RONAKA E. HIGGINBOTHAM,

Grievant,

v. **Docket No. 97-DPS-018**

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY, WEST VIRGINIA STATE POLICE,

Respondent.

D E C I S I O N

This is a grievance by Ronaka E. Higginbotham (Grievant), submitted directly to Level IV in accordance with W. Va. Code § 29-6A-4(e), challenging the action of Respondent West Virginia State Police (WVSP), which suspended her without pay from November 17, 1996, through January 3, 1997. An evidentiary hearing in this matter was conducted at this Board's office in Charleston, West Virginia, on February 27, 1997. At the conclusion of that hearing, Grievant waived closing argument and Respondent elected to file a post-hearing submission. Accordingly, this matter became mature for decision on March 20, 1997, upon receipt of WVSP's proposed findings of fact and conclusions of law. Consistent with W. Va. Code § 29-6A-4 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

As the facts in this matter are substantially undisputed, the following findings of fact are made from the testimony presented and exhibits introduced at Level IV.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia State Police (WVSP) as a Driver's License Examiner.

2. Grievant is an at-will employee. See Patterson v. W. Va. Dept. of Public Safety, Docket No. 95-

DPS-572 (May 28, 1996); John C. v. Dept. of Public Safety, Docket No. 95- DPS-497 (Jan. 31, 1996).

3. On September 19, 1996, WVSP received a copy of a notice to Grievant from the Compulsory Insurance Section of the West Virginia Division of Motor Vehicles (DMV), dated September 13, 1996, which advised Grievant that her privilege to operate a motor vehicle in West Virginia would be suspended for ninety days, commencing on October 3, 1996, based upon her failure to provide proof of liability insurance. See J Ex 1.

4. Grievant's duties as a Driver's License Examiner require her to have a valid West Virginia operator's license as a condition of employment.

5. Shortly after receiving the notice described in Finding of Fact No. 3, Grievant's supervisors determined that Grievant could not function as a Driver's License Examiner during the period that her license was suspended. See R Exs 1 & 2.

6. On September 30, 1996, Grievant met with Marsha Beasley, WVSP's Personnel Director, and First Lieutenant W.D. Totten, Director of Traffic Records and Grievant's third- level supervisor, to discuss her employment situation. Ms. Beasley and Lt. Totten informed Grievant that she would be relieved of her duties during the period of her license suspension, further offering Grievant the opportunity to take as much annual leave as she had available, and then placing her on leave without pay for the remainder of thesuspension period. Grievant agreed with this arrangement. Totten testimony at L IV; Higginbotham testimony at L IV. (See footnote 1)

7. Grievant took annual leave from October 3, 1996, through November 26, 1996, when her annual leave was exhausted. See R Ex 3.

8. On December 2, 1996, WVSP Deputy Superintendent Gary N. Griffith issued Special Order No. 631 which provides, in pertinent part, as follows:

> The following named non-sworn employee of the West Virginia State Police is hereby **SUSPENDED** without pay as a result of having her West Virginai (sic) operator's license administratively suspended by the West Virginia Division of Motor Vehicles, therby (sic) rendering her unable to perfrom (sic) a portion of her duties as a driver's license examiner, effective at 0001 hours, November 27, 1996, and expiring at 2400 hours on January 3, 1997:

RONAKA HIGGINBOTHAM

Ms. Higginbotham will be granted, at her request, a meeting with me in order to offer facts and circumstances in her defense. If Ms. Higgin botham desires this meeting, she must contact 304-746-2116, within ten (10) days of receiving this special order.

Under the provisions of Operational Policy and Procedure §68-1 (C7- 1), you may file a grievance pertaining to this suspension. Any grievance must be filed within ten (10) days of receiving this special order by obtaining a grievance form from an immediate supervisor or the Professional Standards Unit, completing the form, and forwarding it to the Professional Standards Unit and the immediate supervisor.

J Ex 3. (Emphasis in original, paragraph numbers omitted.)

9. On December 24, 1996, Grievant's immediate supervisor, Sgt. C.N. Zerkle, Jr., served a copy of Special Order No. 631 on Grievant at the DMV Office in Winfield, West Virginia. See J Ex 4. 10. On December 16, 1996, Ms. Beasley wrote to Grievant as follows:

As you are aware, you have been removed from the West Virginia State Police payroll effective November 27, 1996, as the result of your recent suspension as outlined in Special Order Number 631, dated December 2, 1996.

For each complete month you are absent from work you are required to pay your monthly insurance premiums as follows:

1) $19.14 health insurance and optional life coverage (payable to PEIA).

2) $37.96 Mountaineer Flexible Benefits (payable to Mountaineer Flexible Benefits).

3) $5.78 Long term disability (payable to Aetna Insurance).

Please mail these payments to the Accounting Office to the attention of Phyllis McKee, by the 16th of each month. Your first payments are due December 16, 1996.

Also, your November 30th paycheck was issued as a full payment. The overpayment you received will be deducted from your January 16th paycheck.

If you have any questions in this matter, please contact this office.

J Ex 2.

11. Grievant received the correspondence from Ms. Beasley described in Finding of Fact No. 9 sometime before she received Special Order No. 631 from Sgt. Zerkle.

12. Grievant's operator's license was reinstated by DMV on January 2, 1997.

13. This grievance was initiated on January 9, 1997.

DISCUSSION

Initially, WVSP contends that part or all of this grievance is untimely as the grievance was not initiated within the time limits contained in W. Va. Code §§ 29-6A-4(a) & (e). Where the employer seeks to have a grievance dismissed on the basis that it wasnot timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. 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 or her failure to file in a timely manner. Sayre v. Mason County Health Dept., 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The running of the relevant time period is ordinarily deemed to begin to run when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, No. 23450 (W. Va. Sup. Ct. Feb. 24, 1997). In this particular matter, Grievant is not contesting the merits of her suspension. In any event, as Grievant began serving this suspension on October 3, 1996, when she began taking annual leave as directed by Ms. Beasley and Lt. Totten, any complaint about the merits of the suspension would be untimely.

Grievant clarified that her grievance alleges that the suspension process was procedurally defective in regard to two events: (1) Grievant's pay was adjusted contrary to the employer's

representations; and (2) Grievant was required to serve an "extra" day of suspension (91 days vs. 90 days). Respondent demonstrated that Grievant was aware ofthese events by not later than December 24, 1996. (See footnote 2) Thus, in accordance with W. Va. Code §§ 29-6A-2(c) and 29-6A-4, Grievant had ten working days, or until January 9, 1997, to initiate this grievance. As this grievance was postmarked on January 9, 1997, the grievance was timely filed before this Grievance Board. See McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

In suspension cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for suspending an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the suspension of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). Indeed, an at-will employee is subject to disciplinary action for any reason which does not contravene some substantial public policy principle. Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); John C., supra. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

Grievant has not articulated any substantial public policy which WVSP has purportedly violated by any of the actions covered by this grievance. Moreover, Grievanthas not cited any specific statute, regulation, rule or policy which WVSP's actions are alleged to contravene. She simply complains that her employer was in error in fixing the length of her suspension, and that the actions taken in regard to her pay adjustments were either inconsistent with explanations she received at the time her suspension was initiated, or were not spelled out in advance so that she had fair notice of what to expect during her suspension. As an at-will, classified-exempt employee, Grievant has not established a basis for obtaining any relief from this Grievance Board. See Logan, supra.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. An at-will employee is subject to discipline for any reason which does not contravene some substantial public policy principle. Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-

215 (Sept. 24, 1996); Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95- DPS-119 (Aug. 15, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

2. Grievant has failed to articulate any basis upon which to find that the actions of her employer in regard to her suspension without pay while her West Virginia operator's license was administratively suspended violated any substantial public policy or any law, rule, regulation, or policy applicable to employees in her status. See Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

Accordingly, this Grievance is **DENIED**.

Any party 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 Judges 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 1997

Footnote: 1

Grievant waived her right to silence under W. Va. Code § 29-6A-6, testifying in her own behalf at the Level IV hearing.

Footnote: 2

Although Grievant testified that she did not realize that she could not report to work on January 3, 1997, until about January 2nd, she acknowledged that the language in Special Order No. 631 clearly indicates that the suspension was effective through January 3rd at midnight. See J Ex 3. Thus, Grievant had unequivocal notice that her suspension would extend through a 91st day. See Naylor, supra.