WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBYN HICKMAN,
Grievant,

v. **Docket No. 2012-0827-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF INSPECTOR GENERAL,
Respondent.

DISMISSAL ORDER

Robyn Hickman, Grievant, was employed by the Respondent, Department of Health and Human Resources ("DHHR") as an Accounting Tech 3. She worked in the DHHR Office of Inspector General/Office of Health Facility Licensure and Certification. ("OHFLAC"). Ms. Hickman filed a level one grievance form dated February 7, 2012, stating that she had been dismissed from her employment without good cause. As relief, Grievant sought: "To be made whole including back pay with interest & all benefits restored."

Respondent DHHR filed a Motion to Dismiss this grievance dated February 28, 2012, alleging that it was not filed within the mandatory time limits set out in statute. A notice of telephonic hearing was sent to the parties on April 26, 2012, and the telephonic hearing was held from the West Virginia Public Employees Grievance Board's Charleston office on May 4, 2012 at 9:00 a.m. Anne B. Ellison, Esquire, Assistant Attorney General participated in that hearing on behalf of the Respondent DHHR. Neither Grievant nor her representative appeared. Ms. Ellison made an oral argument in support of the Respondent's Motion and the hearing was concluded.

At 1:00 p.m. Grievant's Representative, Gordon Simmons, UE Local 170, appeared

before the undersigned in a different matter. Mr. Simmons explained why he had not participated in the morning hearing and indicated that he had been in contact with counsel for the Respondent. The undersigned granted leave to Mr. Simmons to file a written response to Respondent's Motion to Dismiss. The Grievant's Response to Respondent's Motion to Dismiss was received by the West Virginia Public Employees Grievance Board on May 7, 2012. Upon receipt of that Response, the matter became mature for a ruling on the Motion to Dismiss.

Findings of Fact

1. Grievant, Robyn Hickman, was employed by Respondent DHHR as an Accounting Tech 3 in the Office of Inspector General/OHFLAC.

2. Grievant was off work for an extended period of time from August 2011 through October 2011. There is some dispute as to whether Grievant submitted proper forms for leave during that period of time.

3. By letter dated November 14, 2011, Jolynn Marra, OHFLAC Director, informed Grievant that she was dismissed from employment with the Respondent for "job abandonment." Respondent's Exhibit A.[1]

4. Grievant Hickman responded to the dismissal letter by an e-mail sent to Director Marra on November 30, 2011. In the e-mail, Grievant stated that she was responding to the November 14, 2011, letter and she had made efforts to provide appropriate leave forms for Director Marra's consideration. The e-mail made no reference to a grievance. Respondent's Exhibit B.

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[1] All exhibits referred to herein were attached to Respondent's Motion to Dismiss.

5. On December 29, 2011, Director Marra moved to dismiss two grievances that Grievant had filed previously, alleging a hostile work environment. The basis for the motion was that Grievant was no longer employed by Respondent and therefore the grievances were moot. Grievant's Representative, Gordon Simmons, replied to the motion later that day. A level one Order was entered on January 9, 2012, dismissing the grievances as moot. Respondent's Exhibit C.

6. Grievant filed a level one grievance form dated February 7, 2012, twenty days after the entry of the January 9th Order. Excluding weekends and holidays, that is more than two months after Grievant acknowledged receipt of the letter from Director Marra terminating Grievant's employment.

Discussion

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); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

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 § 6C-2-4(a)(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. . . .

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); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

Respondent proved that Grievant was unequivocally notified by a letter dated November 14, 2011, that her employment with OHFLAC was terminated. The time period for filing the grievance began upon Grievant's receipt of that letter. By e-mail dated November 30, 2011,[2] Grievant acknowledged that she had received the letter. Grievant did not file a grievance contesting the termination of her employment until February 7, 2012. Respondent proved by a preponderance of the evidence that Grievant failed to file her grievance within the mandatory time period set out in the statute.

Grievant's representative points out that Grievant was applying for a medical disability and was "under medical care for that disability" from October 2011 until February

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[2] A copy of the e-mail was attached to Respondent's Motion to Dismiss as Respondent Exhibit B.

2012. He also alleges that he was unable to contact Grievant until early February 2012 when she provided him with new contact information. These facts do constitute a basis to excuse Grievant's failure to file her grievance within the statutory time period. Grievant was clearly aware of the fact that her employment had been terminated in November 2011. Further, she was able to write a cogent e-mail regarding the topic to her employer. There is no reason to believe that her medical condition prevented her from filling out a simple grievance form. Accordingly, the grievance is DISMISSED.

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 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); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

2. 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 § 6C-2-4(a)(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. . .

3. 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); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

4. Respondent proved by a preponderance of the evidence that Grievant failed to file her grievance within the mandatory time period set out in W. VA. CODE § 6C-2-3 (a) (1).

5. Grievant did not demonstrate a proper basis to excuse her failure to file in a timely manner.

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 156 C.S.R. 1 § 6.20 (2008).

DATE: MAY 24, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE