WILMA "VICTORIA" CARUTHERS,

Grievant,

v. Docket No. 06-HHR-046

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU FOR CHILDREN

AND FAMILIES and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant Wilma Caruthers, employed by the Department of Health and Human Resources ("HHR"), filed a grievance on November 18, 2005, seeking credit for years of service and annual leave while off work on Total Temporary Disability ("TTD"). (See footnote 1) **The relief sought is "approximately 6 months" of annual leave reinstated, and six months added to Grievant's years of service.**

The grievance was denied at Levels I and II, and dismissed at Level III. Grievant appealed to Level IV on February 1, 2006, and a Level IV hearing was scheduled for April 11, 2006. On February 22, 2006, the Division of Personnel ("DOP") filed a "Motion To Dismiss" the grievance. A conference call was conducted on March 14, 2006, to allow all parties an opportunity to address the Motion. Participating in the call were Karen O'Sullivan Thornton, Assistant Attorney General, for DOP, Jennifer Akers, Assistant Attorney General, for HHR, and Grievant. The parties elected not to submit additional proposals or argument, and the Motion to Dismiss became mature on March 14, 2006. After a detailed review of the entire record, including the written and verbal arguments of Grievant and DOP, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant received TDD benefits from November 2004 to April 2005. Grievant did not accrue seniority or annual leave during these absences, and did not file a grievance until November 18, 2005.

2. Prior to July 6, 2005, employees who were off work, and receiving TDD benefits did

not accrue seniority, annual leave, sick leave, or holiday pay.

3. Pursuant to the decision in Canfield v. West Virginia Division of Corrections and West Virginia Division of Personnel, 217 W. Va. 340, 617 S.E.2d (2005), the West Virginia Supreme Court of Appeals determined denial of credit for years of service and annual leave while on TDD's was not related to a proper government purpose, and violated the equal protection clause of Section 10, Article III, of the West Virginia Constitution.

4. Grievant filed this grievance after learning about the Canfield decision.

Issues and Arguments

Respondents assert this grievance is untimely filed as the event complained of occurred between November 2004 to April 2005, and Grievant did not file until six months after she returned to work. Respondents noted Grievant agreed she did not file until she learned of the Canfield Decision and based her grievance on that case. Respondents noted the timelines are not triggered by the discovery of a legal theory or the success of another grievant. Grievant asserts her grievance should be granted because although she knew she was on a leave of absence without pay, no one told her she would not receive her years of service time. Grievant also complains that no one told her she had the option of getting these benefits, and DOP has deliberately failed to notify employees of this right. It should be noted that the granting of years of service and annual leave was against DOP policy until the West Virginia Supreme Court of Appeals directed the change in the Canfield Decision, thus no one could tell Grievant of a "right" DOP Rules stated did not exist.

This issue has been addressed several times by the Grievance Board in Fincham v. Division of Corrections, Docket No. 05-CORR-400, (December 22, 2005) and Cain v. Department of Transportation, Docket No. 05-DOH-402 (February 6, 2006). The reasoning applied in those Decisions will be applied in this case.

Discussion

The first issue to address is whether this grievance is timely filed. 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. Once

the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Courtof Mason County, No. 96-C-02 (June 17, 1996). Pursuant to W. Va. Code § 29-6A- 3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." The Level I and II Decisions both raised the issue of timeliness, as did DOP when it was first made a party at Level III. The Grievance Board has held that DOP is permitted to raise the timeliness defense at the first level where it had the opportunity to do so, which is often not until Level III. Delbart v. Dep't of Health and Human Res., 99-HHR- 458 (Apr. 21, 2000). See Barnett v. W. Va. Dep't of Health and Human Res., Docket No. 99-HHR-144 (July 20, 1999). Accordingly, the undersigned finds the timeliness defense was properly raised.

As to whether the grievance was timely filed, W. Va. Code § 29-6A-4(a) provides:

> **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. 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).

Grievant concedes she filed this grievance after learning that other employees had prevailed on the same issue in Canfield. The West Virginia Supreme Court has recognized a "discovery rule" which will toll the time limitations for filing grievances in certain instances.

Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Spahr 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. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Res., Docket No. 98-HHR-092 (July 27, 1998). However, the 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 W. Va. Code § 18-29- 4 as interpreted in Spahr. Parkins v. W. Va. Dep't of Envtl. Protection, Docket No. 03-DEP- 156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996). The same analysis applies to grievances filed under the state grievance procedure. Grievant knew she did not accrue seniority or leave time while on TDD, but she did not file a grievance. This claim arose from events which occurred six months prior to the filing. This grievance was not filed within the statutory time frame, and learning of the success of another employee does not toll the time lines under the "discovery exception." Fincham, supra; Cain, supra.

Additionally, DOP revised its rule regarding the accrual of employee benefits while receiving TDD benefits to be effective the date of the Canfield Decision - July 6, 2005, with the provision that the changes were to be applied prospectively. This provision is in keeping with the holding in Bradley v. Appalachian Power Company, 163 W. Va. 332, 256 S.E.2d 879 (1979), that substantial public issues arising from statutory or constitutional interpretations that represent a clear departure from prior precedent will ordinarily favor prospective application. Absent a specifically directed retroactive application of thechanges in Canfield, supra, the prospective application by DOP is upheld, and Grievant's claim from before July 6, 2005, is not covered.

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

Conclusions of Law

1. 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. 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. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. A grievance must be initiated 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 running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. 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. Grievant knew or should have known she would not accrue seniority or leave time while she was on TTD's during her six month leave of absence without pay, but did not file a grievance within ten days of this event. 5. An employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). However, the 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. Parkins v. W. Va. Dep't of Envtl. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996).

6. This grievances was untimely filed, and Grievant offered no proper basis to excuse the late filing. Accordingly, the Motion to Dismiss is GRANTED, and this grievance is DISMISSED from the docket of the Grievance Board. The hearing scheduled for April 11, 2006, is canceled.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Date: April 5, 2006

Footnote: 1

Grievant filed another grievance on this same issue on October 11, 2005, and withdrew it on, or about, October 13, 2005, upon the advice of her representative to try a more friendly approach. When Grievant's request was denied on November 3, 2005, she refiled this grievance.