THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY SIMONS,
Grievant,

v. **Docket No. 2008-1076-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Kimberly Simons, is employed by the Division of Highways ("DOH"). She filed this grievance on, or about, January 23, 2008. Her Statement of Grievance asserts she was unfairly denied the use of her annual leave when she returned to work after she was on Workers' Compensation. The Relief Sought is the return of or payment for her annual leave, and for the Division of Personnel to revise the annual leave policy to cover employees in her situation.

This grievance was denied at Level One on March 5, 2008. When Grievant filed to Level Two for mediation, DOH filed a Motion to Dismiss asserting the grievance was untimely filed to Level Two. A telephone conference on this matter was held on July 21, 2008. At that time, the undersigned Administrative Law Judge asked for a copy of the grievance form Grievant said she originally filed to Level Two. This grievance form was difficult to read, and the undersigned Administrative Law Judge asked Grievant to send the original grievance form, which she did on August 28, 2008. Grievant was represented by Bill Holley,[1] and DOH was represented by Attorney Barbara Baxter.

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[1]It was unclear from the record if Mr. Holley's was affiliated with a union or was a co-worker.

Synopsis

Grievant asserts she filed this grievance in a timely manner. She contends she filed this grievance to Level Two on March 23, 2008. Respondent asserts this grievance was untimely filed as Grievant received the Level One decision denying her grievance on March 13, 2008, and did not file this grievance to Level Two until April 28, 2008. After a review of all the evidence and various grievance forms, the undersigned Administrative Law Judge concludes this grievance was untimely filed at Level Two and must be DISMISSED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant filed this grievance on January 23, 2008.

2. A Level One conference was held on February 14, 2008, and a Level One decision was issued on March 5, 2008.

3. Grievant received her copy of this decision on March 13, 2008.

4. The Grievance Board received Grievant's certified mail filing to Level Two dated April 28, 20008, on April 29, 2008.

5. This grievance form had the Level Two filing date as April 28, 2008. No prior date was crossed out.

6. DOH filed a Motion to Dismiss on May 23, 2008, and a pre-hearing conference was held on July 21, 2008, to discuss the issue.

7. On July 23, 2008, the undersigned Administrative Law Judge requested a copy of the grievance form Grievant asserted she had filed in March 2008, and Grievant faxed a copy of this form.

8. On August 27, 2008, the undersigned Administrative Law Judge requested the original grievance form because the faxed copy was unclear.

9. The grievance form received pursuant to the undersigned Administrative Law Judge's August 2008 request, had only the March 23, 2008, date on it. The date of March 23, 2008, was not marked out or changed to indicate a new sent date of April 28, 2008.

Discussion

DOH contends this grievance is untimely filed, as it was not initiated within the time lines contained in W. VA. CODE § 6C-2-4(b)(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 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-2-4 (b)(1) identifies the time lines for filing a grievance to Level Two and states, "[w]ithin ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or mediation-arbitration with the board if the grievant desires to continue the process."[2]

The issue before the undersigned Administrative Law Judge is when did Grievant file her grievance to Level Two. Was it on March 23, 2008, or April 28, 2008? DOH received the filing to Level Two on, or about, April 29, 2008. The Grievance Board received this filing by certified mail on April 29, 2008.

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[2]This grievance was filed before the last enactment of the grievance statutes.

Grievant stated she sent her Level Two grievance form to all parties, by fax and by United States Mail, on March 23, 2008. DOH stated they did not receive this form. A check of the Grievance Board's past faxes did not find this document. The paper grievance form was not received by this office on, or about, the March 23, 2008, date.[3]

Grievant also stated she had called the Grievance Board, and a staff member reported the document had not been received. She stated she then sent another copy of the grievance form with the new date of April 28, 2008, on it, the date she resent it. A review of the original document sent by Grievant at the request of the undersigned Administrative Law Judge does show the date of March 23, 2008, as filing to Level Two. But this date is not marked through with the new date of April 28, 2008, noted as would have occurred if Grievant had sent the form before. The undersigned Administrative Law Judge concludes Grievant did not file this grievance in March 2008, but filed this grievance on April 28, 2008. Accordingly, Grievant filed this grievance in an untimely manner.

The above discussion will be supplemented by the following conclusions of law.

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

[3]The undersigned Administrative Law Judge directed the Grievance Board to double check its records.

(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. W. VA. CODE § 6C-2-4 (b)(1) identifies the time lines for filing a grievance to Level Two and states, "[w]ithin ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or mediation-arbitration with the board if he Grievant desires to continue the process."

3. This grievance was not timely filed, as Grievant received notification of the Level One denial on March 13, 2008, and did not file this grievance to Level Two until April 28, 2008.

Accordingly, this grievance is DISMISSED as untimely filed.

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 (eff. July 7, 2008).

Date: July 24, 2009

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Janis I. Reynolds
Administrative Law Judge