THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AARON REGINALD WHITE,

Grievant,

v. **Docket No. 2020-0867-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant, Aaron Reginald White, submitted an expedited level three grievance on February 4, 2020, against Respondent, Kanawha County Board of Education, alleging "hostile work environment resulting in removal from assignment."[1] As relief sought, Grievant stated, "[a]s a remedy, I am looking to be reassigned to me job with loss (sic) pay we can agree upon."

This matter was scheduled for a level three hearing to be held on October 26, 2020, via Zoom video conferencing. The parties received proper notice of the same. On that day, Grievant failed to appear. As such, this ALJ continued the matter and issued an Order to Show Cause due to Grievant's failure to appear which required Grievant to respond by November 25, 2020. Grievant did not respond as ordered; however, he sent an email to the Grievance Board on December 22, 2020, explaining that he failed to appear on the day of the hearing due to a mix-up. Respondent, by counsel, Lindsey D. C. McIntosh, Esq., General Counsel, filed a Motion to Dismiss on January 8, 2021, serving

[1] This statement of grievance bore a signature date of January 30, 2020, but it was hand-delivered to the Grievance Board on February 4, 2020. Grievant attached a two-page document explaining his grievance in detail to his statement of grievance. The same is incorporated by reference as if stated *verbatim*.

the same on Grievant by email, asserting that Grievant's response to the Order to Show Cause issued by this ALJ on November 10, 2020, failed to show good cause why Grievant failed to appear at the level three hearing held on October 26, 2020, that his response to the Order to Show Cause was untimely, and that the grievance, itself, was untimely filed. On January 14, 2021, the Grievance Board emailed Grievant and counsel for Respondent informing them that Respondent's Motion to Dismiss and Grievant's response to the November 10, 2020, Order to Show Cause would be heard at a Zoom hearing on March 15, 2021. On February 24, 2021, the Grievance Board emailed Grievant and counsel for Respondent reminding them of the March 15, 2021, Zoom hearing, and informed Grievant that if he wished to respond to the Motion to Dismiss, he was to do so, in writing, no later than close of business on March 11, 2021. The Grievance Board attached to this email a copy of the Motion to Dismiss and the Order to Show Cause.

The Zoom hearing was held as scheduled on March 15, 2021, at which Grievant, *pro se*, and Respondent appeared by counsel, Ms. McIntosh. At that time, Grievant asserted that he had not received a copy of the Motion to Dismiss and that he had not received a copy of the Order to Show Cause before November 25, 2020. Grievant provided an updated mailing address to the ALJ, and verified his correct telephone number and email address.

By Order entered March 15, 2021, Grievant was ordered to submit his written response to Respondent's Motion to Dismiss and to the November 10, 2020, Order to Show Cause by email no later than March 26, 2021. The Grievance Board sent the March 15, 2021, Order, along with a copy of Respondent's Motion to Dismiss, to Respondent and to Grievant at the email address he provided at the hearing on that same date. The

Grievance Board received nothing to indicate that the order mailed and emailed to Grievant at the new addresses failed to reach Grievant. Despite this discussion at the March 15, 2021, Zoom hearing and the detailed Order issued therefrom, Grievant has failed to submit any response to the Motion to Dismiss or the Order to Show Cause.

Synopsis

Grievant is employed by Respondent as a substitute aide. Grievant was removed from a substitute position at Capital High School on October 29, 2019, and, thereafter, no longer allowed to substitute at Capital High School. Grievant remains employed by Respondent and has taken other substitute assignments since October 29, 2019. Grievant filed this grievance alleging "hostile work environment resulting in removal from assignment." Respondent denies Grievant's claims and asserts that this grievance was untimely filed. Respondent proved by a preponderance of the evidence that this grievance was untimely filed. Accordingly, this 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 as a substitute Aide.

2. Grievant was assigned to a long-term substitute Aide position at Capital High School on or about August 6, 2019.

3. Grievant was removed from the substitute Aide position at Capital High School on October 29, 2019. Since that time, Grievant has been prevented from serving

as a substitute at Capital High School; however, he has been allowed to substitute at other schools.

4. Grievant filed this grievance on February 4, 2020, challenging the October 29, 2019, decision to remove him from his long-term substitute Aide assignment.

5. Grievant has continued to work for Respondent as a substitute Aide at other schools since October 29, 2019.

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 asserts that this grievance should be dismissed because Grievant failed to timely respond to the Order to Show Cause after his failure to appear at the level three hearing on October 26, 2020, and when he did respond over a month after the deadline set, he failed to provide an adequate excuse for his failure to appear. Respondent also argues that this grievance should be dismissed as being untimely filed. Grievant has been provided the opportunity to address these arguments orally at the March 15, 2021 hearing and, thereafter, in writing, pursuant the March 15, 2021, Order.

During the March 15, 2021, hearing, Grievant asserted that he submitted his response to the Order to Show Cause on December 22, 2020, because he did not know about the same until that time. Also, at the March 15, 2021, hearing, Grievant stated that he had not received the Motion to Dismiss. On March 15, 2021, the Grievance Board emailed Grievant and Respondent a copy of the entered Ordered from that day's hearing, along with a copy Respondent's Motion to Dismiss so that Grievant would have it when he prepared his written response thereto. Despite being granted additional time to respond to the Motion to Dismiss and to Respondent's allegation that his excuse for missing his October 26, 2020, hearing was insufficient, Grievant failed to submit a written response.

As a ruling on the Motion to Dismiss has the potential to render the issue of Grievant's absence at the October 26, 2020, hearing moot, this ALJ will address the Motion to Dismiss first. "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 time lines. *See Kessler v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-445 (July 28, 1997).

Pursuant to Grievant's statement of grievance, Grievant grieved an incident occurring on October 29, 2019, alleging "hostile work environment resulting in my removal as a Substitute Aid[e]." Grievant further indicates in his statement of grievance that he learned on that same day that Principal Larry Bailey made the decision to remove him from his assignment at Capital High School. Despite learning on October 29, 2019, that he had been removed from his assignment, Grievant did not file this grievance with the Grievance Board until February 4, 2020, by hand-delivery. It is noted that Grievant's signature on the statement of grievance is dated January 30, 2020, and that the attached document detailing the grievance is dated January 4, 2020. The Grievant states in the

document attached to his statement of grievance that he learned that he was being removed from his position on October 29, 2019. Whether February 4, 2020, January 4, 2020, or January 30, 2020, is used as the date the grievance was filed, the grievance was filed more than fifteen business days following the date on which Grievant was unequivocally informed that he was being removed from his position at Capital High School. As such, the grievance was untimely filed. Despite being given the opportunity to respond to the Motion to Dismiss, Grievant has made no argument that his untimely filing should be excused.

Accordingly, Respondent has proved by a preponderance of the evidence that this grievance was untimely filed. Grievant has not demonstrated any proper basis to excuse his failure to file his grievance in a timely manner. Therefore, this grievance is dismissed. The issue regarding Grievant's failure to appear at the October 26, 2020, hearing is now moot, and will not be further addressed herein.

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 his 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: May 4, 2021.

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Carrie H. LeFevre
Administrative Law Judge