# PUBLIC EMPLOYEES GRIEVANCE BOARD

**MELVIN POORE,**

**Grievant,**

**v.** **Docket No. 2008-0686-WVSU**

**WEST VIRGINIA STATE UNIVERSITY,**

**Respondent.**

## DISMISSAL ORDER

Grievant, Melvin Poore, filed this grievance concerning his termination against his employer, West Virginia State University ("WVSU"), on October 22, 2007.

This grievance was filed directly to level three. On October 29, 2007, a Motion to Dismiss for Untimely Filing was filed by Assistant Attorney General Elaine Skorich, WVSU's attorney. By letter dated November 6, 2007, Grievant was given until November 26, 2007, to respond to this motion. A one paragraph response was received by the Grievance Board on November 13, 2007. This paragraph did not respond to the timeliness issue. No further response was received from Grievant, and this case became mature for decision on November 26, 2007.

## Synopsis

Grievant was terminated June 26, 2007, and he did not file this grievance until October 23, 2007. This grievance is untimely filed.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievant was employed by WVSU in the Facilities Department.

2. On June 26, 2007, he received a letter notifying him of WVSU's intent to terminate his employment for insubordination and gross misconduct on June 13, 2007 and on subsequent days. Grievant's pre-termination meeting was scheduled for June 27, 2007. Exh. A.

3. On June 27, 2007, Grievant's employment with WVSU was terminated immediately for insubordination and gross misconduct. Exh. B.

4. By grievance form dated October 22, 2007, and received October 23, 2007, Grievant filed this grievance asserting his termination was unfair, and he was innocent of the charges asserted against him.

5. Grievant's response to the Motion to Dismiss did not identify any excuse to explain his late filing.

## Discussion

WVSU contends this grievance is untimely filed as it was not initiated within the timelines contained in W. Va. Code § 6C-2-4(a). 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).

W. Va. 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-2-4 (1) identifies the timelines for filing a grievance and states,

> 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 (3) allows the filing of a grievance directly to level three when the employee is "discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits."

Pursuant to W. Va. Code § 6C-2-3(c), "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer at or before the level two." This grievance was filed directly to level three as permitted by W. Va. Code § 6C-2-4 (3), and the issue of timeliness was raised one week later. Accordingly, the undersigned finds the timeliness defense was properly raised.

Grievant was terminated on June 27, 2007, and did not file this grievance until October 22, 2007. W. Va. Code § 6C-2-4 (1) requires Grievant to file

"within fifteen days following the occurrence of the event upon which the grievance is based. . . ." Grievant filed this grievance approximately three months after his termination. Clearly, Grievant didnot meet the time requirement for filing this grievance. Although given an opportunity to respond to the Motion and to present an excuse for his untimely filing, Grievant did not do so. Respondent's Motion to Dismiss is Granted.

The above-discussion will be supplemented by the following Conclusions of Law.

## 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 her 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. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article," and W. Va. Code § 6C-2-4 (1) identifies the timelines for filing a grievance as within "fifteen days following the occurrence of the event upon which the grievance is based. . . ."

3. Grievant did not file this grievance until almost three months after

his termination, and he did not offer an excuse for his untimely filing.

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 § 6.19 (eff. Dec. 27, 2007).

**JANIS I. REYNOLDS**

**Acting Chief Administrative Law Judge**

**Dated: January 18, 2008**