

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROXANNA M. WAYBRIGHT,
Grievant,**

v.

Docket No. 2018-1352-DHHR

**DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/WILLIAM R.
SHARPE, JR. HOSPITAL, and DIVISION OF
PERSONNEL,
Respondents.**

DISMISSAL ORDER

Grievant, Roxanna Waybright, is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital (DHHR/Sharpe). On June 18, 2018, Grievant filed this grievance against Respondent stating, "Grievant was not advanced to HSW." For relief, Grievant seeks, "To be made whole in every way including back pay and interest."

A level one waiver¹ was requested and granted on August 10, 2018. The Division of Personnel (DOP) was joined as a necessary party on August 17, 2018. On October 1, 2018, Respondent DOP filed a *Motion to Dismiss, or in the Alternative, Motion for More Definite Statement of Grievance and Relief Sought and Assertion of Timeliness and Other Affirmative Defenses*. A mediation session was held on October 4, 2018. Grievant appealed to level three of the grievance process on October 13, 2018. Respondent

¹Pursuance to W. VA. CODE ST. R. § 156-1-4.3.3. (2018), "Authority Generally -- Additionally, the chief administrator may consolidate, for hearing or conference, grievances that are substantially similar, waive grievances the chief administrator is without authority to decide to level two or three, such as state compensation and classification grievances, and join parties as needed. If conflicts or questions arise on these issues, any party may submit the matter to the Board's chief administrative law judge for resolution."

DHHR filed a *Motion to Dismiss* on November 23, 2020, which stayed scheduling of a level three hearing. The undersigned gave Grievant until December 10, 2020, to respond to the *Motion to Dismiss*. When that date passed without a response, the Grievance Board reached out to Grievant multiple times, but she did not respond.

Synopsis

Grievant accepted a Health Service Trainee (HST) position at Sharpe Hospital on March 24, 2017 and began her employment as an HST on June 1, 2017. Grievant advanced to a Health Service Worker (HSW) position on March 31, 2018. She laments not being advanced to an HSW position sooner. The employer moved to dismiss the grievance for untimely filing. Grievant failed to respond. Grievant should have filed her grievance within 15 working days of March 31, 2018 but waited another two months until June 21, 2018 to file. 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 is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital (DHHR/Sharpe).
2. Grievant was offered and accepted a Health Service Trainee (HST) position on March 24, 2017.
3. Grievant began her employment as an HST on June 1, 2017.
4. Grievant completed a Position Description Form (PDF) in February 2018.
5. Grievant was advanced to a Health Service Worker (HSW) position on March 31, 2018.

6. Grievant grieved her lack of advancement to an HSW on June 21, 2018.
7. Respondents first asserted untimely filing at level two and reasserted untimely filing at level three through a *Motion to Dismiss*.
8. Grievant failed to respond to the *Motion to Dismiss*, to dispute the representation of facts put forth by Respondents, or to offer any excuse for the allegation that she had untimely filed her grievance.

Discussion

Respondents assert that the grievance was not filed within the time allowed by W. Va. Code § 6C-2-4 and that the grievance must be dismissed. “[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. *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).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).²

²“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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant accepted a Health Service Trainee (HST) position at Sharpe Hospital on March 24, 2017 and began her employment as an HST on June 1, 2017. She was advanced to a Health Service Worker (HSW) position on March 31, 2018. She grieves that she was not advanced to an HSW position sooner. Respondents assert that Grievant should have at least filed her grievance within 15 working days of March 31, 2018 but that she waited another two months until June 21, 2018 to file. Grievant failed to dispute the timeline provided by Respondents or to provide an excuse for untimely filing.

The first issue which needs to be addressed is whether Respondents properly raised a timeliness defense. “Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1). Respondents asserted at level two that the grievance was untimely filed and reasserted the issue at level three through their *Motion to Dismiss*.

The next issue which needs to be addressed is whether Grievant timely filed her grievance. 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). Grievant does not dispute that Sharpe advanced her to an HSW position on March 31, 2018 and grieves not being advanced to an HSW position sooner. Yet Grievant waited two and a half months until June 21, 2018 to file her

grievance. Respondents have proven by a preponderance of the evidence that this grievance was untimely filed.

The burden now shifts to the Grievant to prove a proper basis to excuse her untimely filing. Grievant failed to respond to the *Motion to Dismiss* or to offer any excuse for untimely filing her grievance. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001). Therefore, this grievance is hereby dismissed.

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. *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)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. "Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two." W. VA. CODE § 6C-2-3(c)(1).

3. 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).

4. “If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).” *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

5. Respondent has proven by a preponderance of evidence that the grievance was not timely filed.

6. Grievant has not demonstrated a proper basis to excuse her failure to file in a timely manner.

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 *a/so* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 19, 2021

Joshua S. Fraenkel
Administrative Law Judge