JEAN ANN JEFFRIES,

Grievant,

v v.

DOCKET NO. 01-HHR-486

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/LAKIN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Jean Ann Jeffries, filed a grievance on August 8, 2001, protesting her dismissal from West Virginia Department of Health and Human Resources/Lakin Hospital ("DHHR" or "Lakin"). A level four hearing was held in the Grievance Board's Charleston, West Virginia office, on October 15, 2001. Grievant appeared pro se, and DHHR was represented by B. Allen Campbell, Esq., Assistant Attorney General. The parties declined to submit proposed findings of fact and conclusions of law, and this matter became mature at the close of hearing on October 15, 2001.

SUMMARY OF EVIDENCE

Grievant's Exhibits

None.

DHHR's Exhibits

Ex. 1 -

June 15, 2001 letter from W. Keith Stouffer, Administrator, to Jean Ann Jeffries.Ex. 2 - Certified Mail Receipt, dated June 15, 2001.

Ex. 3 -

Physician's/Practitioners's Statement, dated June 18, 2001.

Ex. 4 -

West Virginia Division of Personnel Administrative Rule 15.8.

Testimony

DHHR presented the testimony of Charles Dunavant. Grievant testified in her own behalf.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed by Lakin as a Health Service Worker, and has been off work due to an injury sustained on the job since April 23, 1998.

2. On June 15, 2001, Lakin Administrator W. Keith Stouffer wrote Grievant asking her to contact him to advise him of her employment intentions, and to submit a physician's release to return to her full scheduled job duties. Mr. Stouffer explicitly informed Grievant that the physician's statement needed to state she was able to "fully return to work and perform all the essential functions of [her] position." (Emphasis in original). DHHR Ex. 1.

3. Grievant received the letter on June 15, 2001, and came in to speak with Mr. Stouffer on June 18, 2001. Also present was Human Resources Director Charles Dunavant.

4. Grievant brought with her a physician's statement dated June 18, 2001, which indicated her disability was permanent, she could not lift more than 25 pounds, and that she could only return to her present duties as a Health Service Worker if she was given light duty. DHHR Ex.

3. 5. Grievant informed Mr. Stouffer that she had been receiving Social Security disability for approximately one year.

6. Mr. Stouffer informed Grievant that Lakin did not have light duty assignments, there were no positions available to accommodate her, and that had he known she was receiving Social Security disability payments he would have discharged her earlier.

7. Mr. Stouffer also told Grievant that Lakin had never brought any employee back on light duty who was permanently disabled, in response to her question about another worker, Mary Gerlach,

who was allowed to perform light duty.

8. Mr. Stouffer's June 15, 2001, letter informed Grievant that, “[s]hould you not comply with the directives contained herein, this letter will serve as a fifteen (15) day notification of your dismissal from Lakin Hospital.” DHHR Ex. 1.

9. Grievant received a telephone call from the payroll office on August 3, 2001, and upon further inquiry, she was told by the payroll representative that she had been terminated effective June 15, 2001.

DISCUSSION

In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. 156 C.S.R. 1 §§ 4.21 (2000); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievant alleges she has been discriminated against because at least one other employee at Lakin Hospital has returned to work following an on-the-job injury and is performing light duty assignments. DHHR argues the facts do not support Grievant's allegation of discrimination, and further argues that the grievance was untimely filed. Because a findingthe grievance was untimely filed could be dispositive of the grievance, that issue will be addressed first.

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. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); 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). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate 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 Serv., Docket No. 90-DHS-524 (May 14, 1991). If, proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997). W. Va. Code § 29-6A-4(a) provides in pertinent part:

> 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 grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

DHHR argues Grievant was dismissed on June 15, 2001, pursuant to the terms of the letter from Mr. Stouffer of the same date. Thus, her filing on August 8, 2001, is outside the ten-day time period for filing a grievance in accordance with W. Va. Code § 29-6A-4.

Grievant responds that she believed she complied with the terms of Mr. Stouffer's letter, and that she did not learn of her dismissal until August 3, 2001, when she received the call from the payroll office.

Mr. Stouffer's letter certainly did inform Grievant that if she did not comply with the terms of the letter, the letter would be considered her notice of termination. However, it is easy to see why Grievant might have believed she complied with Mr. Stouffer's request to contact him and bring a physician's statement. She did those two things. Apparently, even though Mr. Stouffer informed her the physician's statement would not support her return to work, he did not inform her in their meeting of June 18, 2001, that she was, indeed,terminated. Grievant left the meeting believing she would be contacted by Mr. Dunavant for further instructions or information. She did not receive any further communication from Mr. Dunavant or Mr. Stouffer, and it was not until the payroll office contacted her on August 3, 2001, that she learned she had been terminated, effective June 15, 2001.

Consistent with the ruling of the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), this Grievance Board has determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. See, e.g., Butler v. W. Va. Dept. of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dept. of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998). However, mere discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance within the intent of Section 18-29-4 as interpreted in Spahr. Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); 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).

In this case, giving Grievant the benefit of the doubt, and recognizing she was without counsel, it was not unreasonable to believe after the June 15, 2001 meeting, that she would receive some further notification of her status from either Mr. Dunavant or Mr. Stouffer. Therefore, the undersigned concludes Grievant did not unequivocally learn she had been dismissed until August 3, 2001, and her grievance is therefore timely filed.

Turning to the merits of the grievance and Grievant's claim of discrimination, W. Va. Code § 29-6A-3(m) defines “discrimination” as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of theemployees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant testified that Mary Gerlach, another employee at Lakin, had returned to work from an on-the-job injury, and was permitted to just make beds and transport patients due to a limitation on lifting. Mr. Dunavant testified that Lakin has never permitted an employee who has been given a permanent total disability award to return to work under any circumstances, and that Grievant's physician certified her permanently disabled, and her collection of Social Security benefits confirms that prognosis.

Other than Grievant's testimony, she presented no other evidence as to Mary Gerlach's status, specifically, whether she is permanently disabled. Thus, Grievant has failed to establish that she is similarly situated to Mary Gerlach, and has failed to establish a prima facie case of discrimination. The applicable West Virginia Division of Personnel Rule provides as follows:

15.8(a) *Personal Leave*

> [A]n appointing authority may grant a permanent, probationary, or provisional employee a leave of absence without pay for a specific period of time which normally should not exceed one year. The employee shall apply for the leave of absence in writing to the appointing authority. If the appointing authority approves the request, the approval shall be in writing. A leave of absence without pay may exceed the normal one year limitation based on the agency's personnel needs. Time spent by provisional employees for leaves of absence does not extend the provisional period limitation. Written approval of the appointing authority is required in all cases. Approval of personal leave is discretionary with the appointing authority.

15.8(c) *Medical Leave; Notice to Employee*

> 1. An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:

a. The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code §§ 23-4-1 and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Worker's Compensation.

b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated.

c. A prescribed physician's statement form is submitted each time the employee's condition is re-evaluated to confirm the necessity for continued leave; and

d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

2. The appointing authority shall, at least 15 days prior to, if possible, but no later than five (5) days following the expiration of the employee's sick leave, mail to the employee a written notice of the employee's right to a medical leave of absence without pay and informing him or her that the leave will not be granted if he or she fails to apply within the time limits specified in subparagraph 14.8(c)1.a of this rule.

15.8(d) *End of Leave.*

1. At the expiration of a leave of absence without pay, the employee shall be returned to duty to either his or her former position, or one of comparable pay and duties, without loss of rights, unless the position is no longer available due to a reduction-in-force.

2. If the leave of absence without pay was granted due to personal illness, the employee must furnish from the attending physician/practitioner a prescribed physician's statement form indicating the ability of the employee to return to work. The appointing authority may permit an employee to return to work at or before the expiration of the leave of absence at less than full duty, but the terms of return are subject to the same conditions specified in subdivision 14.4(h) of this rule.

> 3. Failure 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.

DHHR Ex. 4 (Emphasis added).

An employee may only be on a medical leave of absence for six (6) months within any twelve (12) month period. After that time, any leave becomes a personal leave of absence. Pursuant to the Division of Personnel Rules, it is within the Hospital Administrator's discretion to grant or deny personal leave. As such, Mr. Stouffer, the Hospital Administrator, had the discretion to end Grievant's personal leave of absence, and he did so in compliance with the applicable Division of Personnel Rules. See Starkey v. W. Va. Dept. of Health and Human Resources, Docket No. 01-HHR-002 (Mar. 28, 2001).

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. 156 C.S.R. 1 §§ 4.21 (2000); 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. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998).

3. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. An employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. See, e.g., Butler v. W. Va. Dept. of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dept. of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998).

5. Grievant did not discover the fact of her dismissal until August 3, 2001, and filed her

grievance on August 8, 2001. DHHR has failed to prove Grievant did not file her grievance in a timely manner.

6. W. Va. Code § 29-6A-3(m) defines “discrimination” as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case ofdiscrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

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7. Grievant failed to establish a prima facie case of discrimination.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 23, 2001