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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0932

**DIVISION OF HIGHWAYS,
and TERRA GOINS,**

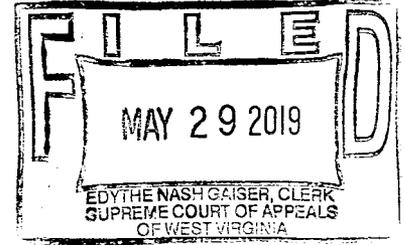
Petitioners,

v.

Appeal from final order of the
Circuit Court of Kanawha County
(Case No.: 17-AA-15)

MICHAEL A. POWELL,

Respondent.



Petitioner Terra Goins' Reply Brief

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ARGUMENT

I. The Circuit Court Incorrectly Determined that the Discovery Rule Applied.

West Virginia Code § 6C-2-4(a)(1) commands that a public employee filing a grievance of an employment decision must do so “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.” Powell plainly missed his statutory deadline and relied on the discovery rule in an attempt to save his grievance. As Administrative Law Judge McGinley concluded, the discovery rule cannot apply under these circumstances.

In his Brief, Powell contends that the discovery rule was properly applied because he had a “reasonable expectation” that the individuals at the DOH who hired Terra appropriately evaluated the candidates’ qualifications. However, Powell has failed to cite to any authority whatsoever for the proposition that his “reasonable expectation” has any bearing on the application of his statutory deadline to file his grievance. Indeed, if Powell’s argument were applied to statutes of limitation in general, then almost every claimant or plaintiff could avoid the dismissal of untimely filings by simply asserting that the claimant reasonably believed that those responsible for the action in question did what was supposed to have been done. Quite simply, Powell’s belief in the propriety of the DOH’s hiring process – reasonable or otherwise – is entirely inapposite to timeliness of his filing.

At bottom, the entire purpose of filing a grievance is to allege that something was amiss, that an improper conclusion was reached. The statute afforded Powell fifteen days to file his grievance. To the extent that he wished to personally explore Goins’s qualifications or otherwise challenge the DOH’s decision, he was required to do so by July of 2015. Powell missed his deadline by nearly four months.

Powell's proposed application of the discovery rule would altogether eliminate the statutory deadline to file such a grievance. Indeed, if Powell's interpretation of the discovery rule is correct, then the other unsuccessful applicants for the Highway Engineer position could still file a timely grievance after this Court decides the subject appeal provided that they do so within fifteen days of becoming aware of the issue. That is, the other three unsuccessful applicants could assert that they were unaware of Goins's allegedly inadequate qualifications until the ALJ or the circuit court or this Court decided the issue.¹ The other three candidates might also contend that they had a "reasonable expectation" that the DOH, the ALJ, the circuit court, and this Court would properly decide the issues in front of them and that they were, therefore, justified in delaying their grievance until the final decision is rendered. These types of absurd results can be avoided and the predictability and certainty afforded by the fifteen-day deadline will be maintained if the circuit court's application of the discovery rule is reversed.²

Powell also tepidly maintained that the facts at issue triggered the "continuing practice exception" to the fifteen-day statutory deadline for grievance filings. *See* Respondent's Brief at 4. This Court, however, has been very clear that "continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice." *Spahr v. Preston County Bd. of Educ.*, 391 S.E.2d 739, 742 (W. Va. 1990). Indeed, in *Clark v. W. Va. Div. of Natural Res.*, 2015 W. Va. LEXIS 622, *10 (W. Va. 2015), this Court rejected a similar argument. In *Clark*, the petitioners

¹ Importantly, Goins did not and does not concede that she was unqualified for the Highway Engineer position when she was awarded the same.

² The doctrine of "reasonable expectations" is that "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Riffe v. Home Finders Assocs.*, 517 S.E.2d 313, 318 (W. Va. 1999). It is an equitable doctrine that seeks to protect insureds in West Virginia from being deprived of the benefit of the insurance policy that they thought they were purchasing; however, the application of the doctrine is limited to those circumstances where the insurance policy language is ambiguous. *Id.* at 318-19. In this instance, there was nothing ambiguous about the DOH's selection of Goins for the Highway Engineer position over Powell and the other applicants.

maintained that they had not received a pay raise to which they were entitled and that, therefore, every pay period that followed thereafter constituted a new triggering event or continuing practice. *Id.* at 9. Relying on *Spahr*, this Court concluded that the decision not to award the pay raise at issue was a singular event and that the subsequent pay periods did not constitute a continuing practice. *Id.* at 10.

Spahr and *Clark* underscore the Petitioners' position – the DOH's decision to award Goins the Highway Engineer position was the singular event that triggered Powell's fifteen-day window to file a timely grievance. Powell missed his statutory deadline. Accordingly, this Court should reverse the decision of the circuit court and reinstate the ALJ's decision dismissing Powell's grievance as untimely filed.

II. Even Assuming that the Discovery Rule Applies, the Record is Inadequate to Establish that Michael Powell Timely Filed His Grievance.

Powell bears the burden of establishing that the discovery rule applies to save his otherwise untimely filed grievance. As illustrated above and as the ALJ correctly concluded, the discovery rule does not apply here. However, even if the discovery rule applies, Powell has not met his burden of establishing that he complied with even the greatly extended deadline that he seeks.

Again, the sole evidence that purportedly establishes the date of Powell's proposed triggering event – the alleged conversation with Goins in November of 2015 – has not been established with any certainty whatsoever. At best, Powell testified during the level three hearing that he "thought" the conversation occurred on November 4. A.R. 0235. Beyond that, Powell simply testified that his grievance was timely filed, which is a legal conclusion that can only be reached by applying the facts at issue to the law.³

³ When the ALJ was deciding whether to dismiss the grievance as being untimely filed, Powell asserted in an email dated March 14, 2016, that he "did not become aware that the successful applicant did not meet the minimum requirements until November of 2015. When I discovered that the applicant did not meet the

Because Powell failed to meet his burden of showing that his grievance was filed timely even if the discovery rule applies, this Court should reinstate the ALJ's decision dismissing the grievance. In the alternative, the Court should remand the case back to the ALJ for further factual development particularly in light of the fact that Powell had known Goins for more than a decade when she was selected over him for the Highway Engineer position.

III. Even if the Circuit Court Correctly Applied the Discovery Rule, the Court Must Still Reverse the Circuit Court, In Part, and Remand to the Board.

Contrary to Powell's assertion, the ALJ did not rule on the substance of the grievance, as there was no determination of whether Goins was qualified for the position that she was awarded. The ALJ made exactly one determination: Powell's grievance was not filed timely and therefore had to be dismissed. Powell's contention that "the decision of the ALJ essentially denied Respondent the relief he sought (i.e. being promoted to the position of Highway Engineer)" is entirely inconsistent with the applicable law. "A statute of limitations does not bar or affect the merits of the controversy in favor of the defendant but merely permits a litigant, if he chooses, to close the door of the court on his tardy adversary." *Morgan v. Grace Hosp.*, 144 S.E.2d 156, 164 (W. Va. 1965).

Because the ALJ determined only that Powell's grievance was untimely filed, that decision was the sole issue that could properly be reviewed by the circuit court. *See Reed v. Grillot*, 2019 W. Va. LEXIS 62, 2019 WL 1012160 (March 4, 2019). West Virginia law is clear that factual determinations of grievances must initially be made by administrative law judges; here, the ALJ did not make any factual determinations on the merits of Powell's grievance. Accordingly, even

requirements, I proceeded to file in a timely manner. . . . I had no way of knowing that this applicant did not meet the requirements and in fact thought that she did since she was awarded the position." *See App. Vol. I, p. 153 of the DOH's Appendix.* As asserted in Goins' appellate Brief, Powell did not allege that a conversation with Goins afforded him the requisite knowledge to file his grievance until the very end of the level three hearing before the ALJ.

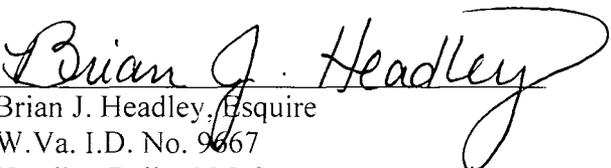
if the circuit court properly applied the discovery rule, this Court must still remand the case for a determination of the merits of Powell's grievance by the ALJ.⁴

CONCLUSION

The circuit court should not have applied the discovery rule under these circumstances. As such, Powell's grievance was untimely filed and appropriately dismissed by the ALJ. And, even if the discovery rule applied here, Powell failed to meet his burden to show that he complied with the deadline, as the facts do not establish that his grievance was filed timely. In any event, this Court must not permit the circuit court's decision to far exceed the ALJ's underlying determination and decide the merits of Goins's hiring to stand. Such substantive decisions are statutorily committed to administrative factfinders. Thus, remand to the ALJ is required to the extent that the Court determines that the substance of Powell's grievance may be heard.

Respectfully submitted,

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⁴ The record before the ALJ requires further development, but it has nonetheless shown that Goins was fully qualified to be selected for the position and has, by all accounts, performed marvelously as the Highway Engineer for years.