

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

APRIL R. PALMER,

Grievant,

v.

Docket No. 2017-2308-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
OFFICE OF HUMAN RESOURCE MANAGEMENT,**

Respondent.

DISMISSAL ORDER

Grievant, April R. Palmer, filed an expedited level three grievance against her employer, Respondent, Department of Health and Human Resources, Office of Human Resource Management, on June 2, 2017,¹ stating, “[e]vent-Dismissal. Due to the circumstances and timing, I believe I was discharged in retaliation for making a workers compensation claim.” As relief sought, Grievant requests “[r]einstatement of position, lost wages, back pay as well as any and all benefits and/or relief to which I am entitled. Additionally, I wish to continue my health care coverage through the grievance process with eligibility for Cobra Benefits. Please advise Division of Personnel and all other relevant agencies to the extent to which they need to be involved.”

On June 21, 2017, Respondent filed a Motion to Dismiss alleging that the grievance was untimely filed. The Grievance Board contacted Grievant’s counsel by electronic mail on June 21, 2017, attaching a copy of the motion, and informed him that if Grievant wished to respond to the motion, he was to do so in writing before close of business July 6, 2017.² The Grievance Board issued a Notice of Hearing on June 27,

¹ Grievant’s signature is dated June 1, 2017, but the statement of grievance was received by the Grievance Board on June 2, 2017.

² Counsel for Respondent was copied on this email.

2017, scheduling this matter for a level three hearing on August 22, 2017. Grievant, by counsel, filed her “Response in Opposition to Department’s Motion to Dismiss Grievance” on June 28, 2017. Respondent is represented by Michael E. Bevers, Assistant Attorney General. Grievant is represented by Scott H. Kaminski, Esquire, Kaminski Law, PLLC. This matter is now mature for consideration.

Synopsis

Grievant filed a grievance challenging her dismissal from employment. Respondent has moved to dismiss the grievance as untimely as it was filed more than fifteen days following the occurrence of the event upon which the grievance is based. Grievant argues that the matter was timely filed, and that the dismissal letter prepared by Respondent was misleading. Respondent has proved by a preponderance of the evidence that the grievance was untimely filed. Grievant failed to demonstrate a proper basis to excuse her failure to file her grievance in a timely manner. Accordingly, Respondent’s Motion to Dismiss is granted, and this grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant had been employed by Respondent as a Senior Staff Development Specialist.
2. By letter dated May 5, 2017, Respondent informed Grievant that she was being dismissed from her employment effective May 20, 2017. This letter was hand-delivered to Grievant on May 5, 2017. By that same letter, Respondent informed Grievant

that it was requiring her immediate separation from the workplace, and that she would be paid up to a maximum of fifteen calendar day's severance pay.

3. Grievant filed a grievance challenging her dismissal on June 2, 2017.³ Grievant's signature on her statement of grievance is dated June 1, 2017.

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 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). *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).

An employee is required 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(a)(1) sets forth the time limits for filing a grievance, stating as follows:

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 This is the date the statement of grievance was faxed to and received by the Grievance Board.

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any 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.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2). 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 Employment 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. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

Respondent argues that the timeframe within which Grievant could file her grievance began when she was informed of her dismissal on May 5, 2017, and ended fifteen working days later on May 26, 2017. Therefore, Grievant filed her grievance one week after the filing deadline. Grievant argues that she was “misled” by the May 5, 2017, letter “into believing that her 15 day period began to run on May 20, 2017, the effective date of her termination.”⁴

The language at issue is contained in the first two paragraphs of the letter, which state as follows:

The purpose of this letter is to advise you of my decision to dismiss you effective May 20, 2017 from your probationary employment as a Staff Development Specialist Senior with the Department of Health and Human Resources, Office of Human Resources Management, Employee Development. This action complies with Division of Personnel *Administrative Rule*, Section 12.2 and provides for the required fifteen (15)-calendar day notice period.

⁴ See, Grievant’s Response in Opposition to Department’s Motion to Dismiss Grievance.

Although the dismissal will not be effective until May 20, 2017, as authorized by W. Va. Code, § 29-6-10(12), I am requiring your immediate separation from the workplace. Therefore, you will be paid up to a maximum of fifteen (15)-calendar day's severance pay. You will also be paid for all annual leave accrued and unused as of your last workday.

See, Exhibit 1, Respondent's Motion to Dismiss, May 5, 2017, letter. The language in the first two paragraphs of the dismissal letter clearly inform Grievant that she is being dismissed from employment. Thus, Grievant was unequivocally notified in writing that she was being dismissed from her employment on May 5, 2017, when she received the letter. Grievant was required to file her grievance within fifteen days of her receipt of that letter. See *Payne v. Div. of Juvenile Serv.*, Docket No. 2017-1436-MAPS (May 8, 2017). While Grievant may not have understood which date started the time period for filing a grievance, the language of the letter is not misleading, and there has been nothing to suggest that Respondent misinformed Grievant of anything. "Ignorance of the grievance procedures does not excuse the untimely filing of a grievance." *Payne v. Div. of Juvenile Serv.*, Docket No. 2017-1436-MAPS (May 8, 2017). "[A]s a general rule, ignorance of the law . . . will not suffice to keep a claim alive." *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991). Therefore, Grievant has failed to demonstrate a proper basis to excuse her failure to file her grievance in a timely manner. Accordingly, 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. 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); *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. An employee is required 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(a)(1) sets forth the time limits for filing a grievance, stating as follows:

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

W. VA. CODE § 6C-2-4(a)(1).

3. “‘Days’ means working days exclusive of Saturday, Sunday, official holidays and any 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.” W. VA. CODE § 6C-2-2(c). In addition, the time limits are extended when a grievant has “approved leave from employment.” W. VA. CODE § 6C-2-4(a)(2).

4. 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 Employment 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. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

5. Respondent has proved by a preponderance of the evidence that the grievance was untimely filed. Grievant has failed to demonstrate a proper basis to excuse her failure to file her grievance in a timely manner.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Dismissal 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 30, 2017.

Carrie H. LeFevre
Administrative Law Judge