

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JAMES DAVID SHOCK,**

**Grievant,**

**v.**

**Docket No. 2021-2347-DOR**

**WEST VIRGINIA LOTTERY,**

**Respondent.**

**DISMISSAL ORDER**

Grievant, James David Shock, filed this expedited level three grievance against his employer, Respondent, West Virginia Lottery, on April 9, 2021, stating as follows:

Returning from unpaid suspension on 3/9/2021, a 2<sup>nd</sup> Predetermination Meeting was set 6 days later on 3/12/2021 but I was sick. I filed a grievance for Harassment and Discrimination. On 3/13/21 my employee access badge was deactivated[.] Security escorted me [to] get files for work. When I went to the office on 3/17/21 for the 9 AM Predetermination Hearing, I noticed security was present. Nothing egregious was noted about my performance during my 6 days back to work[.] The attendees left. I was told to stay in the room with Security. About 20 minutes later, the attendees returned with a lengthy document signed my (sic) John Myers and I was fired. My termination was predetermined and expedited as retaliation for filing a grievance.

As relief sought, Grievant seeks,

I want relocated to a similar position away from Ms. Snidow and Lottery leadership, as a result of relentless discrimination because of my protected class. I was harassed and embarrassed by my supervisors, denied work opportunities and ostracized. I suffered severe and pervasive bullying by my supervisors and other Lottery leadership for more than a year now. I brought the harassment to the attention of Randy Burnside and John Myers and nothing was done, as they had initiated the Performance Development Plan and assisted Ms. Snidow in continuing it when she began working at the Lottery. Prior to that, I was praised for my performance and building a

social media audience of 10,000+ with my creative vision and leadership. I want to be free of this hostility.

On June 2, 2021, Respondent, by counsel, submitted a Motion to Dismiss to the Grievance Board by email, copying Grievant on the same. At the direction of Grievance Board Chief Administrative Law Judge, Billie Thacker Catlett, on June 2, 2021, Grievance Board staff informed Grievant, by email, that if he wished to file a response to the same, such was to be filed before close of business on June 16, 2021. Further, the email stated as follows: "The administrative law judge will decide whether to dismiss the grievance based on the submissions of the parties and will not hold a hearing on the motion. Failure to respond may result in the grievance being dismissed."<sup>1</sup>

Grievant did not submit an email or other document specifically responding to the allegations set forth in Respondent's Motion to Dismiss. Grievant emailed the Grievance Board, copying Ms. Means and Brian Nickerson, West Virginia Lottery General Counsel, on June 14, 2021, stating as follows:

I'm writing to appeal this decision. I will contact your office directly tomorrow for instructions on how to proceed with presenting evidence in this case.

Some of this information I will be forced to disclose is of a sensitive nature, as it related directly to my health and medical history which is the underlying reason for my termination.

Unfortunately it is necessary to bring the circumstances of my harassment and wrongful termination to light, given the misinformation presented by West Virginia Lottery as facts.

Should any of the concerned parties wish to contact me directly they may do so at (telephone number redacted). In particular[,] I am still trying to find out how I can obtain my personal belongings which were removed from my office by

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<sup>1</sup> This matter was reassigned to the undersigned administrative law judge for administrative reasons.

Danielle Snidow moments after I was escorted from the building.

n (sic) particular, I am trying to regain possession of the original newspaper clippings that I saved from my twin brother's murder along with frames I'd purchased to display the articles in my office to remind me that the worst thing that could happen in my life had already occurred.

It was meant to encourage me to keep my head up and persevere. I still intend to do that with or without those clippings as reminders.

Sincerely,  
James Shock

In this email, Grievant does not address the central issue of Respondent's Motion to Dismiss, that being timeliness, on or before June 16, 2021, as the Board directed. Thereafter, on June 24, 2021, Grievant emailed the Grievance Board, Ms. Means, and Mr. Nickerson I stating only, "Please see the attached as an FYI. Thanks." Attached to Grievant's email was a seventeen-page, single-spaced document, which included exhibit-like attachments, arguing the merits of his grievance. He does not address timeliness in the document, or otherwise respond to the allegations in the Respondent's Motion to Dismiss. On July 2, 2021, Respondent, by counsel, submitted a *Motion to Strike Grievant's June 24, 2021 Filing*. Respondent appeared by counsel, Cassandra L. Means, Assistant Attorney General. Grievant appeared *pro se*. It is noted that in email correspondence with the Grievance Board Director, James A. Cox, on July 21, 2021, Grievant stated that he had counsel. In response, Mr. Cox stated, "[o]nce your legal counsel files a notice of appearance [with the Grievance Board], all future correspondence should come your counsel." No legal counsel has submitted a notice of appearance for Grievant in this matter, nor has any legal counsel otherwise informed the

Grievance Board that Grievant is being represented. This matter became mature for decision on June 16, 2021.

### **Synopsis**

Grievant was employed by Respondent as a Lottery Marketing Specialist. On March 17, 2021, Respondent notified Grievant that he was dismissed from employment, effective April 1, 2021. Grievant filed a grievance challenging his dismissal on April 9, 2021. Respondent proved by a preponderance of the evidence that this grievance was untimely filed. Grievant failed to demonstrate any proper bases for excusing his untimely filing. Therefore, 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 March 17, 2021, Respondent informed Grievant, both verbally and in writing, that he was dismissed from employment effective April 1, 2021. Grievant filed this grievance on April 9, 2021.
3. Two days before he was notified of his dismissal, on March 15, 2021, Grievant had filed another, separate grievance in which he alleged maltreatment by supervisor following disclosure of a disability. This was the grievance styled *Shock v. West Virginia Lottery*, Docket No. 2021-2290-DOR.
4. On March 18, 2021, in Docket No. 2021-2290-DOR, Respondent, by counsel, filed a motion to dismiss that grievance 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.<sup>2</sup>

5. Grievant's frequent email communications with the Grievance Board in grievance Docket No. 2021-2290-DOR, and in this instant grievance, have been fraught with problematic issues and confusion. For example, Grievant repeatedly failed to include counsel for Respondent on his emails despite clear instructions to include her on all emails. He further failed to include his named counsel, Adrian Hoosier, on the emails as well. Despite his being named by Grievant, Mr. Hoosier has had no contact with the Grievance Board.

6. Grievant also repeatedly argued the merits of his case in his emails despite being told to stop. Grievant has asked the Grievance Board to investigate things, something the Grievance Board cannot do, and seemingly wanted the Grievance Board to do something with respect to complaints he reportedly filed at the Human Rights Commission and the Ethics Commission. Grievant was informed that the Grievance Board has no jurisdiction over such matters and that the Grievance Board is a separate, distinct agency.<sup>3</sup>

7. On April 2, 2021, in grievance Docket No. 2021-2290-DOR, Grievant sent an email to the Grievance Board stating that he had filed a complaint with the West

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<sup>2</sup>See, Respondent's Exhibit E, *West Virginia Lottery Commission's Motion to Strike Grievant's June 24, 2021 Filing*, Order entered May 6, 2021, *Shock v. West Virginia Lottery*, Docket No. 2021-2290-DOR.

<sup>3</sup>See, Respondent's Exhibit E, *West Virginia Lottery Commission's Motion to Strike Grievant's June 24, 2021 Filing*, Order entered May 6, 2021, *Shock v. West Virginia Lottery*, Docket No. 2021-2290-DOR.

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.”

8. By email dated April 2, 2021, Grievance Board staff informed Grievant that the deadline to respond to the motion to dismiss in Docket No. 2021-2290-DOR was extended to April 9, 2021.

9. On April 9, 2021, Grievant responded to the Grievance Board’s April 2, 2021, email and attached to it a new grievance filing challenging his termination from employment. Grievant also attached a letter from his healthcare provider. In the body of that email, Grievant asked that the two grievances be “combined.” Also, again he complained of alleged contact from Respondent to his “case manager” and appeared to request that the Grievance Board investigate the issue by contacting his case manager.

10. By email dated April 12, 2021, in grievance Docket No. 2021-2290-DOR, Grievance Board staff responded to Grievant informing him that the Grievance Board would not be contacting his “case manager” and reminded him that he was not permitted to argue the merits of his grievance in his emails. Despite this, by email dated April 30, 2021, Grievant responded, again attempting to argue the merits of that grievance and discussed matters irrelevant to the grievance process. Grievant failed to copy Respondent’s counsel on this email, as well.

11. In the Order entered May 6, 2021, in grievance Docket No. 2021-2290-DOR, Chief Administrative Law Judge Billie Thacker Catlett stated as follows:

Despite the instruction of the Grievance Board’s Director and staff, Grievant has continued to attempt to argue his case through emails and has failed to include Respondent on some emails. Grievant has failed to properly respond to the pending

motion to dismiss. Although Grievant may have considered his filing of the second grievance [the instant grievance, Docket No. 2021-2347-DOR] and request to consolidate the two grievances as a response to the motion, it does not cure the allegation that the grievance was not filed on time. It is unclear what Grievant meant in stating that he was “awaiting a written response from West Virginia,” but, at this time, it is Grievant who is obligated to respond to the motion to dismiss and neither a complaint to the Human Rights Commission nor a pending Unemployment Compensation claim has any impact on the grievance procedure.<sup>4</sup>

12. In her Order entered May 6, 2021, Chief ALJ Catlett ordered, in part, that “[t]he parties shall read and comply with the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board and the West Virginia Public Employees Grievance Board Procedure. Any communication that fails to include the other party will not be filed or acted upon by the Grievance Board. Grievant shall cease attempting to argue the merits of the grievance in his email communications. Grievant’s request to consolidate the instant grievance with the termination grievance [this grievance Docket No. 2021-2347-DOR] is held in abeyance pending a decision on the motion to dismiss. . .”

13. Grievant’s earlier grievance, Docket No. 2021-2290-DOR, filed on March 15, 2021, was dismissed as untimely by Order entered May 21, 2021. It is noted that Grievant had failed to submit a response addressing Respondent’s argument that the grievance was untimely filed.

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<sup>4</sup> See, Respondent’s Exhibit E, *West Virginia Lottery Commission’s Motion to Strike Grievant’s June 24, 2021 Filing*,” Order entered May 6, 2021, *Shock v. West Virginia Lottery*, Docket No. 2021-2290-DOR.

14. Given that Docket No. 2021-2290-DOR was dismissed as untimely by Order entered May 21, 2021, Grievant's request to combine, or consolidate, his two grievances was denied as moot by Order entered May 27, 2021.

15. While Grievant has submitted numerous email communications in the instant grievance since Respondent filed the Motion to Dismiss, he has not articulated any arguments addressing the timeliness issue.

16. Grievant has continued to attempt to argue the merits of his grievance in his email communications. He has also continued to address matters irrelevant to the grievance procedure, such as complaints to the Human Rights Commission, the Ethics Commission, and regarding his unemployment compensation action.

17. As Grievant was notified of his dismissal on March 17, 2021, he had until April 7, 2021, fifteen working days thereafter, to grieve the same.

18. Grievant filed this grievance on April 9, 2021, as an attachment to an email he sent in his earlier grievance.

19. Grievant has made no discernable arguments that any late filing should be excused.

### **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. § 159-1-6.2 (2018). 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. "The preponderance standard generally requires proof



that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). As Respondent is asserting the affirmative defense of timeliness, it bears the burden of proof herein. 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).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See W. VA. CODE § 6C-2-1 et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. 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).

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).

Grievant was unequivocally notified of the decision to dismiss him from employment on March 17, 2021. As such, Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Grievant was not granted an extension of the time to file a new grievance action. The timelines for filing a grievance are set by statute. Grievant was only granted an extension of the time to file his response to the motion to dismiss then pending in his prior grievance action, yet he still filed no actual response to Respondent's allegations of timeliness. Grievant has not demonstrated any proper basis to excuse his failure to file his grievance in a timely

manner. As this grievance was untimely filed, there is no need to address the merits of Grievant's claim. 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. § 159-1-6.2 (2008).

2. 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).

3. 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).

4. "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).

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 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).

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 him from filing within the applicable timelines.

Accordingly, this 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 *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

**DATE: July 30, 2021.**

  
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**Carrie H. LeFevre**  
**Administrative Law Judge**