CLARA A. FRESHOUR,

Grievant,

v.

Docket No. 98-BEP-491

BUREAU OF EMPLOYMENT PROGRAMS,

Respondent.

DECISION

Grievant, Clara Freshour, challenges her termination from employment by the Bureau of Employment Programs (BEP). Because this grievance involves an allegation by the employer that it was not initiated in a timely manner, the procedural background at level two will be discussed in the findings of fact below. At level three, a hearing was conducted on November 20, 1998. The grievance was denied at that level, based upon untimeliness, on December 1, 1998. Upon appeal to level four, a hearing was held in the Grievance Board's office in Morgantown, West Virginia, on February 3, 1999. (See footnote 1) This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 2, 1999.

Findings of Fact

1. Grievant began employment with BEP on November 1, 1994, as an Employment Programs Interviewer at the Clarksburg Job Service Office.

2. After obtaining proper approval, Grievant began a six-month medical leaveof absence without pay on October 20, 1995, due to a non-work-related knee injury.

3. Just prior to the expiration of her medical leave of absence, Grievant requested and

received approval for family medical leave of three months, beginning on April 22, 1996. (See footnote 2)

4. Grievant returned to work on July 15, 1996, and, due to her knee problems, was placed on a modified work week of 22.5 hours per week.

5. Between July of 1996 and December of 1997, Grievant was frequently absent, and she maintained low balances of sick and annual leave.

6. On January 8, 1998, Grievant requested and received approval for a second six-month medical leave of absence, again due to her knee injury.

7. Upon expiration of her second medical leave of absence, on July 7, 1998, Grievant requested a personal leave of absence for an indefinite period of time. In support of this request, Grievant provided a statement from her treating physician, who stated that she would be unable to work for an undetermined period of time, due to continuing problems with her knee and potential surgery.

8. Grievant's supervisor, acting manager Stephen Franz, recommended to Commissioner of BEP, William Vieweg, that Grievant's request be denied.

9. By letter dated July 16, 1998, Commissioner Vieweg denied Grievant's request for a personal leave of absence, stating, in part:

> I have received your request for a Personal Leave of Absence . . . . In my letter to you dated May 5, 1998, you were advised that you would need to return to duty on July 8, 1998, on a full-time basis due to the substantialworkload in the Clarksburg Job Service office. I am unable to grant your request . . . .
>
> . . . Unfortunately, due to the substantial backlog of work to be done in your section and the obligation of this agency to provide quality service to the public, you will need to return to work immediately. It is for these reasons that your request is denied.
>
> You will need to either return to duty or submit a letter of resignation to your supervisor immediately. Should you decide not to return to duty or submit a letter of resignation, this letter will then serve as a 15-day notice of your dismissal, which will be effective August 1, 1998.
>
> . . . [S]hould the Bureau be forced to terminate your employment, you may appeal the action through the [Grievance Procedure]. If you choose to exercise your rights,

> you may submit your written appeal at Level II of the Grievance Procedure by submitting your appeal to your division director. You may also appeal directly to Level IV by submitting your grievance to the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia, 25311[.]

This letter was copied to Quetta Muzzle, director of the division under which Grievant worked, but no address for Ms. Muzzle was provided.

10. In response to the denial of a leave of absence, Grievant wrote to Commissioner Vieweg on July 27, 1998, requesting that he reconsider his decision. She stated in the letter that she had seen her doctor on July 22, and that her doctor continued to recommend that she remain off work indefinitely.

11. Commissioner Vieweg phoned Grievant on July 31, 1998, to inform her that his decision, as stated in the July 16 letter, would stand.

12. On July 31, 1998, Grievant phoned Bob Small, an Employment Interviewer Senior, who had previously been Grievant's acting supervisor and acting manager of the Clarksburg Job Service. She asked Mr. Small for the proper forms and explanation of the procedure for filing a grievance. At the conclusion of this conversation, Grievant believedthat Mr. Small was going to send her the information.

13. During the July 31 conversation with Grievant, Mr. Small informed her that he was unsure what forms she needed. Although he gave Grievant the impression he would attempt to obtain them, he advised her to contact Jeff Smith, Manager of the Fairmont Job Service, who had previously served as acting manager in Clarksburg. (See footnote 3)

14. Grievant contacted Mr. Smith, who advised her that, if the Clarksburg office did not have the forms she needed, she should contact the Charleston personnel office. Grievant contacted Vickie Elkins at the personnel office the following day, August 1, 1998, and Ms. Elkins gave her the impression she was going to send Grievant the forms.

15. Joe Baldwin became the manager of the Clarksburg Job Service on July 1, 1998.

16. When Mr. Small spoke with Grievant on July 31, 1998, regarding her request for grievance forms, he informed Mr. Baldwin of the request. Mr. Small composed a short memo, stating that he had told Grievant she needed to come in to the office, so that he could help her obtain the appropriate forms, and the memo was given to Mr. Baldwin. Neither Mr. Small nor Mr. Baldwin took any steps at that time to send the forms to Grievant.

17. After receiving no forms in the mail, on August 14, 1998, Grievant had a coworker deliver a letter to Mr. Baldwin, which stated in part:

> I had requested grievance forms and procedures from Bob Small on July 31, 1998, and haven't received them as of this date [letter was addressed August 12, 1998]. I am submitting this written appeal regarding the action of terminating my job with the Clarksburg Job Service.

The letter then outlined Grievant's reasons why she believed it was wrong for BEP to terminate her employment.

18. Mr. Baldwin received Grievant's written appeal letter on August 14, 1998, which was the tenth working day after her termination became effective.

19. Upon receiving Grievant's appeal letter on August 14, Mr. Baldwin mailed grievance forms to her.

20. When Grievant received the grievance forms on August 18, 1998, she immediately completed them and filed them with Quetta Muzzle, whose address was provided on the forms as the level two evaluator.

21. On September 1, 1998, without conducting a conference with Grievant, Ms. Muzzle denied the grievance as untimely.

Discussion

The preliminary issue in this grievance is whether it was initiated in a timely manner. 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. Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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 failure to filein a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). However, in the instant case, BEP appropriately informed Grievant of her right to initiate the grievance at level two or at level four, pursuant to the provisions of W. Va. Code § 29-6A-4(e). The parties agree that the tenth working day after Grievant's termination became effective was August 14, 1998, the same day she filed a letter of appeal with Mr. Baldwin. BEP contends that, because Grievant did not actually file a grievance form until August 18, 1998, the filing was untimely. Respondent further argues that Grievant's late filing is her own fault, because she did not respond to Mr. Small's request that she come in to the office, so that he could assist her in finding the proper forms for filing a grievance. However, there was obviously a misunderstanding in this regard. Grievant testified that she quite honestly believed that Mr. Small was going to send the forms to her, and she seemed forthright in her testimony. At the level three hearing, Mr. Small seemed very unsure about what he had discussed with Grievant, and he did not even recall preparing the memo for Mr. Baldwin, which stated that he told Grievant to come in to the office. However, the memo itself lends credence to BEP's version of events, but the undersigned believes that Grievant misunderstood Mr.Small's instructions.

Nevertheless, BEP is not without culpability in causing Grievant's confusion about filing this grievance. First, while informing Grievant she could file at level two, Commissioner Vieweg's letter did not give a name or address where to send the grievance. While BEP contends that the “cc” on the letter with Ms. Muzzle's name was sufficient to advise Grievant that Ms. Muzzle was the division director, this hardly provides enough information to expect Grievant to know exactly where to file a level two grievance. Moreover, since Mr. Baldwin felt prompted to send Grievant a formal grievance form after she filed a notice of appeal on August 14, he obviously had this same option on July 31, when Mr. Small gave him a memo explaining that Grievant had requested grievance forms. No explanation has been provided as to why, after Grievant obviously did not appear in the office, no one felt the need to go ahead and mail the forms to her.

In spite of the confusion, Grievant did file a grievance on the final day she could do so, albeit not

on an actual grievance form. W. Va. Code §29-6A-4(a), which addresses the initial filing of state employee grievances, merely says that a “written grievance” may be filed. It does not specify that the grievance must filed on a specific form, as with the grievance procedure for education employees. See W. Va. Code § 18-29-4(a)(3). The West Virginia Supreme Court of Appeals noted in Duruttya v. Board of Education, 181 W. Va. 203, 382 S.E.2d 40 (1989), that the grievance procedure is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." Similarly, the Court stated in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990): "[w]e do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the casesare forgotten. In many instances, the grievant will not have a lawyer; therefore the process should remain relatively simple." Moreover, the Duruttya Court recognized that substantial, if not actual, compliance with the grievance procedure time limitations is possible. See Harmon v. Jackson County Bd. of Educ., Docket No. 98-18-001R (June 30, 1998).

In light of the confusion regarding Grievant's attempt to obtain the proper grievance forms, the undersigned finds that Grievant did initiate her grievance in a timely fashion. Despite the misunderstandings, Grievant did file a letter stating her clear intention to invoke the grievance procedure, within the time limits established by W. Va. Code § 29-6A-4. Accordingly, the filing of this grievance at level two on August 14, 1998, was timely.

As to the merits of this grievance, Grievant has provided virtually no justification for her apparent belief that she was entitled to an additional leave of absence for an indefinite period of time. Personal leaves of absence are governed by Section 15.8(a) of the West Virginia Division of Personnel's Administrative Rule (1998), which states that “[a]pproval of personal leave is discretionary with the appointing authority.” Further, in Section 15.8(d)(3), the Administrative Rule provides that “[f]ailure of the employee to report promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to the appointing authority, is cause for dismissal.” (Emphasis added.) The latter provision applies to all types of leaves of absence, including medical.

The evidence amply establishes that BEP followed the provisions applicable to personal leaves of absence in this case. Grievant attempted to claim for the first time at level four that she only needed to extend her leave until August 5, 1998, at which time herdoctor was very likely to release her to return to work. However, Grievant's allegation in this regard is not only unsupported, but is directly

contrary to, the evidence of record. The only doctor's statement provided by Grievant to her employer, dated June 25, 1998, stated she would be off work indefinitely. Grievant introduced at level four an additional statement from her doctor, dated July 29, 1998, which stated Grievant was “to remain off work indefinitely. Followup [sic] appointment is scheduled for August 5, 1998.” There is no reference to Grievant's alleged release on August 5. Moreover, when Grievant spoke with Commissioner Vieweg on July 31, two days after her last doctor's visit, she made no mention of her supposed potential need to only extend the leave of absence for less than one week. If Grievant's doctor had informed her during the July 29 visit that he was potentially going to release her, one would think that Grievant would have mentioned this to the commissioner.

Accordingly, the undersigned finds that BEP properly followed all provisions of the Administrative Rule regarding personal leaves of absence. In light of Grievant's extended absences during her brief tenure at BEP, along with her failure to provide satisfactory reasons for additional personal leave, Respondent acted within its discretion, and in accordance with the provisions of Section 15.8(d)(3), in refusing her request and in terminating her employment. Grievant has not established any violation of statute, policy, rule, regulation or written agreement in this case.

Consistent with the foregoing findings and discussion, the following conclusion of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. 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. Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

3. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a).

4. Grievant initiated this grievance at level two in a timely fashion, by filing a letter of appeal with her immediate supervisor, after she had encountered difficulty in obtaining the proper grievance form.

5. Leaves of absence are granted within the discretion of the employer, and an employee's failure to return to work at the end of such leave, in the absence of satisfactory reasons, is grounds for dismissal. West Virginia Division of Personnel Administrative Rule, Section 15.8 (1998).

6. Grievant failed to provide satisfactory reasons for her failure to return to work at the end of a leave of absence, and she was properly dismissed from employment.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to theCircuit Court of Kanawha County or 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 (1998). 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.

Date: March 16, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Jack Atchison, a lay representative, and BEP was represented by counsel, Kelli Talbott.

Footnote: 2

The reason for this family medical leave is not entirely clear from the record, but some references were made to Grievant having a child who was ill during this time period.

Footnote: 3

Apparently, there was an extensive period of time during which the Clarksburg Job Service did not have an appointed manager, so Mr. Small, Mr. Smith and Mr. Franz had each served as acting manager at different times.