

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CRYSTAL DAWN MILLER AND NINA LOUISE BLEIGH,  
Grievants,**

v.

**Docket No. 2020-1440-CONS**

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

**DISMISSAL ORDER**

Grievants, Crystal Dawn Miller and Nina Louise Bleigh, were employed by Respondent Department of Health and Human Resources at William R. Sharpe, Jr. Hospital. On January 24, 2020, Grievants filed separate but identical grievances directly to level two of the grievance process alleging functional demotion and working outside of their job classification. The grievances were transferred to level one by order entered February 12, 2020. The grievances were consolidated into the above-styled action at level one of the grievance process.

On June 22, 2020, the chief administrator's designee waived the consolidated grievance to level two. The Division of Personnel was joined as a party by order entered August 31, 2020. An *Order of Unsuccessful Mediation* was entered on October 21, 2021, and was mailed to the parties by first class mail on that date. Grievants appealed to level three of the grievance process on January 25, 2022. Respondent Department of Health and Human Resources, by counsel, filed *Respondent's Motion to Dismiss* on February 1, 2022, asserting the appeal to level three was untimely filed. Respondent Division of Personnel, by counsel, joined in the motion to dismiss by email dated February 4, 2022. Grievants, by representative, filed their response to the motion to dismiss on February

17, 2022. Grievants are represented by Michael L. Hansen, UE Local 170. Respondent Department of Health and Human Resources is represented by counsel, Mindy M. Parsley, Assistant Attorney General. Respondent Division of Personnel is represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on February 17, 2022, upon final receipt of Grievants' response to the motion to dismiss.

### **Synopsis**

Grievants were employed by Respondent, Department of Health and Human Resources, as Human Resource Assistants. Grievants filed their grievances alleging they were functionally demoted and working outside of their job classifications. Due to an error by their representative, Grievants did not timely file their appeal to level three. Respondents moved to dismiss the grievance as untimely. The error of Grievants' representative does not excuse the untimely filing. 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. Grievants were employed by Respondent as Human Resource Assistants at William R. Sharpe, Jr. Hospital.
2. The grievance was denied at level one of the grievance process, from which Grievants appealed.
3. Following mediation, an *Order of Unsuccessful Mediation* was entered on October 21, 2021, and was mailed to the parties by first class mail on that date, including

individually to Grievants. The order clearly states that any appeal must be filed within ten days of receipt of the order.

4. During the mediation, Grievants were represented by Samantha Crockett, Field Organizer, UE Local 170.

5. Grievants believed their representative would file their appeal to level three.

6. Grievants' representative did not file their appeal to level three.

7. On January 19, 2022, UE Local 170's Office Manager emailed the Grievance Board stating that there had been a "mix-up" and, although he had received a copy of the *Order of Unsuccessful Mediation*, he was concerned that Ms. Crockett may not have filed the appeal because she "fell ill shortly after that."

8. On January 25, 2022, Grievants, by representative, Mr. Hansen, filed their appeal to level three.

### **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). “Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.” W. VA. CODE § 6C-2-4(c)(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).

Respondents assert that the grievance was untimely filed to level three as the appeal to level three was filed approximately three months after the *Order of Unsuccessful Mediation* was entered. Grievants do not dispute that they and their representative timely received the *Order of Unsuccessful Mediation* but argue that their late filing should be excused because they believed that their representative had filed their appeal to level three.

“[T]he timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.” *Hale v. Mingo County Bd. of Educ.*, n.10, 199 W. Va. 387, 393, 484 S.E.2d 640, 646 (1997).

In this case, there was no substantial compliance. The grievance was required to be filed within ten days of receipt of the order, or approximately by November 8, 2021.

Grievants did not file their appeal until approximately three months after the mediation. Despite some assertion that the late filing was caused by the illness of Grievants' former representative, Grievance Board records show Grievants' former representative was working and communicating with the Grievance Board in other cases well after the November 8, 2021 deadline. The undersigned takes judicial notice that, during the relevant period, the first request to the Grievance Board for continuance on behalf of Ms. Crockett due to illness was November 29, 2021. The undersigned further takes judicial notice that Ms. Crockett was communicating with the Grievance Board by email in another of the undersigned's cases on November 18, 2021, ten days past the deadline for filing an appeal in this case.

Therefore, Grievants' representative simply failed to file the appeal and no legitimate excuse for her failure has been provided. Further, Grievants were personally aware of the requirement to file their appeal within ten days as they were also mailed copies of the order, which order stated that an appeal must be filed within ten days. There was no unreasonable procedural obstacle in this case. It is not unreasonable to expect Grievants' representative to timely file their appeal or to expect Grievants to investigate when they did not receive a copy of the appeal shortly after the deadline for appeal. The legislative intent is to "[resolve] grievances in a fair, efficient, cost-effective, and consistent manner," which applies to all parties. W.VA. CODE § 6C-2-1(b). It would not appear to be consistent with the legislative intent to allow an appeal to be filed almost three months late when no legitimate excuse was provided for that failure.

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).

2. “Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.” W. VA. CODE § 6C-2-4(c)(1).

3. “‘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).

4. Respondent proved Grievants failed to timely file their appeal to level three of the grievance process and Grievants have not demonstrated a proper basis to excuse their 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 *also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: March 18, 2022**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**