

SHERWOOD SPENCER,

Grievant,

v. DOCKET NO. 96-DEP-126

DIVISION OF ENVIRONMENTAL PROTECTION/

SOLID WASTE MANAGEMENT,

Respondent.

DECISION

_____ On March 22, 1996, Grievant, Sherwood Spencer, filed a grievance with this Board averring:

[u]nlawful termination of his Employment; Discriminatory conduct by Employer; Failure of Employer to comply with statutory (both federal and state) requirements.

He requests as relief that he be reinstated with backpay and attorney fees. As this is a disciplinary action it was filed directly at Level IV pursuant to W. Va. Code §29-6A-4(e). A Level IV hearing was scheduled on April 19, 1996.

On April 16, 1996, Respondent filed a Motion to Dismiss stating the Grievance was untimely filed as Grievant's employment with the Division of Environmental Protection ("DEP") was terminated a year earlier, on March 23, 1995. At hearing, evidence on the Motion to Dismiss was considered as this issue could be dispositive of the case. At the end of the parties' presentations on this issue, Grievant requested the right to take the deposition of Dr. Jerome Massenburg, Grievant's psychiatrist, in order to present additional evidence on his reasons for late filing. Over Respondent's objection, this request was granted.

On July 18, 1996, Respondent requested the undersigned set a time frame for supplementing the record. No response was forth coming from Grievant on this Motion. On August 1, 1996, the undersigned ordered the parties to supplement the record by September 20, 1996. On September 23, 1996, the undersigned received notice from Grievant stating he "would not be presenting data supplementing the record in this matter." Accordingly, this grievance became mature for decision on that date.

Grievant argues he was physically and mentally unable to file his grievance until April 1996. As the following Findings of Fact will demonstrate, this argument is without merit.

Findings of Fact

1. On March 8, 1995, Ms. Mary Hunt, the Chief of DEP's Office of Administration, wrote Grievant informing him his employment with DEP would be terminated on March 23, 1995, due to his continuing inability to work.
2. Grievant had been on a medical leave of absence which ended on February 28, 1995.
3. The termination letter also informed Grievant that his latest request, on February 27, 1995, for a four month extension of medical leave, could not be granted because there was no accompanying physician's authorization. [\(See footnote 1\)](#)
4. The last paragraph of this letter detailed his grievance rights and directed Grievant to file directly with this Grievance Board "within ten (10) working days of the effective date of this action" if he chose to exercise these rights.
5. Grievant signed for this letter on March 9, 1995.
6. As of March 3, 1995, Grievant had met all his goals at the Sports Medicine Clinic, and a letter indicates he had no need to return. Grievant's Exh. 3.
7. On March 20, 1995, Grievant wrote Ms. Hunt stating he was now released to return to work for light duty assignments. Attached to this letter was a return to work slip signed by the doctor. Grievant testified he was ready to return to work on that date.
8. On March 20, 1995, Grievant attempted to return to work even though his termination would be effective March 23, 1995. Grievant was told he no longer had a position.
9. On April 22, 1995, Grievant wrote Ms. Hunt asking why he had been terminated. Ms. Hunt responded with a May 3, 1995 letter stating the reasons for his termination were contained in the March 8, 1995 letter and attached another copy of this letter to her response.
10. Although Grievant did not agree with the letter of March 8, 1995, and thought it was filled with half-truths, he knew he was terminated as of March 23, 1995.
11. From March 1995, up until the time of the hearing, Grievant has been able to perform all the necessary tasks of daily living. These tasks include writing checks, obtaining loans, driving a car, and working out at a gym where he obtained membership on his own.
12. During the time referred to in Finding of Fact 11, Grievant conducted a part-time, private

business in which he performed environmental site assessments for individuals prior to their purchasing commercial or business property. This work included "walking" the property for a visual inspection, obtaining and testing soil samples, and writing the corresponding report.

13. Grievant's stated reasons for failing to file this grievance sooner were the employer "didn't want me back" and "had beaten me down", and "I got depressed" and "I didn't have money for an attorney."

14. Grievant first went to an attorney to see about filing a grievance in December 1995. This attorney referred Grievant to his present attorney.

15. On March 22, 1996, Grievant filed this grievance with the Grievance Board.

Issue

Grievant avers the reason he did not file this grievance in a timely manner is because he was not physically and/or mentally capable of doing so. He cites W. Va. Code § 29-6A-3 as support for this argument. This Code Section states "the specified time limits [for filing a grievance] shall be extended whenever a grievant is not working because of . . . sickness . . .". DEP argues Grievant was capable of filing his grievance, and this fact is confirmed by Grievant's own testimony.

Although Grievant still had some residual effects from his alcohol abuse, organic depression, asthma, and cerebellar dysfunction, he, by his own testimony, was able to work. The only limitations to his activities were lifting and walking on rough terrain. If Grievant was capable of working, he was also capable of filing a grievance.

Further, Grievant's testimony on his inabilities was inconsistent. He testified he was mentally incapable of filing a grievance, but then stated that during this same time he performed environmental site assessments, an activity which obviously required the mental ability to process somewhat complex technical data and to put it into written form. Grievant also stated he was able, during this time frame, to perform other activities which compare favorably with the process of filing a grievance. He was able to write reports, pay bills, and follow an exercise regimen. Additionally, his physical abilities were not impaired to the extent that he could not file a grievance, as he was able to drive a car, walk on level ground, and work out at Nautilus.

Grievant stated frequently that he did not understand the letter of March 8, 1995. On further questioning, this statement was clarified. Grievant meant he disagreed with this letter, felt it contained

half-truths, and was contrary to a letter he had previously received in September 1994 stating he could return to work in a probationary capacity. Grievant testified he knew he had been terminated, and he had a right to file a grievance. Indeed, Grievant had previously filed a grievance on January 6, 1995, on a prior dismissal. [\(See footnote 2\)](#)

The above-discussion will be supplemented by the following supplemental Findings of Fact and Conclusion of Law.

Supplemental Findings of Fact

16. Grievant received notification and understood on March 9, 1995 that he was terminated as of March 23, 1995.

17. Grievant understood his right to file a grievance and that this right had time limitations.

18. From March 9, 1995, to the present, Grievant was mentally and physically capable of filing a grievance.

Conclusion of Law

1. The extension of time to file a grievance granted in W. Va. Code § 29-6A-3 does not apply to Grievant. This Code Section states an extension shall be granted whenever a grievant is not working because of illness. Grievant, by his own testimony, was no longer sick enough to stay home from work, was capable of returning to work, and knew he had a right to file a grievance. He was aware of the time guidelines for filing a grievance as they were included in the March 8, 1995 letter. Accordingly, Respondent's Motion to Dismiss is **GRANTED** because this grievance was not timely filed.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A- 7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judge is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 27, 1996

[Footnote: 1](#)

Grievant had submitted physician's authorizations with his prior leave extension requests.

[Footnote: 2](#)

On December 23, 1994, after Grievant had failed to return to work or submit an extension for medical leave request due in December 20, 1994, he was dismissed as Respondent considered Grievant had abandoned his position. After receipt of this letter, Grievant submitted the request, and he was continued on leave.