WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAPHNE LEMASTERS,
Grievant,

v. **Docket No. 2013-0798-JacED**

JACKSON COUNTY BOARD
OF EDUCATION,
Respondent.

DISMISSAL ORDER

Daphne LeMasters, Grievant, filed this grievance against her employer, Jackson County Board of Education ("JCBE"), Respondent, on November 19, 2012. Grievant initiated a grievance seeking compensation for the time she allegedly worked on several occasions beyond the end of the scheduled work day.

A conference was held at level one on December 4, 2012, and the grievance was denied at that level on December 20, 2012.[1] Grievant appealed to level two on January 4, 2013, and a mediation session was held on March 14, 2013. Grievant appeared at level one and level two in person and with her then representative Jeremy Radabaugh, West Virginia Education Association. At the conclusion of the mediation session, the parties requested that the matter be held in abeyance in order to allow the parties additional time to attempt settlement. Accordingly, this Board, by Order dated March 15, 2013, "Ordered

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[1] Grievant refilled the grievance on December 13, 2012. The cover letter mailed with the grievance form, addressed to the Jackson County Superintendent Blaine Hess states, in relevant part: "This is a refiling of the previous grievance over the duty assignments. I appreciate the fact that you had asked the school to develop a new schedule. The employees worked hard and had nearly come up with a workable solution. Unfortunately, the administration proffered a different solution that contained nearly as many inequities as the disputed schedule."

that this matter be held in abeyance until March 28, 2013." An Order of Unsuccessful Mediation was issued on April 1, 2013. Grievant appealed to level three on April 25, 2013 pursuant to a hand delivered grievance form and cover letter delivered to the Grievance Board's Charleston Office.

Respondent filed a Motion to Dismiss dated May 16, 2013, alleging that Grievant's level three appeal was untimely filed, serving the same upon Grievant and Grievant's then legal counsel Dana F. Eddy, Esquire. Grievant filed a written response to Respondent's Motion to Dismiss dated May 21, 2013. A telephonic hearing on the status of this grievance and the Motion to Dismiss was conducted by the undersigned Administrative Law Judge on June 5, 2013. Respondent appeared by counsel Howard E. Seufer, Jr., Esquire, Bowles Rice, LLP. Grievant was represented by legal counsel Dana F. Eddy, Esquire, The Eddy Law Office.

During the phone conference, the status of this grievance was discussed as well as the pending Motion for Dismissal. It was established that Grievant would be securing new representation.[2] Further, it was determined a ruling on the Motion to Dismiss would be delayed until after Grievant had secured new legal representation and said representative had had time to respond to the pending motion.

Grievant is now represented by legal counsel Donald L. Stennet, Stennett Law Firm, PLLC. Attorney Stennett filed a "Supplemental Response to Respondent's Motion to Dismiss" dated May 21, 2013. The undersigned Administrative Law Judge is of good faith belief that the pending Motion for Dismissal is mature for decision.

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[2] Unrelated to this grievance matter, Attorney Eddy had accepted new employment with a public agency and was in the process of closing his private practice of law, The Eddy Law Office.

Synopsis

Grievant filed her level three appeal in excess of the prescribed time-period allotted pursuant to W. VA. CODE § 6C-2-4(c)(1). Grievant contends that the filing was timely in the circumstances of the case. Respondent asserts that the level three appeal was untimely filed, and, as such, has moved to dismiss this grievance. For reasons more fully set out below, Respondent's Motion to Dismiss is Granted.

The undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant filed this grievance at level one on November 19, 2012. Grievant initiated a grievance seeking compensation for the time she allegedly worked on several occasions beyond the end of the scheduled work day.

2. A level one conference was conducted on December 19, 2012. A Level One decision was issued on December 20, 2012, denying the grievance.

3. The level one decision also instructed Grievant and her representative that the decision could be appealed within 10 days, to the West Virginia Public Employees Grievance Board, located at 1596 Kanawha Boulevard, East, Charleston, WV 25311.

4. The level one decision was mailed to Grievant, Daphne Lemasters, at 4929 Evansview Road, Evans, West Virginia 25241, the address shown on her written grievance form. Also, the level one decision was mailed to the Grievant's representative Jeremy Radabaugh at the West Virginia Education Association, 1558 Quarrier Street, Charleston, West Virginia 25311.

5. Thereafter, on January 4, 2013, Grievant, through her West Virginia Education Association ("WVEA") representative Jeremy Radabaugh, filed an appeal to level two requesting mediation.

6. A mediation session was held on March 14, 2013, at the West Virginia Public Employees Grievance Board in Charleston West Virginia which Grievant, and her WVEA representative, were present.

7. At the conclusion of the mediation session, the parties requested that the Board hold the matter in abeyance until March 28, 2013, to allow the parties additional time to attempt a settlement of this matter.

8. This matter was held in abeyance until March 28, 2013. The parties did not reach a settlement agreement while this matter was in abeyance. As a result, on April 1, 2013, the West Virginia Public Employees Grievance Board entered an order of unsuccessful mediation.

9. The Order of Unsuccessful Mediation was mailed on April 1, 2013, to Grievant, Daphne Lemasters, at 4929 Evansview Road, Evans, West Virginia 25241, the address shown on her written grievance forms. The same Order was also mailed to Grievant's WVEA representative, Jeremy Radabaugh, at the West Virginia Education Association, 1558 Quarrier Street, Charleston, West Virginia 25311.

10. The order of unsuccessful mediation stated:

> "The mediation session conducted on March 14, 2013, was unsuccessful. Pursuant to the provisions of W. Va. Code § 6C-2-4(c)(1), the grievant may request a level three hearing on the grievance. A grievant wishing to do so must file a written appeal within ten (10) days of receiving an Order stating that the level two mediation was unsuccessful…"

11. Grievant was represented by her WVEA representative Jeremy Radabaugh during the level one and level two proceedings.

12. Grievant and her WVEA representative were notified of the time frame in which the appeal to level three had to be filed.

13. Grievant retained attorney Dana Eddy, as legal counsel. Mr. Eddy mailed a Notice of Appearance, in this matter, on April 2, 2013, to Respondent and the West Virginia Public Employees Grievance Board. E-mail copies were also transmitted.

14. Respondent received the Order of Unsuccessful Mediation on April 3, 2013.

15. Discounting the entire week of April 1, 2013, which was spring break for the Jackson County School system, Grievant had until April 19, 2013, to timely file an appeal.

16. During this period Grievant certainly could have communicated with her newly retained attorney to advise him of the need to file her appeal in a timely manner.

17. It is more probable than not that attorney Eddy was aware that this grievance matter had not been successfully mediated.

18. Mr. Eddy provides that he did not receive the written Order of Unsuccessful Mediation until April 24, 2013.

19. From the date of attorney Eddy's Notice of Appearance there were numerous working days, prior to the deadline for filing an appeal to level three. Grievant's newly retained counsel could have ascertain the status of the grievance by communicating with Grievant, her previous representative, or the Public Employees Grievance Board.

20. There is an excess of fourteen working days between the time period Grievant and her then WVEA representative Jeremy Radabaugh would have reasonably received the notice of Unsuccessful Mediation and the date the level three appeal was filed.

21. The appeal to level three was filed on April 25, 2013.

22. Pursuant to the provisions of WEST VIRGINIA CODE § 6C-2-4(c)(1), "a grievant may request a Level Three hearing by filing a written appeal within ten days of receiving an order stating that the Level Two mediation was unsuccessful."

23. Under WEST VIRGINIA CODE § 6C-2-2, "'[d]ays' 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 by statute, rule, policy or practice."

24. Allowing for the school system's spring break from April 1, 2013, through April 5, 2013, fourteen working days passed from the date on which the Order of Unsuccessful Mediation was entered, April 1, 2013, to when the level three appeal was filed, April 25, 2013.

25. The jurisdiction of the Grievance Board is limited to the granting of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. To be considered timely, and therefore within the jurisdiction of the Grievance Procedure, a grievance must be filed pursuant to WEST VIRGINIA CODE §§ 6C-2-1 *et seq*.

26. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Carnes v. Raleigh County Board of Education,* Docket No. 01-41-351 (Nov. 13, 2001).

27. The number of working days between the Order of Unsuccessful Mediation at level two and the filing of the level three appeal exceeds the time period specified by applicable statute as the mandatory filing period.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.2 (2008). The current issue before the undersigned is Respondent's Motion to Dismiss.

Respondent seeks to have this grievance dismissed as untimely. Respondent contends that Grievant's appeal to level three is untimely because it was not initiated within the timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1). Timeliness is an affirmative defense. 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,*

W. Va. Code §§ 6C-2-1 *et seq*. There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely 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 to 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-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See, Kessler v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-445 (July 28, 1997).

WEST VIRGINIA 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-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(c)(1) sets forth the time limits for appealing a grievance from level two, stating as follows:

> 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).

In this matter, Grievant's former legal counsel contends that he did not receive the Order resulting from the level two mediation until April 24, 2013. However, the document was sent to Grievant's correct mailing address and her level two representative received the copy he was sent. Grievant was aware of the time restraints. It is hard to comprehend

how Grievant's then new counsel Dana Eddy was unaware that the matter had not been successfully mediated. It is recognized that Grievant may have other grievance matters pending, but there would be little reason to retain legal counsel in this matter if all issues of concern were resolved. Grievant certainly had ample time to contact her new attorney to advise him of the need to file her appeal in a timely manner.

Discounting the entire week of April 1, 2013, which was spring break for the Jackson County School system, Grievant had until April 19, 2013, to timely file an appeal. The appeal to level three was filed on April 25, 2013. Allowing for the school system's spring break from April 1, 2013, through April 5, 2013, fourteen working days passed from the date on which the Order of Unsuccessful Mediation was entered, April 1, 2013, to when the level three appeal was filed, April 25, 2013.

Grievant was present in person and was represented by her WVEA representative Jeremy Radabaugh during the level one and level two proceedings. Each received a copy of the Order of Unsuccessful Mediation. The number of working days between the Order of Unsuccessful Mediation at level two and the filing of the level three appeal filed by Grievant's then recently retained legal counsel exceeds the time period specified by applicable statute as a mandatory filing period. Grievant's appeal to level three was untimely.

The following conclusions of law are appropriate in this matter:

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 that 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. *See, 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); *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. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

3. 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.

4. The jurisdiction of the Public Employees Grievance Board is limited to the granting of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. *See generally, Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002) and *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002); (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)).

5. WEST VIRGINIA CODE § 6C-2-4 (c)(1), provides that a grievant may request a level three hearing by filing a written appeal within ten days of receiving an order stating that the level two mediation was unsuccessful.

6. Pursuant to WEST VIRGINIA CODE § 6C-2-2, "'[d]ays' 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 by statute, rule, policy or practice."

7. Respondent established by a preponderance of the evidence that Grievant filed her appeal to level three in excess of the ten working days prescribed by applicable statute.

8. Grievant did not file her appeal to level three within the mandatory, statutory timelines for doing so. Grievant's appeal to level three was untimely and Grievant did not demonstrate "a proper basis to excuse her failure to file in a timely manner."

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Decision 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: September 23, 2013

Landon R. Brown
Administrative Law Judge