

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RUBEN C. WRIGHT,**  
**Grievant,**

**v.**

**Docket No. 2020-0657-McdED**

**MCDOWELL COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DISMISSAL ORDER**

Grievant, Ruben Wright, is employed by the McDowell County Board of Education as a substitute teacher. Grievant filed this action on November 26, 2019, directly to level three of the grievance process. By order dated December 4, 2019, this matter was transferred to level one. Grievant filed an amended grievance form requesting a level one hearing on December 11, 2019. Grievant alleges that he was improperly removed from the River View High School and Mount View High School substitute lists, he also contests his non-selection for a coaching position at River View. Grievant seeks to be placed on all substitute lists in McDowell County, and restitution for wages lost during the five-year period in which he was not allowed to substitute.

A level one hearing was held on December 31, 2019. The level one decision dated January 21, 2019, found this matter untimely and was denied. Grievant filed to level three on January 31, 2020 and this matter was transferred to level two by order dated February 14, 2020. A level two mediation was conducted on June 10, 2020. Grievant finalized his appeal to level three on June 21, 2020. Respondent filed a Motion to Dismiss this grievance as being untimely on October 15, 2020. Grievant filed a response to the motion

on October 26, 2020. A hearing on the Motion to Dismiss was conducted before the undersigned on December 28, 2020. Grievant appeared *pro se*. Respondent appeared by its counsel, Howard E. Seufer, Jr., Bowles Rice LLP. This motion is now mature for consideration.

### **Synopsis**

The record of this case demonstrates by a preponderance of the evidence that Grievant failed to file a grievance within fifteen days following the occurrence of the events upon which the grievance is based. Accordingly, this grievance is dismissed as untimely.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. On October 4, 2019, Grievant was notified in writing by Respondent's Personnel Director that he had received a negative substitute teacher evaluation. In the evaluation, the River View High School principal indicated that Grievant would not be called to substitute at River View High School.

2. The evaluation related to an incident in August of 2019 in which it was alleged that Grievant embarrassed a female student during class by asking her to move seats because he could see up her dress.

3. After Grievant received this notification on October 4, 2019, informing him that he was being removed from the substitute list, Grievant submitted a letter to the Superintendent dated October 8, 2019, and protested his removal from the substitute list.

4. The Superintendent informed the Grievant that substitute teachers are not entitled to any minimum number of work assignments. A building principal has broad discretion in selecting substitute teachers to fill the positions of absent teachers.

5. Grievant acknowledged that October 4, 2019, was the date he learned that he was no longer on the substitute call list for River View High School.

6. Grievant did not file this grievance at level three until November 26, 2019, and not until December 11, 2019, at level one.

7. More than fifteen days elapsed in the period that began on October 4 and ended on either November 26 or December 11, 2019, when this grievance was filed, exclusive of Saturdays, Sundays, official holidays, and any day on which the workplace may have been closed due to weather or other cause provided by statute.

8. Grievant acknowledged that more than three years had passed since he was substituting at Mount View High School when he had a disagreement with the principal after Grievant attempted to remove a student from the classroom for making a racist comment to Grievant. The principal informed Grievant that he was no longer going to be called to substitute at his school.

9. More than fifteen days elapsed in the period that began at least three years ago when the principal told Grievant that he would no longer substitute at Mount View High School and ended on either November 26 or December 11, 2019.

10. Grievant complains that Respondent denied him the position of the Volleyball Coach at River View due to discrimination.

11. The position for Volleyball Coach was posted in August of 2018 and filled with another applicant on September 4, 2018.

12. More than fifteen days elapsed in the period that began on September 4, 2018, and ended on either November 26 or December 11, 2019, when this grievance was filed.

## Discussion

The issue to be addressed is whether the grievance was filed in a timely manner. “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). 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).

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 to be addressed. *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).

In the instant case, Grievant was unequivocally notified on September 4, 2018, of his non-selection as the Volleyball Coach at River View; on October 4, 2019, that he was

removed from the substitute list for River View; and at least three years before filing that he was removed from the substitute list for Mount View. Therefore, by any measure, more than fifteen days elapsed between Grievant's knowledge of each of the three events of which he complains and the filing of his grievance. Respondent timely asserted that the filing of the grievance was untimely at level one. The Motion to Dismiss is granted.

The following Conclusions of Law support the decision reached.

### **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).

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. 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 to be addressed. *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. Respondent has established by a preponderance of the evidence that this grievance was untimely filed. Grievant has not demonstrated any reason for excusing him from filing within the applicable timelines.

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* 156 C.S.R. 1 § 6.20 (2018).

**DATE: February 17, 2021**

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**Ronald L. Reece**  
**Administrative Law Judge**