

GEORGE H. HASKIELL, JR., et al.,

Grievants,

v.

Docket No. 99-HHR-195

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

HOPEMONT STATE HOSPITAL,

Respondent.

DECISION

Grievants, George H. Haskiell, Jr., James P. Kelly, and Delphia Rodeheaver, employed by the Department of Health and Human Resources (Respondent) as a Housekeeper (Haskiell) and Food Service Workers (Kelly and Rodeheaver) at Hopemont (Hopemont) State Hospital, filed a level one grievance on March 31, 1999, in which they alleged, "Discrimination Hiring practices and all other that may apply." For relief, they requested to be made whole. The statement of the grievance was clarified at level one to mean that when Grievants were re-employed after being laid off, they were not allowed to negotiate their wages, and their salaries do not reflect their experience and training. Their supervisors lacked authority to grant the requested relief at level one. Alice Westfall, then Administrator of Hopemont, denied the grievance at level two based upon a finding that it was not timely filed. The matter was dismissed at level three following a finding that it was untimely filed. Appeal was made to level four on May 19, 1999, and following a number of continuances, a hearing was conducted on March 27, 2000, in the Grievance Board's Morgantown office. Grievants were represented by Marguarite Kyer of SEIU 1199, and Respondent was represented by Dennise Smith, Esq., Assistant Attorney General. The matter became mature upon the receipt of Respondent's proposed findings of fact and conclusions of law on May 1, 2000. Grievants elected to not submit any post-hearing proposals.

The pertinent facts of this matter are not in dispute and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievants were all long-term employees at Hopemont in March 1997 when they were laid off from the maintenance department due to a shortage of work.

2. In July 1998 Respondent rehired Grievant Kelly as a Food Service Worker. He had previously been employed as a carpenter for fourteen and one-half years.
3. Grievant Rodeheaver had been employed in the maintenance department at Hopemont from 1979 until 1997 . He was rehired in July 1998 as a Food Service Worker.
4. Grievant Haskiell had been employed in the maintenance department at Hopemont for twenty years when he was laid off in 1997. He was rehired in June 1998 as a Housekeeper.
5. Grievants were hired at the entry-level salary for their respective positions. None of Grievants had held their present classifications prior to 1998.
6. Grievants all now earn less than when they were laid off in 1997.
7. Grievants did not file a grievance until March 1999.

Discussion

Initially, Respondent contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code §29-6A-4(a). Where the 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. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employees may demonstrate a proper basis to excuse their failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); 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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code §29-6A-4 provides that a grievance must be initiated “[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which

the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance” Grievants’ delay of approximately nine months prior to filing this matter clearly does not meet the statutory time lines. Grievants knew what their salaries were to be at the time they were rehired in June and July 1998. They also indicated that among the three of them, they had been involved in numerous grievances since 1996; therefore, they knew, or should of known, that the complaint needed to be filed within a certain number of days.

When asked why they delayed in filing, Grievants offered a number of reasons: they were grateful to be employed again and needed to keep their benefits; they wanted to “make it to retirement”; and they were advised not to rock the boat. Grievant Haskiell stated that the complaint was filed pursuant to a directive by another Administrative Law Judge; however, there is no indication that the Judge was aware of any timeliness issues. It cannot be determined that Grievants have offered any acceptable excuse for their failure to timely file this grievance.

Because Respondent has proven the grievance was not timely filed, and Grievants have failed to offer an acceptable reason for the delay, the merits of the case need not be addressed. Pryor v. W. Va. Dept. of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

___1. Where the 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. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

2. Should the employer demonstrate that a grievance has not been timely filed, the employees may demonstrate a proper basis to excuse their failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); 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 Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. W. Va. Code §29-6A-4 provides that a grievance must be initiated “[w]ithin ten days

following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance”

4. Respondent has proven by a preponderance of the evidence that Grievants failed to file this matter within the statutory time lines.

5. Grievants knew the facts which led to this complaint in June and July 1998, and failed to offer a satisfactory reason for the delay in filing this grievance.

6. When an employer proves that a grievance was not timely filed, and Grievants have failed to offer an acceptable reason for the delay, the merits of the case need not be addressed. Pryor v. W. Va. Dept. of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997).

Accordingly, the grievance is **DENIED**. Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: May 26, 2000 _____

Sue Keller

Senior Administrative Law Judge