**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**CYNTHIA A. PAULDING,**
**Grievant,**

**v.** **Docket No. 2009-0809-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,**
**Respondent.**

## DISMISSAL ORDER

Grievant, Cynthia A. Paulding, filed this grievance against her employer, Department of Health and Human Resources, on December 15, 2008. She states that she "was hurt while on the job, since then I have been put on light duty by my doctor. For a year the hospital has placed me in jobs to accommodate my physicians' orders. In November I was called in and told that the hospital would no longer accommodate me, and that I would be put on a two month personal leave of absence. I have taken and passed the register for three other positions at the hospital, interviewed for one position and was later told by the Director of Human Resources that the position was no longer needed." Grievant seeks to "be placed in a suitable position for which I have trained and tested for. Also to be reimbursed for my time and benefits while I was put on the two month personal leave."

On April 5, 2011, Respondent filed a Motion to Dismiss the grievance. Grievant was asked to file a response to this motion, and did so on May 23, 2011. Respondent appeared by its counsel, Jennifer K. Akers, Assistant Attorney General. Grievant appeared by her representative, Elsie Hayward. Respondent's Motion to Dismiss is mature for a ruling.

## Synopsis

Grievant seeks an order placing her in a position at Respondent's Mildred Mitchell-Bateman Hospital (Bateman) after exhausting her allotted six-month medical leave of absence. This grievance was denied at level one by decision dated April 9, 2009. No further action was taken in the grievance until an appeal was filed on March 18, 2011. Respondent asserts that the appeal from level one is not timely. For reasons more fully set out below, the Motion to Dismiss is granted.

After a thorough review of the record, the undersigned makes the following findings of fact.

## Findings of Fact

1. Grievant was injured on November 5, 2007, while performing her job duties as a Health Service Worker.

2. Grievant returned to work under restrictions, but was unable to perform the essential duties of a Health Service Worker. Respondent was able to find suitable temporary employment in other areas of the Bateman Hospital.

3. Grievant's condition worsened over time, and Bateman Hospital was unable to find additional suitable work. Grievant was forced to be off work on personal leave after having exhausted her six-month medical leave of absence.

4. Grievant filed the instant grievance on December 15, 2008. A level one hearing was held on April 7, 2009. A decision was issued on April 9, 2009, denying the grievance. The decision stated that any appeal of the decision must be made within 10 working days from receipt of the decision.

5. Grievant did not take any further action on her grievance until March 18, 2011, when she appealed the level one decision.

**Discussion**

Respondent asked that this grievance be dismissed as untimely appealed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH- 060 (July 16, 1997). If the respondent meets this burden, the grievant may then attempt to demonstrate that he 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).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(b)(1) identifies the time limits for appealing from level one and states:

Within ten days of receiving an adverse written decision at level one, the

> grievant shall file a written request for mediation, private mediation or private arbitration.

Grievant's appeal to level two almost two years after receipt of the level one decision was obviously outside of the time allowed for an appeal under this statutory provision. Grievant's justification for her untimely appeal was the belief that an appeal had been filed and that the "grievance just had gotten lost." This response presents no facts which would be sufficient to support the application of any equitable doctrine to toll the ten-day time limit.[1] The delay in filing the appeal to level two cannot be excused under the facts of this case.

The following conclusions of law support the ruling to dismiss this grievance.

**Conclusions of Law**

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-

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[1] "Equitable theories, including estoppel may be applied to toll the time for filing a grievance." *Rose, et al., v. Raleigh County Bd. of Educ.*, Docket Nos. 94-41-296/314 (Nov. 29, 1994), *aff'd per curiam*, Appeal No. 23450 (W. Va. Feb. 24, 1997). The application of the doctrine of equitable estoppel to untimely filed grievances was discussed in *Lilly v. Raleigh County Bd. of Educ.*, Docket No. 94-41-195 (Nov. 28, 1994), *aff'd* No. 95-AA-7 (Kanawha County Cir. Ct. May 1, 1996); appeal refused (W. Va. April 1997):

> The West Virginia Supreme Court of Appeals, in *Naylor v. W.Va. Human Rights Commission and Bird Machine Company, Inc.*, 378 S.E.2d 843 (1989), 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."

HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

2. A grievant seeking to appeal the denial of her grievance from level one to level two must do so within ten working days of the day she receives the level one decision. W. VA. CODE § 6C-2-4(b)(1).

3. No facts were shown which would excuse Grievant's late filing.

4. Respondent did not take any action which was designed to cause Grievant to delay in filing the appeal to level two, or which should unmistakably have been understood that it would cause Grievant to delay filing the appeal to level two.

5. Grievant's filing of the level two appeal was untimely. Grievant failed to provide a reasonable justification for her untimely filing of this appeal.

Accordingly, the Respondent's Motion to Dismiss 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 (eff. July 7, 2008).

**Date: June 24, 2011**

**Ronald L. Reece**
**Administrative Law Judge**