THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANIEL FROST,
Grievant,

v. **Docket No. 2011-0856-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

DISMISSAL ORDER

Daniel Frost, Grievant, filed this grievance on October 15, 2010. This grievance was denied at the level one and mediation was unsuccessful. Respondent filed a Motion to Dismiss the Grievance as Untimely Filed at level three on August 31, 2011. Grievant did not respond to this motion. The motion is mature for a ruling. Grievant appears by his representative, Ben Barkey, West Virginia Education Association. Respondent appears by its counsel, Kristi A. McWhirter, Assistant Attorney General.

The following findings of fact are undisputed.

Findings of Fact

1. Grievant filed this action on October 15, 2010.

2. Respondent denied the grievance at level one. Grievant appealed.

3. The parties participated in a mediation session on June 22, 2011.

4. An Order reflecting the outcome of the mediation session was issued on June 23, 2011.

5. Grievant filed an appeal from this Order on August 13, 2011.

Discussion

Respondent contends this grievance is untimely as it was not initiated within the time lines contained within W. VA. CODE § 6C-2-4. 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).

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 generally WEST VIRGINIA CODE §§ 6C-2-1 *et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with West Virginia Grievance Statutes and applicable Regulations. To be considered timely, and therefore within the jurisdiction of the Grievance Procedure, a grievance must be 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 need not 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-10 (Jan 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W Va. Dep't of Transp.,* Docket No. 96-DOH-445 (July 28, 1997).

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(c)(1) sets forth the time limits for appealing from level two and states:

> 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 . . .

In the instant case, an Order was issued and mailed subsequent to the mediation session to the parties on June 23, 2011. Pursuant to the level three grievance postmark, Grievant did not file the appeal to level three until August 13, 2011. Accordingly, Grievant did not file the appeal within the ten day time limit. Grievant did not offer any reason for a delay in appealing to level three. Respondent's motion is granted.

The following conclusions of law support the dismissal of this grievance.

Conclusions of Law

1. 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. *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). *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. This grievance was not timely appealed to level three, and Grievant offered no proper basis to excuse the late filing.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

Date: July 31, 2012

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Ronald L. Reece
Administrative Law Judge