THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JULIE E. SHOUP,

Grievant,

v. **Docket No. 2009-0957-DOC**

WORKFORCE WEST VIRGINIA,

Respondent.

DISMISSAL ORDER

Grievant Julie E. Shoup filed a level three grievance form[1] on January 29, 2009, contesting what she characterizes as the termination of her employment with WORKFORCE West Virginia ("WORKFORCE") on October 30, 2008.[2] On February 20, 2009, Respondent filed a written Motion to Dismiss arguing, among other things, that the grievance was not timely filed. On March 2, 2009, the undersigned issued an Order holding the Motion to Dismiss in abeyance and transferring the grievance to level one for further proceedings. Respondent filed a Motion for Reconsideration of that Order and renewed the Motion to Dismiss on March 3, 2009. In recognition that Ms. Shoup alleged that she was improperly discharged, a telephone conference was held on March 23, 2009, concerning the Motion to Reconsider transferring the grievance to level one. *See* Footnote 1 *supra.* Respondent appeared by telephone and was represented by Kelli D. Talbott,

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[1] W. VA. CODE § 6C-2-4(a)(4) provides that an employee may file a grievance contesting her discharge from employment directly at level three.

[2] Grievant tendered a written resignation to Workforce on October 30, 2008, and the resignation was accepted, in writing on the same day. Grievant alleges that, in reality, she was constructively discharged from her employment.

Deputy Attorney General. Grievant was represented telephonically by Michael L. Myers, Esquire. At the telephone conference it was concluded that the grievance was appropriate for consideration at level three and that a hearing would be held to take evidence related to the Motion to Dismiss to resolve the issue of timeliness prior to scheduling a hearing on the merits. On May 6, 2009, a hearing was held at the Charleston Office of the Public Employees Grievance Board concerning Respondent's Motion to Dismiss the grievance as untimely. Grievant Shoup appeared and was represented by Michael L. Myers, Esquire. Respondent WORKFORCE appeared by and through their counsel Kelli D. Talbott, Deputy Attorney General. All parties submitted Proposed Findings of Fact and Conclusions of Law dated May 18, 2009. The matter became mature for a decision on the Motion to Dismiss on that date.

Synopsis

Grievant's employment with WORKFORCE was terminated when she submitted her resignation and it was accepted on October 30, 2008. Grievant filed a grievance on January 29, 2009, claiming that she was improperly discharged. Respondent proved that the grievance was not filed within the time period required by statute. Grievant failed to prove that she was excused from meeting the statutory time limit for filing a grievance. The grievance is dismissed.

The following findings of fact are based upon a thorough review of the record.

Findings of Fact

1. Grievant Shoup was employed by WORKFORCE West Virginia as a Benefit Coordinator in the classification of Administrative Services Assistant 1.

2. Grievant met with her supervisor and other managers of WORKFORCE on October 30, 2008. At that meeting, Grievant submitted a written resignation from her employment with Respondent.

3. The Director of WORKFORCE, Ronald E. Radcliff, gave Grievant a letter accepting her resignation at the October 30, 2008 meeting.

4. At the conclusion of the meeting, in response to a question from Grievant, Radcliff informed Grievant that there was no prohibition against her being hired for other employment by a state agency since she resigned and was not discharged. Radcliff did not promise Grievant that she would be employed in a different position after her resignation.

5. For an extended period of time prior to October 17, 2008, Grievant had been receiving treatment for what had been diagnosed as anxiety disorder and depression.

6. Grievant was treated at a local hospital on October 17, 2008. During that visit it was determined that Grievant's previous diagnosis had been incorrect and that she was actually suffering from a severe sleep disorder and bipolar disorder. As a result of her illness and efforts to adjust her medication, Grievant would sometimes sleep for two or three days at a time, sleep walk, and alternatively be unable to sleep for extended periods. Additionally, Grievant would go through alternating periods of extreme lethargy and periods of heightened activity.

7. After Grievant's employment ended and before she filed her grievance, she applied and interviewed for three jobs, two of which were with WORKFORCE. Grievant also successfully applied for unemployment compensation benefits during this period.

8. Grievant had been told about the availability of the grievance procedure in an orientation when she was initially employed by WORKFORCE and knew how to access the grievance procedure.

9. Grievant Shoup filed a grievance challenging what she characterized as the termination of her employment for the first time on January 29, 2009.

Discussion

WORKFORCE urges that this grievance be dismissed as untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> 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. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). The event giving rise to this grievance was Grievant Shoup's separation from employment with WORKFORCE. Respondent argues that this sepatation was the result of a voluntary resignation and Grievant argues that it was a constructive discharge, but both sides agree that the date of the occurrence was October 30, 2008. Grievant did not file her grievance form until January 29, 2009, roughly sixty working days after the defining event. An examination of the resignation documents[3] and the level one grievance form is sufficient to find that the grievance was not filed within the number of days required by the statute. Respondent met its initial burden of proof.

Grievant points to W. VA. CODE § 6C-2-3(a)(2) which states:

> The specified time limits may be extended to a date certain by mutual written agreement and **shall be extended whenever a grievant is not working because of** accident, **sickness**, death in the immediate family or other cause for which the grievant has approved leave from employment.

(Emphasis added.)

Grievant infers that the underlying reason for her separation from employment and not filing her grievance within the statutory time line was her illness. She avers that since she was not working because of her sickness, the time limit for filing her grievance was extended until late January 2009, when her medication and disorders were under control.

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[3] Grievant's resignation letter, Respondent's Exhibit 1 and Radcliff's acceptance letter, Respondent's Exhibit 2.

This argument ignores the last phrase of the statute; "or other cause for which the grievant has approved leave from employment." The subsection lists events for which an employee may be on approved leave from work. It specifically identifies absence for accident, sickness, and death in the immediate family. All of these are reasons for which a state employee may receive approved leave from employment. W. VA. CODE R. § 143-C.S.R.-1.14 (2007). The next phrase is a catch-all for the remaining leave provisions.[4] "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Syl. pt. 3, Meadows v. Wal-Mart Stores, Inc*, 207 W.Va. 203, 530 S.E.2d 676 (1999). Reading the entire subsection makes the intent clear that for the time limit for filing a grievance to be extended, the grievant must be on the type of leave that could be approved by her employer. In this case, Grievant was not on sick leave from employment, her employment had ceased. Consequently, the time limit cannot be extended by application of W. VA. CODE § 6C-2-3(a)(2).[5]

Grievant also notes the Grievance Board's Procedural Rules state that, "[t]he key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules." Grievant alleges that during the period of October 2008, through December 2009, her illness and changes in medication deprived her of her ability to make rational decisions. She argues that she filed her grievance as soon as she was able to grasp the

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[4] In addition to the reasons listed in the cited statute, state employees may receive approved leave for other reasons including military obligations, education and health care appointments for themselves and immediate family members. W. VA. CODE R. § 143-C.S.R.-1.14 (2007).

[5] W. VA. CODE § 6C-2-3(a)(2) also allows the time for filing a grievance to be extended by mutual agreement of the parties. There was not agreement to extend the filing time limit in this grievance.

events surrounding her separation from employment and therefore she substantially complied with the filing requirements of the statute.

The West Virginia Supreme Court of Appeals has discussed the concept of substantial compliance as it relates to timeliness in *Hale v. Mingo County Bd. of Educ.*, 199 W.Va. 387, 484 S.E.2d 640 (1997). In footnote 10 of *Hale*, Justice Starcher wrote:

> In *Spahr, supra*,[6] we upheld a circuit court's determination that a grievance was timely filed several months after the challenged grievable event because the employees did not initially know of the actual facts relating to their grievance. *Spahr*, 182 W.Va. 726, 391 S.E.2d 739. *Spahr* and *Duruttya, supra,*[7] teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.

Hale, supra.

Hale indicates that there are times when a grievant may be excused for untimely filing of a grievance where the grievant can demonstrate substantial compliance. In *Hale*, there was no clear evidence as to when the actual grievable event took place. Ms. Hale intervened in the case soon after she became aware that it was filed, but she clearly filed her claim to intervene after the original grievance had gone to level one. While a reasonable inference could be made that Hale's claim was made outside the statutory time

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[6] *Spahr v. Preston County Board of Education*, 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990) (applying the "discovery rule").

[7] *Duruttya v. Mingo County Board of Education*, 181 W.Va. 203, 205, 382 S.E.2d 40, 42 (1989).

line, there was not definitive proof to that fact. Justice Starcher noted that “it [did] not appear that there [was] any basis upon which to suggest that Ms. Hale "slept on her rights" for an appreciable period of time.” *Hale, supra,* footnote 10, p. 394.

The facts do not support such a conclusion in this case. Grievant was undoubtedly having debilitating medical problems during the relevant time period. However, she did have periods when she took significant steps to deal with her employment difficulties. She filled out applications, interviewed for jobs and successfully applied for unemployment compensation. All of these activities are as difficult as obtaining and filing a grievance form. Grievant did not introduce any medical testimony concerning her incapacity to make rational decisions. Given that fact that she was able to carry out similar activities, Grievant’s statements alone, that she was not capable of deciding to file a grievance, were not sufficient to prove the same. *Bachman v. Potomac State College,* Docket No. 07-HE-198 (Jan. 17, 2008); *Barker v. Bureau of Empl. Programs*, Docket No. 01-BEP-602 (July 31, 2002), *citing Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1035 (M.D. Tenn. 1995).

Grievant had sufficient knowledge of the grievance procedure to acquire a form and file a grievance without assistance. The record does not support the argument that Grievant was too ill to file her grievance until January 29, 2009. Therefore, the principles of substantial compliance and flexible interpretation do not apply to excuse Grievant’s failure to timely file her claim with the Grievance Board. Because it was not timely filed, the grievance must be dismissed.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. The grievance statutes require a grievance form to be filed within fifteen days of the occurrence of the event giving rise to the substantive claim of the grievance. W. VA. CODE § 6C-2-3(a)(1); W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

3. The grievance was not filed within the statutory time frame required for filing a grievance.

4. Grievant failed to prove a reason for which she should be excused for failing to timely file her grievance.

Accordingly the grievance is DISMISSED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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* W. VA. CODE R. § 156 C.S.R. 1.6.20 (2008).

DATE: JUNE 5, 2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE