THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARLIN C. RUNION III,
Grievant,

v. **Docket No. 2013-0146-DOT**

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Marlin C. Runion III, filed this grievance against his former employer, West Virginia Department of Transportation/Division of Highways (DOH), on August 2, 2012. His statement of grievance reads:

> Please see attached letter.[1] I was told by the unemployment office to file this grievance.

The relief sought reads:

> My job reinstated with back pay.

This grievance was filed directly to level three. Respondent filed a Motion to Dismiss Grievance As Not Timely Filed on August 24, 2012. A telephone conference with the parties was held on September 26, 2012, regarding the motion and proper disposition of the grievance. Respondent and Grievant had the opportunity to address the issue(s).

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[1] Grievant attached a one page, single spaced document which depicts an event or series of facts which are reportedly relevant to his resignations. Among other things, Grievant contends he attempted to retract his resignation and he was treated differently than another identified employee. Also attached was WV Division of Personnel's Workplace Harassment Policy (6 pgs).

The grievance was remanded to Level One by Public Employees Grievance Board Order on October 3, 2012. It was then dismissed at Level One by agency Order dated October 11, 2012, at which time Grievant appealed to Level Two. The previously filed Motion to Dismiss on the basis of untimeliness had been held in abeyance pending Level One proceeding. Both parties have had ample opportunity to present information and/or argument regarding the timeliness issue. The issue is mature for ruling. Grievant appeared *pro se*. Respondent appeared by its counsel, Mark C. Dean, DOH Legal Division.

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, Marlin C. Runion III, was employed with Respondent as a Transportation Worker 2.

2. Grievant submitted a written resignation to Respondent on June 25, 2012. The resignation specified an effective date of July 6, 2012.

3. Respondent accepted Grievant's resignation by letter dated June 27, 2012.

4. Grievant was unequivocally aware that his employment with Respondent was severed on July 9, 2012, when he was denied access to the workplace.

5. Grievant filed a grievance statement dated August 2, 2012, against Respondent with the West Virginia Public Employees Grievance Board challenging the validity of his resignation and Respondent's subsequent acceptance thereof.

6. Grievant did not file this grievance within fifteen working days following July 9, 2012. The fifteen working days deadline after the occurrence of the event on which this grievance is based, and when Grievant unequivocally knew of the facts giving rise to this grievance, is July 30, 2012.

7. Grievant's grievance form was date stamped as received by the Public Employees Grievance Board's Charleston office on Monday, August 6, 2012.

8. Grievant did not offer a legal basis to excuse his failure to file in a timely manner.

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[2] 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).

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[2]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."

The time frame for filing this grievance began to run when Grievant learned of his separation from service. The record established that Grievant was aware of the alleged injury sometime between the date of the acceptance letter on June 27, 2012, and the date of the effective date of his resignation July 6, 2012, but no later than July 9, 2012, when he attempted to report to work and was told to leave because he no longer worked for Respondent. Therefore, the latest deadline for filing a grievance challenging the action of Respondent was July 30, 2012. This grievance was not filed until August, 2012. Although the grievance form is dated August 2, 2012, the envelope received by the Grievance Board with the grievance form has no visible post mark date evident on the envelope. The procedural rules of the Grievance Board define the term file as follows:

> "File" or "filing" means to *place the grievance form in the United States Postal Service mail*, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard East, Charleston, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimilie transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark. All grievance forms shall be date stamped when received. Grievance forms may not be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

156 C.S.R. 1 § 2.1.4 (2009)(Emphasis added). This rule adopted the 'mailbox rule' previously set forth in the case law in *McVay v. Wood County Board of Education*, Docket No. 95-54-041 (May 18, 1995).

The form was received on Monday, August 6, 2012, at the Grievance Board 's Charleston office. For discussion purposes, the undersigned will calculate from the August

2, 2012 date. This is factually inaccurate; nevertheless placing Grievant in the most favorable position possible. The form was date stamped at the Grievance Board's Charleston office on August 6, 2012. The August 2, 2012 date on the grievance form is eighteen (18) working days following the occurrence of the event on which this grievance is based and when, unequivocally, Grievant knew of the fact(s) giving rise to his grievance. Grievant did not file his grievance within fifteen days of the event upon which it is based.

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 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).[3] In addition to oral argument presented at the telephonic conference held on September 26, 2012, Grievant submitted a written

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[3] 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.

document on November 15, 2012, in response to Respondent's Motion to Dismiss. Grievant did not provide adequate basis to excuse his failure to file in a 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 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 instant 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: January 11, 2012

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Landon R. Brown
Administrative Law Judge