SHERRI RENE CUTLIP,

Grievant,

v. **Docket No. 98-BEP-052**

BUREAU OF EMPLOYMENT PROGRAMS/

WORKERS' COMPENSATION DIVISION,

Respondent.

D E C I S I O N

Grievant, Sherri Rene Cutlip, alleges:

> I was wrongly accused of taking part in a crime seven years ago of which I had no knowledge. I was never questioned or charged with any offense but have been removed from my position as an Investigator II. The guilty party, who was charged and found guilty, is still working as an Investigator II. I wish to utilize the grievance procedure to resolve this matter before taking other avenues if necessary.

The relief sought is to be "[r]eturned to work as an investigator in my previous position. Be restored whole! All documents pertaining to this matter be removed from my record."

This grievance was denied at all lower levels. At Level III, Respondent filed a Motion to Dismiss based on Grievant's untimely filing. As this Motion was not raised until the beginning of the Level III hearing, the Level III Grievance Evaluator refused to consider the Motion and denied the case on the merits.

On April 8, 1998, prior to the Level IV hearing, Respondent filed a written motion on this issue. As the timeliness issue could be dispositive of the entire grievance, it was addressed first by the parties at the Level IV hearing scheduled for April 13, 1998. Thetestimony of numerous witnesses was taken on this issue, and the prior testimony on this issue was noted from the Level III hearing. This Motion to Dismiss became mature for decision on April 24, 1998, the deadline for the parties' proposed Findings of Fact on this issue.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact on the issue of timeliness.

Findings of Fact

1. In 1993, Grievant was hired as an Investigator II ("Investigator") by the Bureau of Employment Programs ("BEP"). At the time this grievance arose she was assigned to work in the Workers' Compensation Division, Fraud Investigation Unit (or "Unit").

2. The function of the Fraud Investigation Unit is to investigate and present cases for criminal prosecution with regard to Workers' Compensation fraud.

3. The Fraud Investigation Unit was upgraded in 1995, with the addition of State Police Troopers assigned on a contract basis to the Unit. The State Police brought with them the powers of arrest, the ability to complete complex investigations, and statewide jurisdiction. At the same time the Troopers were added to the Unit, BEP hired an attorney, Ms. Susan Tucker, who was granted special prosecutor status by the Kanawha County Prosecuting Attorney.

4. One of the Investigators' duties is to present evidence to a Grand Jury to obtain an indictment on fraud charges.

5. In May 1996, after an indictment was handed down and in the process of complying with a defense attorney's discovery request, Ms. Tucker requested SergeantGary McGraw, the Trooper assigned to the Fraud Investigation Unit, complete a criminal background check on another Investigator, Ms. Martha Jane Bostic.

6. This check revealed Ms. Bostic had been convicted of misdemeanor embezzlement in 1989. Ms. Tucker requested a copy of the additional police records from the Kanawha County Prosecuting Attorney. Sergeant McGraw spoke to the Investigating Officer.

7. These records named Grievant as a suspect in Ms. Bostic's scheme to defraud her then employer.

8. Ms. Tucker and Sergeant McGraw called Ms. Bostic in and talked to her about this report. She confirmed she was convicted of the charge, and Grievant's role in the scheme.

9. Grievant and Ms. Bostic had been friends for approximately fifteen to twenty years, and Grievant had been instrumental in helping Ms. Bostic receive a position at BEP.

10. Ms. Bostic was immediately removed from her position as an Investigator in the Fraud Investigation Unit and was placed in another position with BEP. She retained her Investigator title and pay grade.

11. On May 31, 1996, Ms. Tucker and Sergeant McGraw called Grievant into a private meeting to discuss the issue. Prior to the start of this discussion, Grievant was told she would be removed from her position with the Fraud Investigation Unit. Ms. Tucker and Sergeant McGraw then spoke to Grievant about the police report and Ms. Bostic's statements to them. Next, they allowed Grievant to read the report and to respond to this information. Sergeant McGraw did not tell Grievant there would be a further investigationinto the matter, and that he would get back to her about her return to the unit, as there was "no need to investigate further." Test. of Sergeant McGraw at Level III and IV.

13. Ms. Tucker informed Grievant at this meeting that she could not continue in her position because her credibility was compromised, and this fact would decrease the effectiveness of her testimony before a Grand Jury.

14. Immediately after this meeting, Grievant's access to most computer material was removed, and she was not allowed to do any investigative work for the Unit.

15. Immediately after this meeting, Ms. Tucker and Sergeant McGraw went to the Executive Director of Workers' Compensation and Ms. Tucker's immediate supervisor, Mr. John E. "Ed" Burdette, and informed him that Grievant must be removed from the Fraud Investigation Unit. Sergeant McGraw informed Mr. Burdette that neither he nor his Troopers would work with Grievant. Ms. Tucker was "adamant" Grievant must be removed from the Unit because she would be unable to perform the essential duties of her position.

16. In June 1996, Mr. Burdette met with Grievant several times. He questioned her about the 1989 incident and found her to be evasive and nonresponsive. He attempted to find her a position elsewhere in BEP and talked to several mangers about a placement for Grievant. He had difficulty placing Grievant, as the major tasks of an Investigator involved working with money and investigating fraud allegations. He set up several interviews for permanent positions for Grievant.

17. By the first week in July 1996, Mr. Burdette still had not found a placement for Grievant. He decided to remove Grievant physically from the Fraud Investigation Unit area. He placed her in a cubicle on another floor, but she was assigned no duties toperform. She still reported her time to Ms. Lisa Prater, her immediate supervisor in the Fraud Investigation Unit.

18. Grievant spent her time reading magazines. She did ask a couple of people she knew if they had work she could do. Even though she changed her testimony at Level IV, Grievant was given some data entry work to perform in September 1996.

19. Neither Mr. Burdette, Sergeant McGraw, nor Ms. Tucker ever told Grievant she would return to the Fraud Investigation Unit. She never asked Ms. Tucker, Sergeant McGraw, Ms. Prater, or Mr. Burdette when she would return to the Fraud Investigation Unit.

20. Grievant filed this grievance on October 16, 1996. No particular event occurred on or about that date that changed Grievant's work circumstances.

21. Grievant filed her grievance on October 16, 1996, because she had been informed by co-workers that she had been in limbo for too long and because she had talked to someone who would represent her.

22. At all times pertinent to this grievance, Grievant has retained her Investigator II classification and her pay grade.

Issues and Arguments

Grievant argues she was never told she would not be returning to the Fraud Investigation Unit. Indeed, she avers she was told the matter would be investigated and "they" would let her know what the decision was after the investigation was complete. Thus, she waited in good faith to file this grievance until she had received a response from a supervisor. When approximately six months had passed, she was encouraged by friends and co-workers to file a grievance and she did. Additionally, Grievant's representativeargued she did not file sooner because she did not know she could have representation. This argument was not supported by Grievant's testimony.

Respondent asserted Grievant was clearly told she would not be returning to the Fraud Investigation Unit and was told why. All necessary investigation of the matter had been completed, and when Ms. Tucker and Sergeant McGraw discussed the situation with Mr. Burdette, he agreed with their assessment and plan.

The issue of credibility is raised by this grievance as Grievant's testimony conflicts with that of Ms. Tucker, Sergeant McGraw, and Mr. Burdette. Additionally, the issue of whether it was reasonable for Grievant to wait six months to file her grievance is at issue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ.

& State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988). Although Grievant attempted to argue the actions taken against her were disciplinary in nature, this allegation was unproven. Grievant received no disciplinary action of any kind. Although she may have disagreed with Ms. Tucker's and Mr. Burdette's decision to move her, this decision was a management decision and not a disciplinary action.

BEP contends this grievance is untimely as it was not initiated within the time limits contained in W. Va. Code §§ 29-6A-4(a). Where an employer seeks to have a grievancedismissed 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 her failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

To decide the issue of timeliness in this case, an examination of the witnesses's credibility must be conducted. It is an administrative law judge's responsibility to assess the credibility of the witnesses before her. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1994). The fact that testimony is offered in written form does not alter this responsibility. (See footnote 1) Some factors to be considered in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence ornonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

After reviewing the above-guidelines for assessing credibility, the undersigned Administrative Law

Judge finds Grievant's testimony to be less than credible. It is clear from the testimony that Grievant was told she would be removed from her position. Even Grievant testified to this fact. Grievant is the only witness who stated this removal was only until an investigation was completed. (See footnote 2) Ms. Tucker and Sergeant McGraw both testified they would not work with Grievant. Both testified Grievant was told why and how her testimony would be compromised before a Grand Jury. Mr. Burdette testified he would not have given Grievant any hope of return, because Ms. Tucker and Sergeant McGraw were so "adamant " in their refusal to work with Grievant, and their demands that Grievant be moved.

Determinations of credibility in this case were based on the consistency of prior statements, corroboration of testimony, responsiveness to questions, and plausibility of the witnesses's testimony. Grievant's testimony was confusing and conflicting on several points, it was not supported by others, she appeared nonresponsive at times, and some of her statements were implausible given the evidence of record. Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony that she was told further investigations would be taking place and she might be returned to the Unit untrue, and thus, she had no reason to delay her filing. The next issue to address is whether, given the facts of this case, this grievance is timely filed. The timeliness issue is governed by the time lines set out in W. Va. Code § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Grievant's main statement in defense of her position is that no one ever told her she would not return to work, and she assumed they would investigate further. This lack of action, given the fact Grievant was told she would be removed, her access to her computer and her work were removed immediately, she was physically removed from the Fraud Investigation Unit approximately one month later, and Mr. Burdette arranged interviews for employment, is unreasonable. If Grievant did not know

her position at the Fraud Investigation Unit was over, it is because she refused to acknowledge the statements made to her and to accept the evidence before her.

It is unclear why, if Grievant truly believed she might be returned to the Fraud Investigation Unit after an investigation, she did not ask someone at sometime about the status of this investigation. Grievant never questioned anyone about the status of this investigation. Further, it must be noted Grievant did not explain what there was left to investigate. The report had been received, Ms. Bostic had been questioned, the detectivewho conducted the investigation had been called, and Grievant had been given an opportunity to respond to the charges. It must also be noted the decision to remove Grievant was not based on her guilt or innocence in the 1989 fraud scheme, but on whether the effectiveness of her testimony before a Grand Jury would be compromised. This grievance would be untimely filed whether the date relied on by Grievant was the day Grievant was told she would be moved, May 31, 1996, or the first week of July, 1996, when she was physically removed from the Unit. Either way this grievance would be untimely filed. If the May date is used, Grievant waited five and one-half months to file, and if the July date is utilized, Grievant waited over three months to file. Either of these dates is far outside the ten working days allowed by statute.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS- 72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Respondent's decision to remove Grievant from the Fraud Investigation Unit was a managerial one and was not a disciplinary action.

3. W. Va. Code § 29-6A-4 provides a grievance must be filed within ten days of the event upon which the grievance is based, or within ten days of the date on which theevent became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance.

4. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996).

5. It is an administrative law judge's responsibility to assess the credibility of the witnesses before her. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1994).

6. Because Grievant did not file her grievance until five and one half or three months following the event upon which the grievance is based, the grievance was not timely filed pursuant to W. Va. Code § 29-6A-4.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 29, 1998

Footnote: 1

At the time of the Level IV hearing, Ms. Tucker was no longer employed by BEP, thus, the sworn testimony from the Level III hearing was the source of her statements.

Footnote: 2

Ms. Lisa Prater, Grievant's first level supervisor, indicated she thought she might be able to return, but she also testified the decision was out of her hands.