

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DEBRA S. TENNEY,
Grievant,**

v.

Docket No. 2022-0143-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.**

DISMISSAL ORDER

Grievant, Debra S. Tenney, was employed by Respondent, Department of Health and Human Resources. On August 18, 2021, Grievant filed this grievance against Respondent alleging “hostile work environment/discrimination.” For relief, Grievant sought cessation of the “hostile work environment/discrimination.”

On September 3, 2021, a level one decision was rendered dismissing the grievance as moot as Grievant was no longer employed by Respondent. Grievant, by representative, appealed to level two on October 18, 2021. On November 9, 2021, Respondent, by counsel, filed *Respondent’s Motion to Dismiss* asserting the grievance must be dismissed as moot and untimely filed. Grievant was notified by email on November 23, 2021, that any response to the motion must be filed by December 9, 2021. Grievant is represented by Samantha Crockett and Michael Hansen, UE Local 170. Respondent is represented by counsel, Katherine A. Campbell, Assistant Attorney General.

Synopsis

Grievant was employed by Respondent and grieved an alleged hostile work environment. Respondent moved to dismiss the grievance when Grievant failed to timely file to level two following the denial of her grievance at level one of the grievance

process. Grievant failed to file within the timeframe required by statute and failed to respond to the motion to dismiss to provide any excuse for her late 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

A level one decision was rendered dismissing the grievance on September 3, 2021.

Grievant did not file her appeal to level two until October 18, 2021, which was twenty-six statutory days after the decision was rendered.

Even allowing a week to receive the decision in the mail, Grievant would still have been eleven days late to file.

Grievant failed to respond to the motion to dismiss to assert any excuse for her late filing.

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 an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration.” W. VA. CODE § 6C-2-4(b)(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).

Respondent asserts the grievance must be dismissed as moot and untimely filed. Respondent asserts the time to file ran out on September 20, 2021. Grievant was notified by the Grievance Board by email to her own email and to her representative on November 23, 2021, that any response to the motion must be filed by December 9, 2021. Grievant failed to respond to the motion to dismiss to assert any excuse for her late filing.

A level one decision was rendered dismissing the grievance on September 3, 2021. It is unclear why Respondent asserts the time to file ran on September 20, 2021, as Respondent attached no proof of Grievant’s receipt of the level one decision to its motion and that date would have allowed only one day for mailing as September 6, 2021, was a holiday. However, Grievant did not file her appeal to level two until

October 18, 2021, which was twenty-six days after the decision was rendered. Even allowing a week to receive the decision in the mail, Grievant would still have been eleven days late to file so her filing is clearly untimely.

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. An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1).

3. “Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration.” W. VA. CODE § 6C-2-4(b)(1).

4. “‘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).

5. Grievant failed to file her appeal to level two of the grievance process within the timeframe required by statute and failed to respond to the motion to dismiss to provide any excuse for her late filing.

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: January 25, 2022

Billie Thacker Catlett
Chief Administrative Law Judge