MARY LAMBERT and DAVID WHITE,

Grievants,

v. DOCKET NO. 97-DEP-275

DIVISION OF ENVIRONMENTAL

PROTECTION/OFFICE OF AIR QUALITY,

Respondent.

D E C I S I O N

Grievants, Mary Lambert and David White, filed this grievance against the Division of Environmental Protection/Office of Air Quality ("OAQ") on or about December 16, 1994. Grievants alleged that Kathy Peet, OAQ Personnel Representative, had threatened them because of their participation in the grievance process, that Laboratory Supervisor Venisa Flesher (See footnote 1) **had made verbal statements in retaliation against Grievants, and that both Ms. Peet and Ms. Flesher had required Grievant Lambert to provide additional information about her grievance. As relief, Grievants asked that any disciplinary measure planned or unplanned against them be suspended until resolution of this grievance and another grievance filed by Grievant Lambert; that Grievants' personnel files be placed in the custody of a neutral party and that Ms. Peet and Ms. Flesher not be allowed access tothem or be allowed to make entries in them; that no entries be made in Grievants' personnel files characterizing Grievant Lambert's cooperation in the grievance process, or referencing Grievant White's representation of Grievant Lambert; that no reprisals be taken against Grievants for filing a grievance; and that Grievants be reimbursed for costs.**

The Level III Decision dismissed Mary Lambert as a grievant as she is no longer an employee, and none of the relief she had requested was available to her. That Decision is affirmed. Grievant Lambert's grievance is moot, and to render a decision on her grievance would be to issue an advisory opinion, which this Grievance Board does not do. Brightwell v. Tyler County Bd. of Educ., Docket No. 96-48-255 (Nov. 22, 1996); Jervis v. Bd. of Trustees, Docket No. 94-BOT-1117 (Mar. 20, 1995).

Respondent filed a Motion to Dismiss this grievance as untimely appealed to Level IV, citing W. Va. Code § 29-6A-4(d)(1). That Code Section provides, in pertinent part:

(d) Level four.

(1)

> If the grievant is not satisfied with the action taken by the chief administrator or his designee, within five days of the [Level III] written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a [Level IV] hearing examiner.

Evidence taken at the Level IV hearing substantiated Respondent's argument that this grievance was untimely submitted to Level IV, and must be dismissed for that reason. As the procedural history of this case is dispositive, it will be set forth in the following findings of facts, made from the recorddeveloped at the hearings held at Levels III and IV, on November 22, 1996, and July 21, 1997, respectively. (See footnote 2)

Findings of Fact

1. Mary Lambert is no longer employed by OAQ.
2. David White is employed by OAQ as an Environmental Resource Specialist II.
3. This grievance was submitted to Grievant White's supervisor on December 16, 1994. His supervisor was without authority to grant the relief requested. Grievant appealed to Level II on December 29, 1994, and the grievance was denied on January 6, 1995. The Level II Decision was appealed by Grievant to Level III on January 12, 1995.
4. A Level III Decision was issued by John E. Caffrey, Director, on May 9, 1997. (See footnote 3)
5. Grievants received the Level III Decision on May 29, 1997, when Grievant White found it on his chair, and then provided it to Grievant Lambert.
6. The Level III Decision advises that, "[a]ny party may appeal this decision to Level IV of the grievance procedure, and such appeal must be filed within five (5) days of the receipt of this decision, as stipulated in WV Code 29-6A-4(d)(1)." (See footnote 4)
7. Grievant White has been admitted to practice law in West Virginia. 8. Grievant White appealed the Level III Decision on behalf of both Grievants to Level IV by signing the grievance form on June 6, 1997, and submitting it to the Grievance Board. It was hand-

delivered to the Grievance Board on June 6, 1997.

9. June 6, 1997, is six working days after Grievants received the Level III Decision.

10. Nothing prevented Grievants from submitting the appeal to Level IV prior to June 6, 1997. Grievants were capable of filing their appeals to Level IV earlier.

Discussion

Only working days are counted in determining when the five day time period runs for appealing a Level III Decision to Level IV. Holidays are not counted. W. Va. Code § 29-6A-2(c). Grievant White explained that May 29th was a Thursday, and Friday was a holiday, Memorial Day, and then June 6th was the fifth day. When it was pointed out to him that the state holiday for Memorial Day was a Monday, he acknowledged it was the preceding Monday, May 26th, which makes June 6th the sixth day after receipt of the Level III Decision. He provided no reason for his tardiness, but argued he should not be held to the statutory filing deadlines when Respondent had taken so long to process this grievance at the lower levels. He asserted that the doctrine of equitable estoppel should be applied to prevent Respondent from raising his untimely filing. Respondent argued this did not excuse Grievant, and asserted that this grievance had been delayed at the lower levels with Grievant's consent.

"Equitable theories, including estoppel may be applied to toll the time for filing a grievance." Rose, et al., v. Raleigh County Bd. of Educ., Docket Nos. 94-41-296/314 (Nov. 29, 1994), aff'd per curiam, Appeal No. 23450 (W. Va. Feb. 24, 1997). The application of the doctrine of equitable estoppel to untimely filed grievances was discussed in Lilly v. Raleigh County Bd. of Educ., DocketNo. 94-41-195 (Nov. 28, 1994), aff'd No. 95-AA-7 (Kanawha County Cir. Ct. May 1, 1996); appeal refused (W. Va. April 1997):

> The West Virginia Supreme Court of Appeals, in Naylor v. W.Va. Human Rights Commission and Bird Machine Company, Inc., 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge."

No evidence was presented, or argument made, that Respondent took some action which might have led Grievants to delay the filing of this appeal to Level IV, or that Grievants, in fact, failed to timely file their appeal because they had relied in any way on Respondent's conduct

or representation. The doctrine of equitable estoppel is not applicable to these facts. Grievant White simply argued that Grievants should not be subject to any statutory timelines because Respondent had not followed them. This same argument has been rejected by the Grievance Board in other cases, noting that it is not Respondent's delay which is at issue.

> Moreover, Respondent's error does not excuse Grievant's failure to adhere to statutory requirements. Numerous prior decisions of this Grievance Board . . . 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).

Eva Short, et al., v. Dept. of Health and Human Resources, Docket No. 97-HHR-270 (July 29, 1997).

In Hutchinson v. W. Va. Dept. of Highways, Docket No. 89-DOH-471 (Jan. 31, 1990), the Administrative Law Judge went on to point out that a grievant's remedy, if a decision is not rendered within the statutory time periods, is to advance his claims by appealing to the next level, as is provided in W. Va. Code § 29-6A-3(a). The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant Lambert's grievance is moot.
2. A grievant seeking to appeal the denial of his grievance at Level III to Level IV, must do so within five working days of the day he receives the Decision. W. Va. Code § 29-6A-4(d)(4).
3. Grievants did not meet the statutory deadline for appealing the Level III Decision to Level IV.
4. No facts were shown which would excuse Grievants' late filing.
5. Respondent did not take any action which was designed to cause Grievants to delay filing the appeal to Level IV, or which should unmistakably have been understood that it would cause Grievants to delay filing the appeal to Level IV.
6. Grievants' failure to file their appeals within the mandated time period does not constitute substantial compliance with the statute. Eva Short, et al., v. Dept. of Health and Human Resources, Docket No. 97-HHR-270 (July 29, 1997); Gaskins v. W. Va. Dept. of Health

and Human Serv., Docket No. 90-H-032 (Apr. 12, 1990).

7. These grievances were not timely appealed to Level IV.

Accordingly, these grievances are 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 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 20, 1997

Footnote: 1

Ms. Flesher is no longer an employee of OAQ, so any relief requested which relates to her future actions is moot.

Footnote: 2

This matter became mature for decision at the conclusion of the Level IV hearing.

Footnote: 3

Neither party explained what caused the extensive delay at the lower levels. As will be addressed later in this Decision, Grievant White asserted he should not be held to the statutory filing deadline when this much delay had occurred at the lower levels.

Footnote: 4

Although the grievance form used by Grievants does not list the Grievance Board's correct address, Grievant White did not assert that this caused him to miss the filing deadline.