HELENA BOWREY,

Grievant,

v. Docket No. 99-CORR-145

DIVISION OF CORRECTIONS/

HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Helena Bowrey, filed the following grievance against her employer the Division of Corrections at the Huttonsville Correctional Center ("HCC"), on March 14, 1999, stating:

> **During the periods Sep 95 thru Nov 95 and 13 Jan 98 thru 28 Feb 98[,] I was on Worker's (sic) Compensation. WVa Code 23-5A-1 forbids [treating] employees receiving Worker's (sic) Compensation differently than those off while using sick leave or annual leave. RELIEF SOUGHT: Reinstatement of approximately 3 months time/seniority reimbursement of lost wages plus interest, annual leave, sick leave, holidays and increment time.**

At Level I, Grievant's supervisor was unable to grant the relief sought, and directed the Grievant to Level II. At Level II, Deputy Warden Keith Weese denied the grievance as untimely filed. At Level III, James Ielapi recommended the grievance be denied as untimely filed, and this recommendation was accepted by Commissioner Paul Kirby on April 7, 1999. A Level IV appeal was received on April 14, 1999, and a Level IV hearingwas held in the Grievance Board's Elkins office on May 25, 1999. (See footnote 1) **This case became mature for decision on June 9, 1999, by agreement of the parties.** (See footnote 2)

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

Findings of Fact

1. **Grievant has been employed by HCC since July 1, 1995.**

2. She has been off work with a work related injury twice. The first time was in September 1995 through November 1995, and the second time from January 13, 1998, through February 28, 1998. (See footnote 3)

3. The Division of Corrections ("DOC") allows its employees to elect whether they use Workers' Compensation or sick leave benefits when they are off on a work related injury, in accordance with the Division of Personnel's Policy on Workers' Compensation and sick leave. (See footnote 4)

4. On August 1, 1995, Grievant signed a statement electing to receive Workers' Compensation benefits. This statement stated;

> **I elect to receive Workers' Compensation TTD benefits. I do not wish to use sick leave, although I understand that I may use sick leave until I receive my initial TTD Benefit check, as described above. I understand that while on a Medical Leave of Absence Without Pay and receiving TTD benefits, tenure for the purposes of the annual increment, annual leave, and sick leave will not accrue, nor will holidays occurring during this period be paid.**

5. The other option employees may select, is to receive sick leave benefits while they are absent from work, and during that time they will not be considered off payroll and will continue to accrue tenure for the purposes of the annual increment, annual leave, sick leave, and holidays.

6. Grievant also elected to receive Workers' Compensation while she was off the second time. (See footnote 5)

7. Grievant returned to work from the last work related injury on or about February 28, 1998.

8. This grievance was filed on March 14, 1998, and after Grievant learned another Corrections employee received a favorable ruling in a similar grievance on March 5, 1999, McCauley v. West Virginia Division of Corrections/West Virginia Division of Personnel, Docket No. 97-CORR-354 (March 5, 1999).

Issues and Arguments

The major issue is whether this grievance was timely filed. Grievant argues she did not file her grievance until after the McCauley decision because until then she believed HCC's method of dealing with Workers' Compensation and sick leave was correct. Grievant did not indicate

anyone had ever told her she could not file a grievance, but did indicated that filing a grievance after receiving this leave time information would appear to indicate the individual in charge of benefits, Ms. Joyce Gumm was lying, and Grievant didnot think this was true. Grievant also points to newly enacted W. Va. Code § 23-5A-4 and avers this statute, which was passed and effective on March 11, 1999, applies to her grievance and mandates Respondent to give her the requested relief.

Respondent argues this grievance was untimely filed, as Grievant knew of the events giving rise to her grievance, the election of Workers' Compensation benefits, when she was off on Workers' Compensation both in 1995 and again in 1998. Respondent related Grievant returned to work for the last time on February 28, 1998, approximately one year prior to filing this grievance. Respondent notes W. Va. Code § 23-5A-4 limits relief to annual increment benefits, but argues even this relief does not apply to this grievance because of untimely filing. (See footnote 6)

Discussion

As this grievance does not involve a disciplinary matter, Grievant would have the burden of proving 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. Dep't 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).

HCC contends this grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). When 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 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. Dep't. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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).

The timeliness issue is governed by the timelines 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).

In this case, Respondent demonstrated Grievant did not file in a timely manner. The grievance as it relates to the Fall 1995 time period was filed approximately three and one half years after Grievant elected to receive Workers' Compensation. The filing in theWinter 1998 time period was filed approximately one year after Grievant elected to receive Workers' Compensation benefits the second time. Thus, Grievant has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner.

Grievant argues the event from which her filing date should be counted is when she learned of the McCauley decision. She maintains that until that time she did not know the employer was incorrect in giving her the information she received. Grievant admitted she was aware of the facts upon which her claim is based for many years. As will be revealed in the discussion below, this argument, the discovery of a legal theory, has been made numerous times before this Grievance Board without success.

It is clear W. Va. Code § 29-6A-4(a) provides for a "discovery rule", in that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. However, "it is not the discovery of a legal theory which triggers the statute, but the event." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997) at 8. The instant case is clearly one in which the event, election of sick leave or

Workers' Compensation benefits, was known to Grievant, but the legal theory to support it was not discovered until later, i.e. shortly after March 5, 1999. "[T]he date a [g]rievant finds out an event or continuing practice was illegal is not the date for determining whether a grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989) (emphasis inoriginal). (See footnote 7) **In fact, it has specifically been held by this Grievance Board that "learning of the success of another employee's grievance . . . does not constitute discovery of an 'event' giving rise to a grievance." Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996) at 7. See Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991); Harris, supra.**

At level four, Grievant testified she was given the information about the election and had no reason to doubt the information given to her by the payroll person. Grievant did not indicate a possible grievance was discussed with anyone at the time she made her election. This Grievance Board has previously recognized that, in some instances, the principle of equitable estoppel may excuse an untimely filing. The doctrine was explained in Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994):

> **The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 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."**

A payroll employee's statement on the policy in place at the time of the election was signed does not rise to the level of conduct contemplated in Lilly, supra, and Naylor, supra. There is absolutely no evidence to indicate Grievant was discouraged in any way from filing a grievance over this matter, or that her supervisors took any action which could be interpreted by Grievant as discouragement. Indeed, HHC was following the Policy put in place by the Division of Personnel. See n. 9.

Grievant also argues her claim is timely filed as it was filed three days after W. Va. Code §

23-5A-4 became effective. This Code Section is titled "State employees to accrue increment pay during absence due to work-related injuries; legislative rules" and states:

> **(a) All employees of the state of West Virginia shall continue to accrue increment pay during absences from work due to a work related injury.**
>
> **(b) The director of the division of personnel shall propose rules for legislative approval to implement the provisions of this section.**

This Code Section became effective upon passage, March 11, 1999.

It is a well-settled principle of statutory construction in this state that a statute is presumed to operate prospectively, unless retroactive applicability is clearly expressed or necessarily implied from the statute's language. Syl. Pt. 3, Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980); See Conley v. Workers' Compensation Div./Hercules, 199 W. Va. 196, 483 S.E.2d 542 (1997); W. Va. Code § 2-2- 10(bb) (1989). However, statutes which are merely procedural, rather than substantive, in nature may be retroactively applied. Shanholtz, supra. In Syllabus Point 2, Public Citizen, Inc. v. First National Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996), the Supreme Court of Appeals of West Virginia stated, "[a] statute that diminishessubstantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." See generally, Conley, supra; State ex rel. Blankenship v. Richardson, 196 W. Va. 726, 474 S.E.2d 906 (1996). "Accordingly, an initial determination must be made as to whether the statute in question affects procedural or substantive rights." Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98- BEP-285 (Sept. 24, 1998); Dismissal Order, Sharifpour v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-265 (Sept. 9, 1998).

Black's Law Dictionary 997 (6th ed. 1991), defines "substantive law" as:

> **That part of law which creates, defines, and regulates rights and duties of parties, as opposed to "adjective, procedural, or remedial law" which prescribes [the] method of enforcing the rights or obtaining redress for their invasion. The basic law of rights and duties . . . as opposed to procedural law . . . .**

The recently issued Sharifpour Order, cited above, discussed this issue as it related to defaults and stated:

> **In the instant case, the default provision affects substantive rights and "augments substantive liabilities," in that the Grievant "prevails by default." In other words, the employee wins his grievance, and the employer is required to grant him the relief requested. Although the employer has the right to request a level four hearing to show that "the remedy received . . . is contrary to law or clearly wrong" the administrative law judge is to presume the "the employee prevailed on the merits of the grievance." Code §29-6A- 3(a)(2) (1998). This is not a procedural matter, because the default provision creates a "substantive liability" on the part of the defaulting employer, imposing upon it the "duty" of providing grievant what he has requested.**

Sharifpour, supra.

In reviewing this issue and the statute, it is clear that requiring an employer to compensate a grievant for actions taken and decisions made long ago, and that were notgrieved at the time, could create substantial liability for a respondent; and thus, would be substantive and not merely procedural. This statute was not in effect at the time Grievant elected to receive Workers' Compensation benefits, and does not now serve to make a grievance timely that should have been filed long ago. Additionally, it must be noted that the language in the statute is very specific and speaks only to annual increment pay and does not address the multiple other issues referred to in Grievant's Statement of Grievance. See generally, Public Citizen, supra; Jenkins-Martin, supra.

The event giving rise to this grievance was Grievant's election to receive Workers' Compensation benefits instead of using accrued sick leave. Grievant knew of the policy and her election for a considerable period of time, well more than ten days prior to the filing her grievance. Accordingly, as this grievance was not timely filed, this Grievance Board is without jurisdiction to decide the merits of the claims raised. Pryor, supra.

Conclusions of Law

1. Timeliness is an affirmative defense which a respondent must establish by a preponderance of the evidence. Ray v. Cabell County Bd. of Educ., Docket No. 96-06- 343

(Feb. 21, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996).

2. 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. W. Va. Code § 29-6A-4(a). 3. The timeliness statute is not triggered by a grievant's discovery of a legal theory to support her claim or the success of another employee's grievance, but by the event or practice which is the basis of the grievance. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1; Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996); Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

4. Untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

5. The latest date of the events giving rise to this grievance was more than ten days prior to the date upon which Grievant filed her grievance on March 14, 1999; therefore, this grievance was not timely filed.

6. An untimely filing will only be excused on grounds of equitable estoppel if the untimely filing resulted from deliberate conduct by the employer or actions which the employer should have known would cause the employee to delay filing his claim. Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 843, 378 S.E.2d 843 (1989); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994).

7. Grievant did not meet her burden of proof and establish an acceptable reason for the delay in filing her claim.

8. The passage and enactment of W. Va. Code § 23-5A-4 on March 11, 1999, does not serve to make this grievance timely as there were no specific provisions indicating the statute was to be retroactive, and the statute could create substantial liability for theemployer. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance

occurred. Any 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 30, 1999 _____

Janis I. Reynolds

Administrative Law Judge

Footnote: 1

There were two grievances on the same issue scheduled for hearing on the same day. Although the possibility of consolidation was discussed, neither party wanted to have the grievances consolidated. Given this request from the parties, these cases were heard and decided separately.

Footnote: 2

Grievant was represented by a co-worker, John Jeffers, and Respondent was represented by Assistant Attorney General Charles Houdyschell.

Footnote: 3

There was some testimony to indicate Grievant did not have enough time to elect to take sick leave with the first injury. This point would appear to be true, as Grievant was injured only two or three months after she started work and was off work for approximately two months.

Footnote: 4

This Policy stated in pertinent part:

A. An employee absent from work due to a compensable work-related injury shall submit an Election of Option form to the agency payroll office within 3 working days from when aclaim is filed. The form will designate whether TTD or sick leave benefits are preferred during the period of absence.

. . .

C. Option to Receive Sick Leave: If an employee elects to receive sick leave during the period of absence from work due to a compensable work-related injury, the employee's original Election of Option form shall be forwarded by the employer to the Workers' Compensation Fund with the WC-123. In these instances, the Workers'

Compensation Fund will not, upon a compensable ruling, issue payment of TTD Benefits until notified by the agency payroll office of the expected date the sick leave benefits will expire.

1. Tenure, annual leave, and sick leave will accrue during the period of time an employee is absent from work and receiving sick leave benefits.

2. Employees will be paid for holidays that occur during the period of absence if leave is paid for a portion of the day before or after a holiday, and either the full day before or after the holiday.

3. Annual leave may be used as sick leave only after exhaustion of all accrued sick leave.

. . .

D. Election to receive TTD Benefits: If an employee elects to receive TTD Benefits, sick leave may be used only until the initial Workers' Compensation benefit check is received, and the employee must then be removed from the payroll. The employee must reimburse the employer for the net value of any sick or annual days used after which sick leave or annual leave, if used in lieu of, shall be restored.

Footnote: 5

At the Level IV hearing, there was some indication Grievant received some sick leave benefits during the second work related injury. This testimony conflicted with the Statement of Grievance and the testimony at Level III. Thus, it is found that Grievant received Workers' Compensation benefits during her second work related injury.

Footnote: 6

Because of the ruling in this case, it is not necessary to speak to Respondent's argument that McCauley has been overruled by the enactment of the above cited statute.

Footnote: 7

This provision of the education grievance statute, W. Va. Code § 18-29-4(a), is virtually identical to the state grievance statute, the only exception being that education employees are given fifteen days to initiate the process, rather than ten.