EVA SHORT,

SANDRA PERDUE, and

WAYNETTE KAY SMITH,

Grievants,

v. DOCKET NO. 97-HHR-270

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

HUNTINGTON STATE HOSPITAL,

Respondent.

DECISION

Grievants Eva Short, Sandra Perdue and Waynette Kay Smith filed grievances on or about October 9, 1996, regarding merit raises which they were allegedly promised, but never received. (See footnote 1) Grievants requested merit raises, retroactive to June 1996. Level I proceedings were waived, and the grievances were denied at Level II. Grievants advanced the matter to Level III, and a Level III hearing was held on January 3, 1997. A Level III Decision was rendered, denying the grievances, on May 19, 1997. Grievants advanced the matter to Level IV, where the grievances were consolidated, without objection, by Order dated July 3, 1997. Respondent filed motions to dismiss the grievances on the ground that their appeal to Level IV was untimely.

Based upon documents filed with the grievances and a telephonic hearing held on July 21, 1997 (See footnote 2) , the following findingsof fact are not in dispute:

FINDINGS OF FACT

1 1. Grievants Short and Perdue received the Level III Decision in this matter on May 19, 1997.

2 2. Grievant Smith was mailed a copy of the May 19, 1997 Level III Decision on May 19, 1997, to the same address which she provided on her Level IV grievance form.

3 3. Grievant Smith received the Level III Decision on May 19, 1997.

4 4. The Level III Decision dated May 19, 1997 specifically advises that "If Grievant does not agree with this decision, then she has the right to appeal it to the Grievance board [sic] within five (5)

working days," and provides the correct address and telephone number for the Grievance Board.

5 5. Grievants Short and Perdue filed their grievances at Level IV, eight days later, on June 3, 1997, by depositing them in United States mail, postage prepaid.

6 6. Grievant Smith's Level IV grievance form was dated June 10, 1997, and was received at the office of the West Virginia Education and State Employees Grievance Board on June 17, 1997.

7 7. Grievant Smith filed her Level IV appeal after June 10, 1997.

8 8. All Grievants were capable of filing their appeals to Level IV by May 27, 1997.

9 9. Grievants Short and Perdue spoke with someone in theAttorney General's office during February 1997, who told them that the time limits in the grievance procedure were not mandatory. The identity of the person is unknown.

10 10. Grievants Short and Perdue filed another grievance on February 24, 1997 grieving Respondent's failure to issue its Level III Decision in a timely fashion.

DISCUSSION

W. Va. Code §29-6A-4(d)(1) states that, if a grievant is not satisfied with the action taken at Level III, "within five days of the written decision the grievant may request, in writing,...that the grievance be submitted to a hearing examiner..." The statute defines "days" as working days, exclusive of Saturday, Sunday or official holidays. W. Va. Code §29-6A-2(c). The Grievance Board considers an appeal timely filed if it is postmarked on the date due. 156 C.S.R. Series 1, §2.1.1; McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

Here, Grievants received the Level III Decision on May 19, 1997. Five days after May 19, 1995, exclusive of weekends and holidays, was May 27, 1997. None of the grievances were filed at Level IV by this date. Grievants Short and Perdue agreed that they were not unavailable or incapacitated during that time, such that they would have been unable to comply with the filing requirements. No evidence suggests that Grievant Smith was unable to file her appeal in a timely manner.

Although the Respondent failed to adhere to statutory time frames for rendering the Level III Decision in this matter, the issue of Respondent's noncompliance with statutory proceduralrequirements is not at issue here. Moreover, Respondent's error does not excuse Grievant's failure to adhere to statutory requirements. Numerous prior decisions of this Grievance Board, many of which are cited in Respondent's Motion to Dismiss, mandate that under the

circumstances found here, these grievances must be dismissed as untimely appealed to Level IV. Gaskins v. W. Va. Dept. of Health and Human Services, Docket No. 90-H-032 (Apr. 12, 1990); Hicks v. W. Va. Dept. of Health and Human Services, Docket No. 97-HHR-170 (June 10, 1997).

CONCLUSIONS OF LAW

1. W. Va. Code §29-6A-4(d)(1) states that, if a grievant is not satisfied with the action taken at Level III, "within five days of the written decision the grievant may request, in writing,...that the grievance be submitted to a hearing examiner..."

2. W. Va. Code §29-6A-2(c) defines "days" as working days, exclusive of Saturday, Sunday or official holidays.

3. The Grievance Board considers an appeal timely filed if it is postmarked on the date due. 156 C.S.R. Series 1, §2.1.1; McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

4. Grievants failed to file their appeal to Level IV of the grievance procedure within the five day time limit.

5. No facts were shown which would excuse Grievants' late filing.

6. Grievants' failure to file their appeals within the mandated time period does not constitute substantial compliance with the statute, and the grievances must be dismissed. Gaskins v.W. Va. Dept. of Health and Human Services, Docket No. 90-H-032 (Apr. 12, 1990).

Accordingly, Respondent's Motion to Dismiss is **GRANTED** and this matter is **DISMISSED** and stricken from the docket of the Grievance Board.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred. 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.

Dated: July 29, 1997 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

Grievant Smith filed her grievance on or about December 3, 1996. However, Respondent did not challenge any of the initial filings as untimely, and Ms. Smith's grievance was apparently considered part of the Level III proceeding, as shown by the hearing transcript and decision.

Footnote: 2

Grievant Smith failed to appear for the July 21, 1997 telephone conference, or to advise that she would be unavailable. The gentleman answering her home telephone number stated that she was not there and that he did not know where she was. Grievant Smith no longer works for Respondent Huntington State Hospital. Consequently, all Findings regarding Grievant Smith are taken fromdocuments in the file, and reasonable conclusions drawn therefrom.