective date of 02/16/20.

The DAS Director waived this matter to level two by letter dated April 7, 2020. The Division of Personnel ("DOP") was joined as a party Respondent by order dated June 17, 2020.

The Division of Personnel filed a Motion to Dismiss prior to the level two mediation on July 31, 2020. Grievant filed a Response to the Motion to Dismiss dated August 10, 2020. Following the mediation held October 8, 2020, Grievant appealed to level three.

DOP filed a renewed Motion to Dismiss on February 10, 2021, and Grievant renewed her response. Respondent DOP is represented by Karen O'Sullivan Thornton, Assistant Attorney General. Grievant is participating *pro se*.¹ This matter is now mature for a decision on the Motion to Dismiss.

Synopsis

Respondent DOP seeks dismissal of this grievance arguing that it was not filed within fifteen days of the action giving rise to it. DOP argues that a final determination was made that Grievant did not meet the minimum qualifications for the ASM 1 classification on December 19, 2019, but the grievance was not filed until March 17, 2020, months after the final notification. Grievant argues that the DAS Director and the DOP Director discussed her situation over the period of January 17, 2020 through March 4, 2020. She asserts that she was not unequivocally notified of DOP's decision until March 4, 2020, rendering her grievance timely.

DOP unequivocally notified Grievant regarding her qualifications vis-à-vis the ASM 1 classification on December 19, 2019. That was the date when the filing time began to run. Grievant and her supervisor could continue to discuss the matter thereafter but that does not toll the filing deadline.

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.

¹ "*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. DAS did not participate in the motion or response.

Findings of Fact

1. Grievant, Shawna Marie Carson, is employed by Respondent, Division of Administrative Services (“DAS”). Her position is in the HR Generalist 2 classification.

2. Respondent submitted a position description form (“PDF”) to the DOP seeking to have Grievant’s position reallocated to the Administrative Services Manager 1 classification. By letter dated November 22, 2019, the DOP issued a Position Review Determination concluding that the appropriate classification for the position was ASM 1. The Review Determination specifically stated the following:

Please note that this reallocation action is for the position, not the employee. Ms. Carson must meet the minimum training and experience qualifications for the recommended classification (and may be required to pass a written examination).²

3. Respondent issued a personnel action for approval to promote Grievant with the reallocation of her position.

4. On December 6, 2019, DOP rejected a personnel transaction entered by Respondent DAS to promote Grievant from a HR Generalist 2 to an ASM 1 after determining that Grievant did not meet the minimum qualification of the ASM 1 classification. (Respondent Attachment 2).

5. On December 11, 2019, Respondent DAS, in cooperation with Grievant, provided additional information regarding Grievant’s prior work experience to the DOP as an appeal for DOP to change the determination regarding Grievant’s qualifications. *Id.*

6. DOP staff reviewed the additional information and met with the DAS Director and her staff to discuss the issue of Grievant’s qualifications for the ASM 1

² Respondent Attachment 1.

classification. On December 19, 2019, DOP Director Sheryl Webb informed Respondent DAS and Grievant, that Grievant still did not meet the minimum qualifications for the ASM 1 classification. *Id.*

7. DOP further offered to assist DAS in realigning and reassignments of duties for the position to meet the needs of the agency. *Id.*

8. DAS Director Jennifer Wilson continued to contact DOP Director Webb concerning ways Grievant's experience might be interpreted to meet the ASM 1 classifications, including a lunch meeting held on January 17, 2020. By email dated March 4, 2020, Director Webb restated DOP's finding of December 6 and December 11, 2019, and advised Director Johnson that nothing she had been provided had changed DOP's determinations.

9. Ms. Carson filed the present grievance dated March 17, 2020, contesting DOP's determination that her work experience did not meet the minimum qualifications for the ASM 1 classification.

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.*" *Rules of Practice and Procedure of the West Virginia Public Employees Grievance*, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge's discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

Respondent DOP asserts that the grievance brought by Ms. Carson was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and therefore it must be dismissed. When 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 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).

W. VA. 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-2-4(a)(1) identifies the timelines for filing a grievance and states:

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. . . .

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).

Respondent DOP notes that it first rejected the transaction of promoting Grievant to the reallocated ASM 1 position on December 6, 2019. Grievant and Respondent DAS provided additional information regarding Grievant's work experience and duties attempting to persuade DOP to reverse its decision. On December 17, 2019, DOP Director Webb informed DAS Director Johnson that the additional information did not change DOP's determination that Grievant did not meet the minimum qualifications for the ASM 1 classification.

Respondent DOP argues the December 19, 2019, correspondence unequivocally notified DAS and Grievant concerning of their determination that Grievant did not hold the minimum qualifications for the ASM 1 classification making it the date when Grievant's time for filing a grievance began. Ms. Carson filed her grievance on March 17, 2020, which DOP avers is far outside the timeframe of fifteen workdays.

Grievant argues that the decision was not final on that date. She points out that Director Johnson continued to have informal discussions regarding the position and Grievant's prior experience during the period of January 17, 2020, through March 4, 2020, when Director Webb sent an email to Director Johnson memorializing their lunch meeting and once again confirming the DOP position that Grievant did not meet the minimum qualifications for the ASM 1 classification. Grievant asserts that is the date she and DAS were unequivocally notified of DOP's decision making her March 17, 2020, filing date within the statutory filing time period.

The obvious question is upon which date did the time begin for the mandatory fifteen-day filing period. The West Virginia Supreme Court of Appeals provided guidance on this issue in *Miller v. Marion County Bd. of Educ.*, No. 19-1109 (W.Va. Supreme Court,

December 7, 2020) (memorandum decision). In that case the petitioner was a special education classroom aide. She wanted to return to work after surgery with the restriction that she could not lift more than thirty pounds. This would require another employee to assist her in moving a student in and out of a wheelchair. Respondent refused to allow petitioner to return to work with any restrictions, causing, petitioner to use an additional twenty-two "leave with cause" days.

Petitioner returned to work on May 17, 2018. On May 21, 2018, she discovered that another aide suffering from MS may have been given help, due to restriction cause by her medical condition, with a student in her classroom who was confined to a wheelchair. She spoke with the school principal and vice principal on that day stating that she was discriminated against when she did not get to return to work with limited restrictions. Petitioner contacted her union representative who met with Respondent's human resources director on May 25, 2018, and with the superintendent of schools on June 4, 2018, attempting to work out the problem. On June 18, 2018, the superintendent informed the union representative that he would take no action on petitioner's complaint. Petitioner filed a grievance on June 22, 2018, believing that she was unequivocally notified on June 18, 2018, that Respondent was rejecting her claim for leave because she was improperly not allowed to return to work with restrictions. In *Miller v. Marion County Bd. of Educ.*, *supra* the Supreme Court summarized the Circuit Court ruling as follows:

The circuit court rejected petitioner's claims (1) that her delay in filing a grievance against respondent was a mere technical error that did not invalidate the grievance, and (2) that she substantially complied with the appropriate procedure. The court found that petitioner did not merely commit a technical error, but instead filed her grievance outside the filing deadline found in West Virginia Code § 6C-2-4(a)(1). The court noted that petitioner learned about M.S.'s return to work on May 21,

2018, but that petitioner did not file her grievance until June 22, 2018, more than a month later and, well past the fifteen-day filing period. The court concluded that petitioner "was free to file her grievance and continue to discuss resolution of the matter with the appropriate individuals, but the grievance nonetheless needed to be filed within fifteen days of May 21, 2018." *Id.*

The Supreme Court then stated:

. . . [W]e concur with the circuit court's finding that petitioner filed her grievance after the fifteen-day statutory deadline found in West Virginia Code § 6C-2-4(a)(1) had passed. As noted above, § 6C-2-4(a)(1) clearly requires that a grievance be filed "[w]ithin 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 . . ." *Id.*

In this case, on December 19, 2019, after reviewing additional material and interpretations submitted by Grievant and DAS, the DOP Director reaffirmed the DOP decision that Grievant did not meet the minimum qualifications for the ASM 1 classification. At that point, Grievant was unequivocally notified of DOP's determination which started the statutory time for filing a grievance. Removing holidays and weekends, the grievance needed to be filed by January 15, 2020, to be timely. As noted by the Circuit Court in *Miller*, Grievant "was free to file her grievance and continue to discuss resolution of the matter with the appropriate individuals, but the grievance nonetheless needed to be filed within fifteen days. . ." *Id.*³

³ The Supreme Court quoted and concurred with this statement in *Miller v. Marion County Bd. of Educ. Supra.*

Respondent DOP proved by a preponderance of the evidence that the grievance was not filed within the mandatory time set out in West Virginia Code § 6C-2-4(a)(1). Accordingly, the Motion to Dismiss is **GRANTED** and the grievance is **DISMISSED**.

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.*” *Rules of Practice and Procedure of the West Virginia Public Employees Grievance*, 156 C.S.R. 1 § 6.2 (2018). It is within an administrative law judge’s discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. *See Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

2. Respondent DOP asserts that the grievance brought by Ms. Carson was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and therefore it must be dismissed. When 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 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).

3. W. VA. 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-2-4(a)(1) identifies the timelines for filing a grievance and states:

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. 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).

5. An employee is free to file a grievance and continue to discuss resolution of the matter with the appropriate individuals, but the grievance nonetheless needed to be filed within fifteen days of being unequivocally notified of the decision being challenged.

6. Grievant did not file her grievance within fifteen days of being unequivocally notified of the DOP's decision she was challenging. Grievant did not demonstrate by a preponderance of the evidence a proper basis to excuse his failure to file in a timely manner.

Accordingly, the Motion to Dismiss is **GRANTED** and the grievance is **DENIED**.

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).

Dated March 16, 2021

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**