WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WANDA E. YOUNG,
Grievant,

v. **Docket No. 2009-0599-MAPS**

DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL
CENTER,
Respondent.

DISMISSAL ORDER

Wanda Young ("Grievant") filed this grievance directly at level three on October 27, 2008, challenging the termination of her employment as a Correctional Officer II at Anthony Correctional Center. On October 30, 2008, Respondent filed a Motion to Dismiss the grievance, on the basis that it was untimely. During a telephonic conference conducted on November 19, 2008, Grievant testified in her own behalf, and Respondent appeared through its counsel, Charles Houdyschell, Jr., Senior Assistant Attorney General, who presented the testimony of Wayne Armstrong, Human Resources Director.

Synopsis

Grievant was terminated from her employment by letter dated September 5, 2008. This letter informed Grievant that she was being immediately separated from the workplace, but that she would be compensated for the 15-day notice period provided for by the Division of Personnel's Rule. Also, pursuant to the 15-day required notice, the termination letter advised Grievant that her termination would be effective on September

20, 2008, and that she must file a grievance within 15 days after the effective date of her termination.

Grievant was confused regarding the applicable time limit for filing a grievance, and testified that she had a telephone conversation with an unidentified person regarding her rights. First she stated this person worked for the Grievance Board, then stated he was with the Division of Personnel, and finally alleged that he answered the phone in the Division of Corrections' Human Resources office. Grievant alleged this unidentified person told her that she had thirty days to file a grievance after the effective date of her termination on September 20.

Grievant's statements were found not to be credible, and the termination letter was clear regarding her time limits for filing a grievance. She has failed to provide sufficient justification for her delay in filing this grievance on October 27, 2008, so it is dismissed as untimely.

Findings of Fact

1. Grievant was employed as a Correctional Officer II at Anthony Correctional Center prior to her termination.

2. On August 29, 2008, Warden Teresa McCourt met with Grievant, reviewing the details of an incident that occurred on July 31, 2008, and informed Grievant of her intention to dismiss her, allowing her an opportunity to respond to the allegations.

3. By letter dated September 5, 2008, Warden McCourt informed Grievant that she was being dismissed from her employment. This letter advised Grievant, in part, as follows:

> [The Division of Personnel's Administrative Rule] . . . allows for a fifteen (15) working day notice. However, due to the circumstances surrounding this matter, I am requiring your immediate separation from the workplace as authorized by West Virginia Code § 29-6-10. You will be given severance pay for your regularly scheduled work days instead of being given the opportunity to work out the fifteen calendar day notice period. You do, however, still have the opportunity to respond to the matters of this letter provided you do so by close of business on 20 September 2008 as this is the effective date of your termination.
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> This personnel action is in accordance with Section 12.2 of the Administrative Rule of the West Virginia Division of Personnel which provides for the required fifteen (15) calendar day notice period. You may respond to the matters of this letter, either in writing or in person, provided you do so within fifteen (15) days of the date of this letter. For any grievance rights you may have, refer to West Virginia Code 6C-2-1 et seq. . . . If you choose to exercise your grievance rights, you must submit your grievance, in writing, within fifteen working days of the effective date of this action . . .

4. Upon receiving the termination letter, Grievant did not understand when her time limit for filing a grievance would expire. She called the number for the Division of Corrections' ("DOC") administrative offices and spoke with an unidentified male. After discussing the termination letter with this person, Grievant believed she had thirty days after September 20, 2008, in which to file a grievance.

5. The number that Grievant says that she called was the main number for all the administrative offices, including Human Resources. However, Grievant did not speak with anyone in the Human Resources office, as Mr. Armstrong is the only male employee in that section, and she did not speak with him.

6. Grievant called Wayne Armstrong, Human Resources Director, in late October to discuss filing a grievance regarding her termination. Mr. Armstrong informed her that he believed the 15-day time period was long past, but advised her that she may

want to go ahead and file a grievance, leaving the decision on timeliness up to the Grievance Board.

7. After talking with Mr. Armstrong, Grievant filed this grievance on October 27, 2008.

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 her 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. . . .

There is no question in this case that the grievance was not filed within the required 15-day timeframe. As noted by Respondent, even giving Grievant the benefit of the maximum possible amount of time, using the effective date of her termination of September 20, her grievance should have been filed by October 10, 2008. Her filing on October 27 was clearly untimely.

Grievant's justification for her untimely filing is based entirely upon the conversation she alleges she had with an unidentified person who answered the phone in the DOC's administrative offices. She testified that she explained to this individual what her termination letter said, and she was then told that she had 15 days after the effective date of her termination, plus an additional 15 days beyond that in which to file a grievance. Therefore, she believed that her time did not begin to run until after September 20, the effective date of her termination, and that she had 30 days to file her grievance after that date. Although she did not explain why she contacted Mr. Armstrong in late October to discuss her termination, Grievant stated she did not know her time limit had expired until Mr. Armstrong told her so during that conversation.

The Grievance Board has long recognized that a grievant may be excused from untimely filing, if he delayed filing as a direct result of statements made by his employer.

The West Virginia Supreme Court of Appeals, in *Naylor*, *supra*, 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."

The evidence presented by Grievant falls short of proving a “deliberate design” on the part of DOC to cause her to delay filing her grievance. Indeed, Grievant’s explanation for her delay was quite muddled during the telephone conference, in which she initially stated that she had called “the Grievance Board,” where a male person told her she had a total of thirty days after the date of her termination to file a grievance. After hearing DOC counsel’s argument that any representations of a “third party” could not be attributed to the employer, thus the delay not being DOC’s responsibility, Grievant then stated that she had actually obtained the information from “the Division of Personnel,” not the Grievance Board. However, after further discussion, Grievant finally stated that she had called the number for Wayne Armstrong’s office and spoken with the unidentified person who gave her this information. She did not ask for the person’s name or position within DOC’s administrative offices.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the

witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Obviously, Grievant has interest and motive to give untruthful testimony which would justify her delay in filing her grievance beyond the required 15 days after the grievable event. Her testimony on this subject simply does not ring true, due to the various versions of the story she told during the telephone conference, and it is not supported by any other evidence. Mr. Armstrong testified that he had no knowledge of anyone in his office having such a conversation with Grievant, and he did not recall her mentioning this previous conversation regarding the grievance time limits when he spoke with her in late October. Grievant also failed to explain why she contacted Mr. Armstrong in late October to discuss filing a grievance; it would seem she would not have been concerned about her time limitations, if she truly believed she had a thirty-day period after September 20 to file her grievance.

Moreover, it is difficult to imagine that anyone who would agree to give an employee advice regarding statutory time limits would have advised Grievant as she has claimed, *if* he had an actual understanding of the exact contents of her termination letter, as she alleges. Clearly, the initial 15-day notice period in the September 5 termination letter provides the reasoning for an effective date of September 20 for the termination (5 + 15 = 20). It is completely nonsensical to anyone reading the letter, regardless of that person's knowledge of the grievance procedure, to conclude that Grievant actually had 30 days for filing a grievance *after* the effective date of the termination on September 20. Indeed, the verbatim language in the last paragraph of the letter states otherwise, advising Grievant that she has 15 days to file a grievance after the effective date of her termination.

It is also possible that Grievant simply misunderstood the instructions that were given to her regarding the grievance time limits. She stated several times in her testimony that the person she spoke with told her she had fifteen days to *file after the first fifteen days* identified in the letter. In actuality, this is correct, in that the initial fifteen days began on the date of the termination letter, September 5, and Grievant did have an additional fifteen days after that (from September 20) to file a grievance. Unfortunately, as recently discussed in *Pisino v. Division of Corrections*, Docket No. 2009-0539-MAPS (Dec. ___, 2008), a grievant's misunderstanding of the law regarding time limitations does not excuse a late filing. 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).

Common sense and simple logic would dictate that a prudent person in Grievant's situation, being initially notified of her termination in early September, would have filed a grievance with expediency if there were any doubt regarding the applicable time limits. Nonetheless, Grievant chose to wait, knowing that she was unsure as to when a grievance needed to be filed, and she did not actually file until she was told by Mr. Armstrong that she had missed the deadline. Grievant has failed to provide any excuse which would justify her delay in filing in this case, so the grievance must be dismissed for untimely filing.

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. Estoppel is 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." *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Grievant has failed to provide a reasonable justification for her untimely filing of this grievance, which was more than 15 days after the effective date of her termination on September 20, 2008.

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

DENISE M. SPATAFORE
Administrative Law Judge