WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

KIMBERLY R. PISINO,

Grievant,

v. **Docket No. 2009-0539-MAPS**

DIVISION OF CORRECTIONS/

PRUNTYTOWN CORRECTIONAL

CENTER,

Respondent.

DISMISSAL ORDER

This grievance was filed at level three on October 21, 2008, by Kimberly Pisino ("Grievant"), alleging she was "given the option to resign or be terminated . . .", resulting in her resignation from employment with the Division of Corrections ("DOC") on September 17, 2008. On November 7, 2008, DOC counsel Charles P. Houdyschell, Senior Assistant Attorney General, filed a Motion to Dismiss the grievance on the basis that it was not timely filed. A telephonic hearing on the motion was conducted by the undersigned on November 19, 2008, during which Grievant represented herself, and Mr. Houdyschell represented DOC.

Synopsis

Grievant resigned from her employment as Kitchen Supervisor at Pruntytown Correctional Center on September 17, 2008. She filed a grievance on October 21, 2008, alleging she was required to resign or be terminated for misconduct. Pursuant to the statutory requirements for filing grievances,

Grievant had fifteen days from the grievable event to file her claim, which would have been on October 8, 2008. Grievant's onlyexplanation for not filing within the statutory timeframe was that, due to her apparent misunderstanding of the law, she believed she had 30 days to file the grievance. Generally, the Grievance Board has recognized that ignorance of the law does not excuse such a delay, so the grievance is dismissed.

Based upon the undisputed facts as ascertained during the telephonic hearing, the undersigned makes the following findings of fact:

Findings of Fact

1. On September 17, 2008, Grievant submitted a written resignation from her employment as Kitchen Supervisor at Pruntytown Correctional Center.
2. On October 21, 2008, Grievant filed a written grievance, alleging she was required to resign or be terminated from her employment.
3. Grievant believed she had thirty days to file a grievance, due to her misreading of the grievance statute.

Discussion

DOC contends this grievance is untimely filed, as it was not initiated within the timelines contained in W. Va. Code § 6C-2-4(a). When an 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. *Higginbotham v. W. Va. Dep't of Pub. 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).

W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of*

Transp., Docket No. 96-DOH-445 (July 28, 1997); *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). W. Va. Code § 6C-2-4(a)(1) identifies the timelines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

In the instant case, Grievant filed directly at level three, due to her allegation that her employment was terminated. W. Va. Code § 6C-2-4(a)(4) allows the filing of a grievance directly to level three when the employee is "discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits."

There is no question that Grievant's filing on October 21, 2008, was well beyond the fifteen-day timeframe for grieving her “termination” or resignation, which was the grievable event, occurring on September 17, 2008. Therefore, it must be determined whetherGrievant has provided a valid excuse for not filing in a timely manner. During the telephonic hearing, Grievant stated that she believed that she had thirty days to file her grievance, because of “instructions on the grievance form.” When questioned as to the exact instructions to which she was referring, Grievant retrieved the information (although it is still somewhat unclear what the document was), and read from the “instructions.” The provision Grievant read was the portion of W. Va. Code § 6C-2-4(c), regarding level three hearings, which states that “[w]ithin thirty days following the hearing . . . the administrative law judge shall render a decision in writing . . . .” Grievant was unable to explain why she believed this provision applied to filing her grievance, when it clearly discusses the obligations of the administrative law judge after a level three hearing is conducted. The undersigned takes administrative notice that the grievance form provided by this agency contains instructions for filing, which clearly state that a grievance must be filed within fifteen days of the grievable event.

As a general rule, “ignorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule.” *Reeves v. Wood County Bd. of Educ.*, Docket No. 91- 54-337 (Dec. 30, 1991); *See also Mills v.*

Wayne County Bd. of Educ., Docket No. 05-50- 451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001). Unfortunately, Grievant consulted the wrong portion of the statute, failing to ascertain the correct information regarding filing timelines. Her misunderstanding of the lawdoes not excuse her failure to file in a timely manner. Therefore, the grievance must be dismissed.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. When an 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. *Higginbotham v. W. Va. Dep't of Pub. 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).

2. Pursuant to the requirements of W. Va. Code § 6C-2-4(1), a grievance must be filed within fifteen days of the event upon which it is based.

3. "[I]gnorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule." *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *See also Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001). 4. Grievant did not file her grievance within fifteen days of the grievable event, nor did she provide justification to excuse her untimely fililng.

Accordingly, the Respondent's motion is hereby GRANTED, and this grievance is DISMISSED from the docket of the Grievance Board.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must

be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 15, 2008

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DENISE M. SPATAFORE

Administrative Law Judge