THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RITCHIE KINGERY,
Grievant,

v. **Docket No. 2012-1080-DHHR**

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

DISMISSAL ORDER

Grievant, Ritchie Kingery, filed this grievance against his employer, Mildred Mitchell-Bateman Hospital, on April 9, 2012. His statement of grievance reads:

> Been on workers comp. Dr Finley still has me off till 3-29-12 and MMBH sent me a letter that I was fired.

His relief sought reads:

> How can a person get fired if they sent the papers and give the papers to the Dr. and the Dr. sends the papers to Brickstreet. So how can a person get fired.

This grievance was filed directly to level three. Respondent filed a Motion to Dismiss Grievance As Not Timely Filed on April 19, 2012. Grievant failed to file a response to this Motion to Dismiss. The matter is mature for a ruling. Grievant appeared *pro se*. Respondent appeared by its counsel, Michael E. Bevers, Assistant Attorney General.

Synopsis

The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed.

The following findings of fact are undisputed in this grievance.

Findings of Fact

1. Grievant was a cook at Mildred Mitchell-Bateman Hospital. A facility operated by the Department of Health and Human Resources.

2. Grievant developed neck and should pain in November 2010, became unable to work, and received workers' compensation in the form of temporary total disability until January 2012.

3. BrickStreet, the workers' compensation administrator, notified the Respondent that Grievant had reached maximum medical improvement on November 30, 2011. Grievant did not return to work or contact Respondent about returning to work after he reached maximum medical improvement.

4. Respondent dismissed Grievant for job abandonment by letter dated February 21, 2012. Grievant filed this grievance on April 9, 2012. However, the Grievance Form was dated March 9, 2012, indicating that Grievant became aware of his dismissal no later than March 9, 2012.

5. Grievant did not offer any basis to excuse his failure to file in timely manner. In addition, the record demonstrated that Grievant was not on approved leave at the time of his dismissal.

6. The deadline for filing a grievance challenging the dismissal was March 30, 2012, fifteen working days after he signed the Grievance Form. Grievant did not file this grievance within fifteen working days after he signed the Grievance Form.

Discussion

Respondent has asked that this grievance be dismissed as untimely filed. 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 28, 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(a)(1) identifies the time limits for filing a grievance and states:

> Within fifteen days[1] 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). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

The time frame for filing this grievance began to run when Grievant learned of his dismissal. The record established that Grievant learned of his dismissal sometime between the date of the dismissal letter on February 21, 2012, and the date he signed the Grievance Form on March 9, 2012. Therefore, the latest deadline for filing a grievance challenging the action of Respondent was March 30, 2012. This grievance was not filed until April 9, 2012. The Respondent has met its burden of proving, by a preponderance of the evidence, that this grievance was untimely filed.

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

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[1]Pursuant to W. VA. CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

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] Grievant did not provide any basis to excuse his failure to file in timely manner.

The following Conclusions of Law support the dismissal of 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-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

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[2]**W. VA. CODE § 6C-2-3. Grievance procedure generally.**

(a) Time limits. –

(1) An employee shall file a grievance within the time limits specified in this article.

(2) 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.

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).

2. Pursuant to the requirements of W. VA. CODE § 6C-2-4(a)(1), a grievance must be filed within fifteen days of the event upon which it is based.

3. Grievant's filing of the level three grievance was untimely. Grievant failed to provide a reasonable justification for his untimely filing of this grievance, which was more than fifteen days after the occurrence of the event upon which the grievance is based.

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: July 16, 2012

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Ronald L. Reece
Administrative Law Judge