

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JAMES DAVID SHOCK,
Grievant,**

v.

Docket No. 2021-2290-DOR

**WEST VIRGINIA LOTTERY,
Respondent.**

DISMISSAL ORDER

Grievant, James David Shock, was employed by Respondent, West Virginia Lottery. On March 15, 2021, Grievant filed an expedited level three grievance with the Grievance Board stating, "Since disclosing my disability, WV Lottery and Ms. Snidow has singled me out for unwarranted and destructive criticism. Ms. Snidow, has deliberately ostracized and humiliated me by forbidding me to participate with my team in promotional events. Along with diminished [sic] earnings, I'm the only team member required to have doctors notes for sick leave which state doesn't require." For relief, Grievant requested as follows: "If I can't be treated equally, relocation somewhere with a reasonably similar role and pay in an office environment where I can begin and end each day with an upbeat attitude knowing my contributions are appreciated and valued and everyone is treated fairly with dignity and respect. A place where sharing a disability isn't a bullseye used to target me for disciplinary [sic] action and termination."

West Virginia Code § 6C-2-4(a)(4) allows for grievances to be filed directly to level three only in certain instances. It was unclear from the statement of grievance whether the grievance was properly filed at level three. As such, Grievance Board staff requested clarification of the nature of the grievance filing from the parties. Respondent provided that Grievant had been suspended and Respondent did not object to the expedited nature

of the filing as the grievance appeared to protest the suspension. Therefore, the Grievance Board acknowledged the filing at level three by letter dated March 18, 2021. Grievant did not respond.

On March 18, 2021, Respondent, by counsel, filed a motion to dismiss alleging untimeliness and mootness. On March 19, 2021, Grievance Board staff, by email, notified the parties that any response to the motion to dismiss must be filed by April 2, 2021, that the administrative law judge would not hold a hearing on the motion, and that failure to respond could result in dismissal of the grievance.

On April 2, 2021, Grievant sent an email to the Grievance Board stating that he had filed a complaint with the West Virginia Human Rights Commission and requested an “extension of the deadline to appeal the decision to terminate my employment” because of the necessity to review “extensive documentation.” By email dated April 2, 2021, Grievance Board staff informed Grievant that the deadline to respond to the motion to dismiss was extended to April 9, 2021. On April 9, 2021, Grievant responded to the Grievance Board’s April 2, 2021 email attaching a new grievance filing protesting his termination from employment and a letter from his healthcare provider discussing Grievant’s medical conditions and alleged attempts to request accommodations from Grievant’s employer. Grievant requested in the body of the email that the two grievances be “combined.” Grievant did not address the motion to dismiss. By order entered May 6, 2021, Grievant was ordered to provide an explanation in writing by May 14, 2021, if he asserts that the grievance was timely filed. Grievant did not file any explanation why his filing was timely.

Grievant appears *pro se*¹. Respondent is represented by counsel, Cassandra L. Means-Moore, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent as a Lottery Marketing Specialist. Grievant filed the instant grievance as a result of a disciplinary suspension. The grievance was untimely filed as it was filed more than fifteen days after Grievant was unequivocally notified of the suspension. 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. Grievant was employed by Respondent as a Lottery Marketing Specialist.
2. On February 17, 2021, Grievant was suspended for five days for unacceptable conduct and performance. Grievant received the letter by certified mail on February 20, 2021.
3. Grievant filed the instant grievance by email on March 15, 2021, directly to level three.
4. Grievant failed to respond to the Grievance Board's request for clarification of the justification for filing the grievance directly to level three of the grievance process.
5. Respondent responded that the grievance appeared to challenge the February 12, 2021 suspension.

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

6. Grievant did not dispute Respondent's characterization of the grievance as challenging the suspension.

7. Grievant did not respond to Respondent's motion to dismiss despite being given first an extension of time and then an additional opportunity to respond after failing to respond by the extended deadline.

8. By letter dated March 17, 2021, Grievant was dismissed from employment and subsequently filed a second grievance challenging the dismissal from employment.

Discussion

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).

Respondent asserts the grievance challenges Grievant’s suspension from employment and was, therefore, untimely filed as Grievant was unequivocally notified of the decision being challenged on February 20, 2021, and filed the grievance more than fifteen days later.² Grievant failed to dispute Respondent’s assertions, despite being given first an extension of time and then an additional opportunity to respond after failing to respond by the extended deadline.

Based on Grievant’s failure to respond to Respondent’s initial clarification to the Grievance Board that the grievance was precipitated by the suspension and failure to respond to the motion to dismiss alleging the same, it appears that the suspension is the triggering event of the grievance. Grievant was unequivocally notified of his suspension

² Respondent further asserted that, to the extent Grievant grieved something other than the suspension, that issue was rendered moot by Grievant’s subsequent dismissal from employment. Following the filing of the motion to dismiss, Grievant filed a second grievance protesting his termination from employment, which negates the assertion of mootness.

on February 20, 2021 and was, therefore, required to file his grievance by March 12, 2021. The grievance was not filed until March 15, 2021.

To the extent that Grievant is alleging a continuing practice of negative actions by his supervisor, Grievant is still required to file his grievance within fifteen days of the most recent event of a continuing practice. As Grievant did not provide the dates of any event in his grievance filing and failed to respond to the motion to dismiss, it appears that the most recent event was the suspension, which occurred more than fifteen days prior to the filing. Therefore, the grievance must be dismissed as untimely.³

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).

³ Although the instant grievance must be dismissed as untimely filed, the dismissal of this grievance does not impact Grievant's ability to argue the alleged negative actions of his supervisor as a defense in his termination grievance.

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. The grievance was untimely filed.

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: May 21, 2021

Billie Thacker Catlett
Chief Administrative Law Judge