THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONALD RAY SMITH, JR.,

Grievant,

v. **Docket No. 2012-0348-MAPS**

DIVISION OF CORRECTIONS/ST. MARY'S CORRECTIONAL CENTER,

Respondent.

DISMISSAL ORDER

Grievant, Donald Ray Smith, Jr., filed his Level One grievance against his employer, Respondent Division of Corrections/St. Mary's Correctional Center on September 27, 2011, challenging a disciplinary demotion he received on September 13, 2011. As relief sought, Grievant requests "[r]einstatement to the rank of Correctional Officer III and to retain all supervisory responsibilities/restoration of seniority and rate of pay that the position holds./reimbursement of wages lost dating back to 01 October, 2011./removal from my record of the actions taken against me."[1]

Respondent filed a Motion to Dismiss on July 16, 2012, alleging that the Grievant's Level Three appeal was untimely filed, serving the same upon Grievant and his Representative. Grievant filed no response to Respondent's Motion to Dismiss. A telephonic hearing on the Motion to Dismiss was conducted by the undersigned administrative law judge on August 7, 2012, at which Respondent appeared by counsel, Charles P. Houdyschell, Jr., Esquire, and Grievant appeared by his Representative, Jack Ferrell, Communication Workers of America. This matter is now mature for consideration.

[1] *See,* Statement of Grievance.

Synopsis

Grievant filed his Level Three appeal more than two months after the issuance of the Level Two Mediation Order. Grievant contends that he did not receive the Order; however, his Representative received a copy of the Order. Respondent asserts that the Level Three appeal was untimely filed, and, as such, has moved to dismiss this grievance. For the reasons more fully set out below, Respondent's Motion to Dismiss is granted.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant filed this grievance at Level One on September 27, 2011.

2. A Level One hearing was conducted on November 14, 2011, and this grievance was denied by decision dated December 5, 2011.

3. Grievant's Level Two appeal was perfected on December 19, 2011.

4. A Level Two Mediation was conducted on April 19, 2012. An Order regarding the Level Two Mediation was entered on April 20, 2012, and served on the parties by first class mail, postage prepaid, on that same date.

5. Grievant submitted his Level Three appeal to the Grievance Board on June 25, 2012, along with a document entitled "Memorandum" containing the subject line "Untimely Appeal to Grievance Level III."[2]

[2] It is noted that the Level Three section of the Statement of Grievance form is dated June 20, 2012. However, as indicated by the postmark on the envelope, the form was mailed on June 25, 2012. It was received by the Grievance Board on June 26, 2012.

6. Grievant acknowledges that his appeal to Level Three of the grievance process was untimely, but asserts that he did not receive the mediation order entered on April 20, 2012.

7. Grievant's copy of the mediation order was mailed to his correct mailing address.[3]

8. The mediation order mailed to the Grievant was not returned to the Grievance Board's office by the Postal Service as undeliverable.

9. Grievant's Representative received his copy of the mediation order entered on April 20, 2012.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). This issue before the undersigned is the Respondent's Motion to Dismiss.

Respondent contends that this grievance is untimely because it was not initiated within the timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1). Timeliness is an affirmative defense. 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. *See, Higginbotham v. W. Va. Dep't of Pub. Safety,* Docket No. 97-DPS-018 (Mar. 31, 1997);

[3] Grievant's mailing address has not changed since the filing of this action.

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); *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).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See generally,* W. Va. Code §§ 6C-2-1 *et seq*. There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997), *aff'd, Circuit Court of Kanawha County,* No. 97-AA-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See, 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." W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(c)(1) sets forth the time limits for appealing a grievance from Level Two, stating as follows:

> Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance . . . .

W. VA. CODE § 6C-2-4(c)(1).

In this matter, the Grievant contends that he did not receive the Order resulting from the Level Two Mediation. However, the document was sent to Grievant's correct mailing address and his representative received the copy he was sent. Additionally, the Level Two Order was not returned to the Grievance Board as undeliverable, and Grievant's address has remained unchanged throughout the grievance process. Pursuant to the postmark on the Level Three appeal and Grievant's "Memorandum," Grievant failed to file his appeal to Level Three within the statutory ten-day time limit. The undersigned cannot find any proper basis for excusing Grievant's untimely filing. Therefore, the Respondent's Motion to Dismiss is granted, and this grievance, dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated that 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. *See, 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); *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 failed to timely appeal to Level Three of the grievance process. As such, the grievance is untimely filed, and Grievant has offered no proper basis to excuse his late filing.

Accordingly, this Grievance is **DISMISSED**.

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: August 28, 2012.

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Carrie H. LeFevre
Administrative Law Judge