JEANNE SAYRE, .

.

Grievant, .

.

v. . Docket No. 95-MCHD-435

.

MASON COUNTY HEALTH DEPARTMENT, .

.

Respondent. .

D E C I S I O N

This is a grievance by Jeanne Sayre (Grievant), submitted directly to Level IV on September 25, 1995, in accordance with W. Va. Code § 29-6A-4(e), challenging her dismissal from employment as an Office Assistant with the Mason County Health Department (See footnote 1) (MCHD or Employer) in Point Pleasant, West Virginia. After this matter was set for hearing at Level IV, MCHD filed a Motion to Dismiss on November 13, 1995, contending that this grievance was not timely filed. Following a telephone conference on November 16, 1995, the parties agreed to limit the Level IV hearing to the issue of timeliness. Accordingly, a hearing was conducted in this Board's office in Charleston, West Virginia, on November 20, 1995. The parties thereafter filed post-hearing submissions and this matter became mature for decision on December 20, 1995. Consistent with the intent of W. Va. Code § 29-6A-4 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

MCHD notified Grievant of her impending dismissal in a letter dated August 18, 1995, and signed by Dr. Francis G. Fugaro and Kay Rutherford. Portions of that letter pertinent to the matter at issue are set forth below:

> The purpose of this letter is to inform you of my decision to dismiss you from your position as an Office Assistant with the Mason County Health Department. Your dismissal is effective September 2, 1995 which provides a fifteen (15) calendar day notice in accordance with the provisions of Section 12.02 of the West Virginia Division of Personnel Administrative Rule.
>
> * * *
>
> You have an opportunity to either meet with me in person or present to me a written explanation as to why you think this action should not be taken. If you choose to meet with me, or to write me, please contact my secretary for an appointment or deliver to me your written explanation within fifteen (15) calendar days of receipt of this letter.
>
> For any appeal rights you may have, refer to W. Va. Code § 29-6A-4(e), Expedited Grievance Process. If you choose to exercise your appeal rights, you must submit your appeal directly to the Education and State Employees Grievance Board at 808 Greenbrier Street, Charleston, WV, 25311, within ten (10) working days of the effective date of this action. Copies of your appeal should be forwarded to me and the Director of Personnel.

R Ex 1.

Susan Brown, employed by MCHD as Director of Nursing and Administrator, was Grievant's immediate supervisor. She personallygave the above-described letter to Grievant on August 18, 1995. At the same time, she provided Grievant with a pamphlet entitled "An Employee's Guide to the Grievance Procedure" prepared by the West Virginia Division of Personnel. R Ex 9. Ms. Brown also noted that on August 30, 1995, Grievant came to the MCHD office to collect her pay. During that visit, Ms. Brown gave Grievant a grievance form. On August 28, 1995, Attorney Ronald F. Stein wrote to Dr. Frances [sic] Fugaro, MCHD's Physician Director, with copies to Kay Rutherford, MCHD Chairperson, and Grievant, as follows:

> Please be advised that I am responding to your letter of August 18, 1995, on behalf of Jeanie [sic] Sayre, a twenty year employee with the Mason County Health Department. Ms. Sayre takes the position that the allegations in your letter are groundless, false, based upon hearsay and rumor[,] unjustified and contrary to the facts, as well as the regular employee evaluations that have been documented on this employee. Your action of dismissal is totally unjustified and without the proper foundation.

> Ms. Sayre is seeking to employ counsel to represent her in ongoing legal action in this matter, however, I ask that you treat this letter as a direct response in the grievance procedure.
>
> Your letter states that Ms. Sayre had fifteen calendar days to respond.

R Ex 2.

After consultation with someone in the West Virginia Division of Personnel in Charleston, MCHD responded to Mr. Stein's letter on September 13, 1995, by letter from Dr. Fugaro stating:

> This is in response to your letter of August 28, 1995, regarding your client, Ms. Jeannie [sic] Sayre, a former employee of the Mason County Health Department. In addition to presenting Ms. Sayre's opposition to her dismissal from employment you stated, "I ask you to treat this letter as a direct response in the grievanceprocedure." I am not sure what you meant by this statement.
>
> Your client was informed, by letter dated August 18, 1995, that she needed to refer to W. Va. Code § 29-6A-4(e) entitled, Expedited Grievance Process for a description of her appeal rights. In addition, she has since been provided with a copy of a grievance form and a copy of a booklet, An Employee's Guide to the Grievance Procedure, prepared by the West Virginia Division of Personnel. The Personnel's Guide, [sic] along with Ms. Sayre's August 8, [sic] 1995, letter contain a detailed description of the procedures to be followed when filing a grievance.
>
> I wish to advise you that your August 28, 1995, letter does not comply with the grievance procedure; therefore, I cannot respond beyond pointing this fact out to you.

R Ex 3.

Attorney Shirley A. Skaggs wrote to Ms. Brown, in a letter dated September 7, 1995, as follows:

> This law firm represents Jeannie [sic] Sayre who was last employed at Mason County Health Department. Enclosed is a Waiver of Employment Information signed by Ms. Sayre. Please provide us, at your earliest convenience, Ms. Sayre's entire personnel file representing all employment with Mason County Health Department.

> Please include all applications for employment, promotion, transfer, records of training, all evaluations done concerning her work and any documents concerning any disciplinary action, whether formal or informal. Also, include all documents pertaining to Ms. Sayre's separation from employment each time there was a break in her employment. Also, if, at any time, Ms. Sayre was an "employee-by-contract," please include a copy of each such contract. Finally, please provide me with the written reasons, if any, for Ms. Sayre's termination by Mason County Health Department.
>
> If there is a charge for copying such records, please call my office at 343-4323 and contact Jeanne Hunt. We will pay reasonable charges for such copying.
>
> If you have any questions, please feel free to contact me. Thank you for your assistance.

R Ex 4.

On September 25, 1995, Attorney Shirley A. Skaggs sent the following letter (See footnote 2) to this Grievance Board's main office in Charleston, West Virginia:

> This letter is written to file a grievance on behalf of Jeanne Sayer [sic] who was wrongfully dismissed from employment with the Mason County Health Department. Her attorney, Mr. Ronald Stein[,] apprised the Mason County Health Department of his intention to challenge through the grievance process the termination of Ms. Sayer within ten (10) days of the receipt of the dismissal letter from her supervisor(s). She is also grieving an unlawful suspension from her employment for ten (10) days without pay, April 7, 1995.
>
> Ms. Sayer [sic] requests that the WVSEEGB [sic] order the Mason County Health Department to reinstate her to her position as Office Assistant, and grant her backpay with interest from the date of her wrongful termination as well as the costs of attorney fees associated with this process. In addition, Ms. Sayer request[s] that she be reimbursed for the ten (10) days of wages she was docked as a result of the erroneous suspension she suffered beginning April 7, 1995.
>
> If there are any questions regarding this grievance, please call. Thank you for your attention to this matter.

R Ex 6.

Grievant testified in her own behalf at Level IV. She recalled that Ms. Brown explained to her during their meeting on August 18, 1995, that "since this was a termination" her grievance "would have to go directly to Level IV." Grievant understood Ms. Brown to say that she would "have to get a lawyer." She acknowledged that Ms. Brown gave her a grievance form on August 30, 1995. Grievant also stated: "I didn't know what to do. That's how come I had to get a lawyer."

Under W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters falls on the employer. Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Where the 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 that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his or her failure to file in a timely manner. 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 29-6A-4(e) (1992) provides as follows:

> An employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days directly to the hearing examiner. The expedited grievance shall be in writing and must be filed within ten days of the date of the final action with the chief administrator and the director of personnel of the state civil service commission.

Here, Grievant received notice of her impending dismissal on August 18, 1995. R Ex 1. The dismissal letter properly notified Grievant of her right to file a grievance with this Grievance Board within ten working days of the effective date of the action. The undersigned administrative law judge is not persuaded that thisletter, or any other verbal or written communication from her employer, communicated erroneous or misleading information to Grievant, so as to justifiably excuse her from filing a timely grievance. See Jack, supra. Indeed, the letter provides unequivocal notice that Grievant is being terminated, unless she elects to exercise her due process right to respond, and thereby

persuade her employer to rescind or mitigate the action. Absent such an intervening event, Grievant's dismissal was to become, and did become, effective on September 2, 1995. See Indep. Fire Co. v. W. Va. Human Rights Comm'n, 376 S.E.2d 612, 617 (W. Va. 1988).

Grievant argues that the time limit for filing her grievance did not begin to run until she received MCHD's letter of September 13, 1995, refusing to reconsider the decision to dismiss her from employment. The theory represented in the court decisions cited by Grievant in support of this proposition was effectively rejected by the West Virginia Supreme Court of Appeals in Independent Fire Co., supra. Attorney Stein's letter includes two sentences denying the charges set forth in the dismissal letter in broad and general terms. Such a pro forma response does not represent a good faith effort to resolve the matter without resort to the grievance procedure. MCHD was under no obligation to respond to Attorney Stein's letter and their decision to afford the courtesy of a reply does not extend the statutory time limit for filing a grievance. (See footnote 3) Accordingly, in order to file a timely grievance, Grievant needed to submit her Grievance not later than September 18, 1995, the tenth working day following her termination. (See footnote 4) As previously noted, her grievance was submitted to this Board on September 25, 1995, seven days after the required filing date. R Ex 6. At best, Attorney Stein's letter of August 28, 1995, put MCHD on notice of Grievant's intent to file a grievance over her termination. (See footnote 5) However, as it was not addressed to this Grievance Board in accordance with W. Va. Code § 29-6A-4(e) and clearly explained in Grievant's dismissal letter, this correspondence cannot be construed to constitute substantial compliance with the statutory grievance procedure. See Duruttya v. Bd. of Educ., 382 S.E.2d 40 (W. Va. 1989).

Moreover, as correctly noted by Respondent, the opportunity to respond, which Grievant exercised through Attorney Stein, was provided consistent with Grievant's right to due process as an employee of a government entity, not as an additional step in the expedited grievance procedure provided under § 29-6A-4(e). SeeAlbright v. W. Va. Dept. of Health & Human Resources, Docket No. 91-HHR-348 (Nov. 27, 1991); Knauff v. Kanawha County Bd. of Educ., Docket No. 20-88-095 (Jan. 10, 1989).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. On August 18, 1995, Grievant was notified by her employer, the Mason County Health Department (MCHD), that she was being dismissed from employment, effective September 2, 1995.

2. Grievant did not submit her appeal to this Grievance Board until September 25, 1995.

CONCLUSIONS OF LAW

1. W. Va. Code § 29-6A-4(e) provides that a grievance relating to a dismissal must be filed within ten days of the date of the final action. Taylor v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-534 (Mar. 2, 1995).

2. "'Days'" are defined in W. Va. Code § 29-6A-2(c) as "working days exclusive of Saturday, Sunday or official holidays." Taylor, supra.

3. Because Grievant did not file her grievance until more than ten working days after the effective date of her dismissal, it was not timely filed pursuant to W. Va. Code § 29-6A-4(e). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Taylor, supra.

4. Grievant failed to demonstrate that MCHD engaged in any conduct or affirmatively misled Grievant regarding her right togrieve her dismissal so as to equitably toll the time limit for submission of a grievance. See Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (7th Cir. 1986); Indep. Fire Co. v. W. Va. Human Rights Comm'n, 376 S.E.2d 612 (W. Va. 1988); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

Accordingly, this Grievance is **DISMISSED** for lack of jurisdiction.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: December 29, 1995

Footnote: 1As employees of county health departments are members of the state merit system, this Grievance Board has jurisdiction over grievances arising in these agencies. W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 192 W. Va. 202, 451 S.E.2d 768 (1994).

Footnote: 2The envelope containing this letter was properly addressed to this Board's main office in Charleston, West Virginia, and postmarked on September 25, 1995. In addition, a copy was received by this Board via facsimile machine on September 25, 1995.

Footnote: 3Had MCHD taken some affirmative step to indicate the dismissal decision was being reconsidered, such as permitting Grievant to remain working beyond September 2, 1995, the effective date of her termination set forth in her dismissal letter, then Grievant's argument would have merit.

Footnote: 4In McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995), this Board specifically adopted the "mail-box rule," allowing grievants to establish timely filing by showing that their grievance was properly addressed and postmarked on the due date. See also Wadbrook v. Shepherd College, Docket No. 93-BOD-214 (Aug. 31, 1993).

Footnote: 5Grievant's claim that Attorney Stein's letter represented an effort to invoke Level I of the standard grievance procedure is not supported by the evidence. In particular, assuming Grievant elected to waive her right to pursue an expedited grievance directly to Level IV by pursuing her grievance at Level I, she could not thereafter abandon that tactic by submitting an appeal to Level IV, skipping Levels II and III without explanation.