JANET BUTLER,

Grievant,

v v.

DOCKET NO. 01-DOH-547

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Janet Butler, filed this grievance against her employer, the West Virginia Division of Highways ("Highways"), on May 17, 2001, alleging as follows:

> Notation on my evaluation presented 5-2-2001 states that I was abusing my sick time.
>
> Relief sought: Elaborate on my leave abuse and remove statement from my file.

The grievance was denied at level one by decision dated May 25, 2001, by Glenn Hanlin, Calhoun County Highway Administrator. The level two grievance evaluator attempted to conduct a level two conference, but due to concerns about the presence of other individuals, Grievant excused herself from the level two conference, and the parties agreed to waive the grievance to level three. Prior to waiver to level three, and with all parties present, the level two evaluator asserted the grievance was filed untimely. Grievant appealed to level three, and a level three hearing was conducted on July 19, 2001. BrendaCraig Ellis, the level three grievance evaluator, denied the grievance by decision dated October 17, 2001, and that decision was accepted by Jerry Bird,

Assistant Commissioner/Division of Highways, that same date. Grievant appealed to level four on October 24, 2001, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on December 12, 2001, and this case became mature for decision on January 11, 2001, after receipt of the lower level record. Grievant was represented by Kelly Rice, and Highways was represented by Jennifer Francis, Esq. No written submissions were filed by the parties.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Employee Performance Appraisal of Janet Butler for calendar year 2000, signed by employee May 2, 2001.

Ex. 2 -

Application for Leave With Pay of Janet Butler for May 11, 2001.

LIII Highways' Exhibits

Ex. 1 -

Employees Leave Balances as of December 31, 2000.

Ex. 2 -

Employees Leave Balances as of December 31, 1995, December 31, 1998, December 31, 1999, May 31, 2001.

Ex. 3 -

Employee Performance Appraisals of Janet Butler for calendar year 2000, and from January 1, 2001 through May, 2001.

Ex. 4a -

Employee Performance Appraisal of Harold Woverton for calendar year 2000.

Ex. 4b -

Employee Performance Appraisal of William Watkins for calendar year 2000.

Ex. 4c -

Employee Performance Appraisal of Robert Swisher for calendar year 2000.

Ex. 4d -

Employee Performance Appraisal of Holly Greathouse for calendar year 2000.

Ex. 7 -

Employee Time Reports for Janet Butler for calendar year 2000.

Ex. 8 -

Employee Time Reports for Janet Butler for calendar year 2001 through June 30, 2001.

Ex. 9 -

Employee Time Reports for Janet Butler for calendar year 1999.

Ex. 10 -

Employee Time Reports for Janet Butler for calendar year 1998.

Ex. 11 -

Employee Time Reports for Janet Butler for calendar year 1997.Ex. 14 -
Leave Requests for the year 2000 for Janet Butler.

Ex. 15 -

All employees in Organization 0307, their classifications, and employment dates.

Testimony

Grievant testified in her own behalf, and presented the testimony of Joe Webb, Carl Osbourne, Harold Wolverton, William R. Watkins, and Roscoe Parsons. Highways presented the testimony of Glenn Hanlin and Joan Satterfield.

FINDINGS OF FACT

After a careful review of all of the testimony and evidence, I find that the following facts have been proven by a preponderance of the evidence.

1. Grievant, a Highways employee with over twenty (20) years seniority, is currently assigned to the Calhoun County road maintenance operations in Highways' District Three.

2. On May 2, 2001, Joe Webb, Transportation Crew Supervisor II, and Carl Osbourne, Crew Leader, tendered to Grievant her written performance appraisal for calendar year 2000.

3. A specific factor on the appraisal form, “Availability for Work,” contains three standards, including “Employee's presence can be relied upon for planning purposes.” On Grievant's evaluation this standard was marked, “Needs Improvement,” and a comment beneath stated, “Needs to improve on sick leave.” G. Ex. 1; R. Ex. 3.

4. Although Grievant had experienced no major illness during 2000, she had a sick leave balance of 6.31 hours at the end of the evaluation period. 5. Overall, Grievant had a “Meets” expectations on her evaluation, and, contrary to Grievant's assertion, there was no statement or accusation in the evaluation that she was “abusing” her sick time.

6. Three other Calhoun County employees with more than ten years' seniority, no major illnesses in 2000, and low sick leave balances of 100 hours or less, received similar ratings on the “Availability for Work” portion of their evaluations as did Grievant.

7. On May 11, 2001, Grievant reported to work and requested annual leave for the last hour of that working day. This request was granted by the assistant supervisor, and Grievant signed a leave report slip verifying the hour's annual leave request.

8. Grievant did not indicate she was sick on the morning of May 11, 2001, when she requested the hour's annual leave.

9. Grievant filed her grievance at approximately 7:30 a.m. on May 17, 2001, eleven (11) working days from the date she received and signed her performance appraisal.

10. Grievant and her representative appeared for the scheduled level two conference in this matter on June 8, 2001, before grievance evaluator James Roten. Mr. Roten had notified Glenn Hanlin, Calhoun County Highway Administrator, and Jack Conley, Maintenance Engineer, of the conference, and they too attended. Grievant and her representative objected to the presence of Messrs. Hanlin and Conley at the level two conference. While all were present, Mr. Roten raised the issue of whether the grievance had been timely filed, and Grievant responded that she believed she filed it within thestatutory time frame. Thereafter, Grievant and her representative refused to go forward with the level two conference, and the parties agreed to waive the matter to level three.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Her statement of grievance indicates she seeks elaboration on her evaluation stating she was abusing sick time and seeks removal of the statement from her file. The evaluation does not indicate anywhere that Grievant was abusing sick time, nor did any of her evaluators, Messrs. Webb, Osbourne, or Hanlin, testify that they believed she was abusing her sick time. The comment on her evaluation merely stated she needed to improve her sick time, and the evidence demonstrates that Grievant, an employee with over twenty years of service with the state, and suffering no major illness or injuries, had less than 100 hours' sick leave at the end of the 2000 calendar year. In fact, Grievant's end of year statement for 2000 show she had a sick leave balance of 6.31 hours. R. Ex. 1.

While Grievant did not articulate a legal theory in her grievance statement, her testimony and evidence at levels three and four indicate she believes she was discriminated against with regard to her evaluation, and that it was arbitrary and capricious for her evaluators to rate her based on sick time usage.

Highways denies any wrongdoing in rating Grievant as “Needs Improvement” in one category based upon her sick leave usage. Further, Highways avers that this grievance was not timely filed and should be dismissed on that basis. As an untimely filing will defeata grievance, it is necessary to address whether Grievant timely filed her grievance at level one. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 29-6A-4(a) provides in pertinent part:

> Within 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, the Grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the Grievant.

W. Va. Code § 29-6A-3 requires the employer to raise the issue of timeliness at or before level

two. Highways raised the issue at level two, although Grievant refused to proceed with the conference due to a disagreement concerning the presence of other individuals. Highways raised the issue again at level three, and this Grievance Board has held that, in the case of State employers, raising the issue of timeliness at the level three hearing satisfies the statute. See Greathouse v. W. Va. Dept. of Transp., Docket No. 99- DOH-413 (Aug. 21, 2000).

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides in pertinent part:

> A grievance must be filed within the times specified in section four of this article. . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

Grievant asserts she filed her timely filed her grievance because she did not work a full eight-hour day on May 11, 2001, and that the hour she took off from work should be excepted from the time frame count. “Days” is defined by W. Va. Code § 29-6A-2(c) as “working days exclusive of Saturday, Sunday or official holidays.” Grievant did not cite, nor did the undersigned find, any case law expanding the definition of the word “days”. The “plain meaning rule” of statutory construction is that the clear and express language of a statute cannot be interpreted by a court, as only statutes which contain language that admits of more than one meaning can be interpreted. State v. Boatright, 184 W. Va. 27, 399 S.E.2d 57 (1990). In Syl. pt. 2 of State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951), the West Virginia Supreme Court of Appeals recognized that “a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Ambiguity is found to exist when the language is difficult to comprehend, or lacks clearness or definiteness. Brown v. Lukhard, 330 S.E.2d 84 (Va. 1987). Generally, a court may find that a statute is clear and unambiguous by interpreting the words used in a literal sense, when doing so brings about the result thought to be intended by the legislature. The undersigned finds the statute defining “days” is clear and unambiguous, and does not provide for an hour-by-hour substitute as Grievant would have it applied.

Grievant also argues that she delayed in filing her grievance until after she learned of a legal theory to support her action. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. 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). This Grievance Board has repeatedly held that it is

not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines. Childers v. Dep't of Health and Human Resources, Docket No. 98-HHR-447 (Feb. 24, 1999); Galloway v. Dep't of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997); Edwards v. Clay County Bd. of Educ., Docket No. 96-08-064 (July 9, 1996). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Therefore, Grievant's delay in filing renders her grievance untimely.

CONCLUSIONS OF LAW

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

2. W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before the level two hearing. In State cases, this Grievance Board has held that employers have satisfied the statute if they raise the issue at the level three hearing, as there is no level two hearing in State cases. See Greathouse v. W. Va. Dept. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). Highways raised the issue at level two and level three.

3. W. Va. Code § 29-6A-4(a) provides in pertinent part:

> Within 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, the Grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the Grievant. .

4. W. Va. Code § 29-6A-3(a) provides in pertinent part:

> A grievance must be filed within the times specified in section four of this article. . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

5. The statutory language regarding the time limits for filing a grievance does not provide for an hour-by-hour substitution in calculating those time limits, but rather breaks the time limits into increments of “days”.

6. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. 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). Grievant was unequivocally notified of the "needs improvement" rating on her performance evaluation on May 2, 2001.

7. This Grievance Board has repeatedly held that it is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines. Childers v. Dep't of Health and Human Resources, Docket No. 98-HHR-447 (Feb. 24, 1999); Galloway v. Dep't of Banking, Docket No. 98-DOB-167 (Sept.22, 1998); Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997); Edwards v. Clay County Bd. of Educ., Docket No. 96-08-064 (July 9, 1996). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

8.

Grievant's delay in filing until May 17, 2001, renders her grievance untimely.

Accordingly, this 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 § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 22, 2002