

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KEVIN VANDEVANDER,
Grievant,**

v.

Docket No. 2021-1461-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION,
Respondent.**

DISMISSAL ORDER

Grievant, Kevin Vandevander, is employed by Respondent, Division of Corrections and Rehabilitation. On October 29, 2020, Grievant filed this grievance attaching a lengthy statement of grievance, which is incorporated in full by reference. In sum, Grievant contests a pay differential he received in 2013 through action of a policy, alleging it should have been greater. For relief, Grievant seeks for the policy to be changed, for audit conducted to change the pay of similar employees, and to “[a]djust my 5% Special Operations Differential Pay to 10% as the other members in the Special Operations Group. Along with back pay, plus interest, from the time the preceding of the fair [sic] and unreasonable action occurred.”

On November 5, 2020, the level one chief administrator waived the matter to level two of the grievance process. On November 16, 2020, Grievant also filed an appeal form requesting mediation. On April 9, 2021, the Division of Personnel was joined as a necessary party. On July 6, 2021, Respondent Division of Personnel, by counsel, filed its *Affirmative Defense of Timeliness*. Level two mediation was held on November 4, 2021. An *Order of Unsuccessful Mediation* was mailed to the parties on November 5, 2021. Grievant appealed to level three of the grievance process on December 8, 2021.

On December 22, 2021, Respondent Division of Personnel, by counsel, filed its *Motion to Dismiss* alleging that the grievance was not timely filed at level one or at level three. Grievant filed his response by email on December 27, 2021. A limited evidentiary hearing was held on the motion to dismiss on February 28, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conferencing. Grievant appeared *pro se*. Respondent Division of Corrections and Rehabilitation was represented by counsel, Philip B. Sword, Assistant Attorney General. Respondent Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. The parties were given the opportunity to submit written Proposed Findings of Fact and Conclusions of Law by March 28, 2022, but no party elected to submit the same.

Synopsis

Grievant is employed by Respondent as a Correctional Officer III, K9 Handler. Grievant contests a pay differential he received in 2013 through action of a policy, alleging it should have been greater. Respondent moved to dismiss alleging the grievance was untimely filed both initially and at level three. Respondent failed to prove the grievance was untimely filed at level three as Grievant testified he did not receive the level two order in the mail and filed the same day he was informed the order had been previously mailed. Respondent proved the initial filing was untimely as the application of the policy simply caused continuing damage that cannot be converted to a continuing practice under which the grievance could be timely filed. Grievant failed to prove a proper excuse for his untimely filing of the initial 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. Grievant is employed by Respondent as a Correctional Officer III, K9 Handler and has been so employed since 1998 when his position was reallocated.
2. Upon the reallocation of his position in 1998, Grievant received a 5% pay increase.
3. In 2007, Grievant was promoted and received a 10% pay increase.
4. In 2013, the State Personnel Board approved a Special Pay Differential for Special Operations duties.
5. The K9 Unit, along with the Corrections Emergency Response Team ("CERT") and the Crisis Negotiation Team ("CNT") are considered "Special Operations."
6. Respondent Division of Corrections and Rehabilitation administered this special pay differential through Policy Directive 321.00. Under the policy, CERT and CNT personnel received a 10% pay differential. K9 handlers received only a 5% pay differential because, upon completion of the K9 Basic Handler Course, the position of a K9 Handler is reallocated from Correctional Officer II to Correctional Officer III, which results in a 5% increase in base salary.
7. On February 14, 2013, Grievant signed the *Special Operations Special Pay Differential Acknowledgement & Waiver* acknowledging his receipt of the 5% special pay differential and further acknowledged, "I already received a 5% salary adjustment when I was reallocated to Correctional Officer 3/Corporal upon successfully

completing the K9 Basic Handler Course and that the 5% special pay differential will total a 10% increase for K9 duties.”

8. Grievant alleges that in 2016 several K9 handlers “were able to keep their 10% Special Operation differential pay.”

9. Grievant alleges that, beginning in 2019, upon two years of service, the positions of Correctional Officer IIs are reallocated to Correctional Officer IIIs.

10. Grievant alleges that in July 2019, an employee “transferred from K9 to the Academy as an ITO and continued with Special Operations” and received an additional 5% pay differential.

11. Following the unsuccessful mediation, Grievant did not receive the *Order of Unsuccessful Mediation* in the mail although the same was properly mailed to him by regular mail to the address he provided.

12. After waiting what he believed to be a reasonable amount of time, on December 8, 2021, Grievant called the Grievance Board to inquire about the order. When informed that the order had already been mailed, Grievant immediately filed his level three appeal.

13. The Grievant’s level three appeal was postmarked on December 8, 2021.

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). The Code sets forth the time limits for the initial filing of 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). “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). 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); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

Respondent asserts the grievance was untimely filed both initially and at level three. Regarding the level three filing, the *Order of Unsuccessful Mediation* was mailed to the parties on November 5, 2021, but Grievant’s time to file to level three did not begin to run until he received the order. Grievant testified that he did not initially receive the order in the mail and that he called the Grievance Board to inquire about the order after what he believed to be a reasonable time. When Grievance Board staff informed him on December 8, 2021, that the order had previously been mailed to him, Grievant immediately filed the level three appeal that day. Therefore, Respondent has failed to prove Grievant’s level three appeal was untimely.

Regarding the initial filing, Grievant was unequivocally notified of the decision being challenged in 2013 when he signed the waiver accepting the 5% special pay differential. He knew at that time that K9 Handlers were being given a different pay differential than other special operations personnel and why. Grievant acknowledges that he disagreed with the policy at that time but chose not to grieve its application to him. The incidents Grievant cites in 2016 and 2019 are simply the continued application of that policy which Grievant again chose not to grieve at the time he discovered them.

Grievant asserts that he timely filed his grievance as he challenges a continuing practice. A Grievant may file within fifteen days of the most recent occurrence of a

continuing practice but a single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990); *Straley v. Putnam County Bd. of Educ.*, Docket No 2014-0314-PutED (July 28, 2014), *aff'd*, *Straley v. Putnam County Bd. of Educ.*, No. 15-1207 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision). “[W]hen a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in the past.” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001).

Although this case involves a pay differential rather than a salary determination, it is similar to a salary determination in that the differential is granted through the one-time application of the policy. Grievant alleges the policy should have granted K9 Handlers the same 10% differential that other special operations personnel received. That is a decision that was made when the policy was created in 2013, which cannot be converted into a continuing practice by Grievant’s current dissatisfaction with his pay as a result. Therefore, Respondent Division of Personnel has proven that the grievance was not timely filed.

Grievant alternatively asserted that his untimely filing should be excused because he was trying to work out a resolution with his supervisor and he believed he was required to “exhaust all measures” before filing a grievance. Nothing requires an employee to “exhaust all measures” prior to filing a grievance. The grievance procedure clearly requires a grievant to timely file following the “occurrence of the event upon which he grievance is based.” Even if Grievant’s complaint to his supervisor or the

alleged promise of the deputy commissioner to “take care” of the special operations pay differential were the relevant events, both of those events occurred in 2019 and Grievant did not file until October 2020. “[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.’ *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). A grievant’s “failure to timely file his grievance is not excused by the fact that he did not know he could or should file one.” *Cyrus v. Dep’t of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001). Grievant failed to prove a proper excuse for his untimely filing.

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). The Code sets forth the time limits for initial filing of 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).

3. “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).

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. 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); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

6. A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990); *Straley v. Putnam County Bd. of Educ.*, Docket No 2014-0314-PutED (July 28, 2014), *aff'd*, *Straley v. Putnam County Bd. of Educ.*, No. 15-1207 (W. Va. Supreme Court, Nov. 16, 2016) (memorandum decision). “[W]hen a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in the past.” *Young v. Div. of Corrections*, Docket No. 01-CORR-059 (July 10, 2001).

7. Respondent Division of Personnel proved that the grievance was not timely filed.

8. “[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991).

9. A grievant’s “failure to timely file his grievance is not excused by the fact that he did not know he could or should file one.” *Cyrus v. Dep’t of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001).

10. Grievant failed to prove a proper excuse for his untimely 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: May 9, 2022



Billie Thacker Catlett
Chief Administrative Law Judge