THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES DEAN, JR.,
Grievant,

v. **Docket No. 2011-0829-MAPS**

DIVISION OF JUVENILE SERVICES/
ROBERT L. SHELL JUVENILE CENTER,
Respondent.

DISMISSAL ORDER

Grievant, Charles Dean, Jr., filed a grievance against Respondent, Division of Juvenile Services/Robert L. Shell Juvenile Center (DJS), on November 1, 2010. Grievant asserts he was denied light duty assignments when other employees were permitted to perform light duty. As relief Grievants seeks, "probation date back to 7/16/2010, 16 hrs. annual time, 24 hours sick time back and $5,000."

A level one conference was held on December 7, 2010. The grievance was denied as untimely at that level on December 21, 2010. A level two mediation was conducted on March 9, 2011. On April 20, 2011, a Motion to Dismiss was filed by Respondent's counsel. A level three hearing was scheduled for July 25, 2011 before the undersigned at the Public Employees Grievance Board in Charleston, West Virginia. Grievant appears in this matter *pro se*. Respondent appears in this matter by Steven R. Compton, Esq., Senior Assistant Attorney General. Grievant did not appear at the level three hearing.

Synopsis

Grievant suffered a knee injury in July 2009. In February or March of 2010, Grievant

learned that other employees were performing light duty assignments. Grievant filed an Equal Employment Opportunity (EEO) complaint on July 30, 2010. The EEO complaint was closed as unsubstantiated on September 17, 2010. Grievant did not file this grievance until November 1, 2010. This grievance was untimely filed.

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

Findings of Fact

1. Grievant is employed by Respondent as a Youth Specialist II.

2. In July 2009, Grievant suffered a knee injury.

3. In February or March of 2010, Grievant learned that other employees were performing light duty assignments.

4. Grievant did not file a request for light duty with Respondent.

5. Grievant filed an EEO complaint on July 30, 2010.

6. Grievant's EEO complaint was closed as unsubstantiated on September 17, 2010.

7. Grievant filed this grievance on November 1, 2010.

Discussion

Respondent contends this grievance is untimely as it was not initiated within the time lines contained within W.VA. CODE § 6C-2-4. 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." W.VA. CODE § 6D-2-4(1) identifies the time lines 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...

Pursuant to W.VA. CODE § 6C-2-3(c), "[a]ny assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer at or before the level two." The issue of timeliness was raised by Respondent at the level one conference. This grievance was denied as untimely at level one of the grievance procedure. Accordingly, the undersigned finds the timeliness defense was properly raised.

Grievant suffered a knee injury in July 2009. In February or March of 2010, Grievant learned that other employees were given light duty assignments. Grievant did not file a grievance within fifteen days of becoming aware that other employees were performing light duty assignments. Grievant initiated an EEO complaint on July 30, 2010, regarding

the same complaint as the present grievance. That EEO complaint was closed as unsubstantiated on September 17, 2010. Grievant asserted at the level one conference that the EEO Investigators told him he should have filed a grievance. Even if one were to consider the date Grievant claims an EEO Investigator told him he should have filed a grievance, Grievant did not file a grievance within fifteen days.

Respondent filed a Motion to Dismiss on April 20, 2011. Grievant did not file a response. At the level three hearing on July 25, 2011, Respondent again asserted its Motion to Dismiss. Grievant did not respond because Grievant did not appear at the level three hearing. Respondent's Motion to Dismiss is granted.

The discussion above 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 (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-2-3(a)(1) requires an employee to "file a grievance

within the time limits specified in this article."

3. W.VA. CODE § 6D-2-4(1) identifies the time lines 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...

4. Grievant did not timely file this grievance.

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (2008).

DATE: July 28, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge