MICHAEL MIANO,

Grievant,

v.

DOCKET NO. 02-DOH-008

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Michael Miano, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on June 11, 2001, protesting his dismissal from employment, effective April 30, 2001. The grievance was denied at level one on June 12, 2001, by Joseph T. Deneault, State Highway Engineer, waived at level two, and following a level three hearing on November 6, 2001, denied by Grievance Evaluator Brenda Craig Ellis in a decision dated December 19, 2001. Grievant appealed to level four on January 10, 2002, and a level four hearing was held on April 8, 2002. This matter became mature for decision on May 30, 2002, upon receipt of the parties' proposed findings of fact and conclusions of law. Grievant represented himself, and DOH was represented by Belinda B. Jackson, Esq.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

July 28, 1999 letter from Michael P. Miano to Governor Cecil H. Underwood.

Ex. 2 -

August 5, 1999 letter from Thomas F. Badgett to Michael P. Miano.

Ex. 3 -

Computer file notations from Michael Miano re: Commissioner Beverage.

Ex. 4 -

November 16, 2000 handwritten notes from Michael Miano.

Ex. 5 -

West Virginia Civil Service System Position Description Form for Michael Miano.

Ex. 6 -

February 20, 2001 memorandum from Fred VanKirk to C&H Level, District Administrators, Division Directors re: Reorganization.

Ex. 7 -

November 6, 2001 level three statement by Michael Miano.

Ex. 8 -

February 21, 2001 letter from Fred VanKirk to Michael Miano; March 2, 2001 letter from Fred VanKirk to Michael Miano; June 13, 2001 memorandum from Michael Miano to Joe Deneault; June 14, 2001 email from Michael Miano to Joe Deneault.

LIII DOH Exhibits

Ex. 1 -

August 5, 1999 letter from Thomas Badgett to Michael Miano.

Ex. 2 -

February 21, 2000 letter from Fred VanKirk to Michael Miano.

Ex. 3 -

March 2, 2001 letter from Fred VanKirk to Michael Miano.

Ex. 4 -

Personnel Action form for Michael Miano.

Ex. 5 -

Employee Time Reports, April 16 to May 31, 2001, for Michael Miano.

Post-LIII Hearing Exhibit(s)

Ex. 1 -

Series of email beginning May 22, 2001 through November 29, 2001.

LIV Grievant's Exhibits

Ex. 1 -

West Virginia Division of Highways Transaction Form, effective April 27, 2001.

Ex. 2 -

West Virginia Department of Transportation Secretary's Order dated February 16, 2001; Abstract from the Records of the Commissioner's Orders dated February 16, 2001; post-it note to Michael Miano from Jeff Black.

Ex. 3 -

Copies of pay stubs for Michael Miano.

Ex. 4 -

June 6, 2001 email from Michael Miano to Jeff Black; June 7, 2001 reply email.

Ex. 5 -

Classification Specifications for Assistant to Commissioner; State Highway Engineer; Director, Legal Division.

Ex. 6 -

March 5, 2001 email from Phyllis Holmes to Michael Miano.

Testimony

Mr. Miano testified in his own behalf, and presented the testimony of Jeff Black, Joe Deneault,

Fred VanKirk, and Jack White. DOH presented the testimony of Drema Smith and Jeff Black.

FINDINGS OF FACT

Based upon a careful review of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

1. Mr. Miano served as Commissioner of the Bureau of Environment for former Governor Cecil Underwood until July 31, 1999, when he resigned from that position. LIII G. Ex. 1.

2. Mr. Miano then accepted an at-will position with DOH as Transportation Services Manager III. His effective date of employment was August 1, 1999, and his working title was Assistant to the State Highway Engineer. Mr. Miano was appointed to this position pursuant to W. Va. Code § 29-6-4(c)(9), at a salary of $70,000 per year, as reflected in his August 5, 1999, hiring letter. LIII G. Ex. 2; LIII DOH Ex. 4.

3. Samuel Beverage was the Commissioner of Highways at the time Mr. Miano accepted and began his employment at DOH.

4. In January 2001, Governor Bob Wise was elected into office, and Mr. Beverage was replaced by Commissioner Fred VanKirk.

5. Commissioner VanKirk reviewed the operations of the agency, and determined a reorganization was necessary.

6. In anticipation of the reorganization, Commissioner VanKirk requested, through Director of Human Resources Jeff Black, that each classified-exempt employeeprepare a position description form. Mr. Miano prepared a position description form. LIII G. Ex. 5.

7. Upon review of Mr. Miano's position description form, and after consultation with Mr. Black and the State Highway Engineer, Commissioner VanKirk determined that Mr. Miano's duties could be performed more efficiently and with less cost to the agency by classified employees. See LIII G. Ex. 6.

8. Mr. Miano was notified by Commissioner VanKirk by letter dated February 21, 2001, that due to the reorganization of the agency, his services were no longer needed and his employment would be terminated effective March 2, 2001. LIII G. Ex. 8.

9. At Mr. Miano's request, Commissioner VanKirk held Mr. Miano's separation from

employment in abeyance until April 30, 2001, to permit him to pursue employment within the classified service of state government. LIII G. Ex. 8.

10. Despite his efforts, Mr. Miano was unable to secure such employment, and his termination became effective April 30, 2001.

11. Mr. Miano continued to be paid for accrued annual leave and compensatory time through May 31, 2001.

12. Mr. Miano filed his grievance on June 11, 2001.

13. Joseph Deneault met with Grievant to discuss his grievance on June 12, 2001, at which time he raised the issue of timeliness. LIII G. Ex. 8.

DISCUSSION

Grievant alleges he was a permanent, classified employee of state government who was terminated for political reasons, and that the reorganization was outside theboundaries of the law. DOH maintains Grievant was an at-will, classified-exempt employee who could be terminated for any, or no, reason, and that the grievance was untimely filed. As a finding that the grievance was untimely filed could be dispositive of the grievance, that issue will be addressed first.

Any assertion by the employer that the filing of the grievance at Level I was untimely shall be asserted by the employer on behalf of the employer at or before the Level III conference. Greathouse v. W. Va. Dept. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000); W. Va. Code § 29-6A-3(a)(2). DOH raised the timeliness issue at Level I. 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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 failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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).

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)(1). 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).

DOH claims the time for filing the grievance began to run on April 30, 2001, Grievant's last official day of employment. Grievant contends the time for filing did not begin until May 31, 2001, the date he was removed from DOH's payroll. Grievant had accrued compensatory time and had also taken a few annual leave hours which extended his time on the payroll to include May 31, 2001. Grievant filed his grievance on June 11, 2001.

The undersigned agrees with DOH that the occurrence of the event giving rise to this grievance was Mr. Miano's effective date of termination from employment. That event occurred on April 30, 2001. While Grievant may have had compensatory and annual leave coming, which was reflected in his last few paychecks, this does not change the fact that his last day of work was April 30, 2001, or that he knew on that date that he was terminated from DOH employment.

Grievant alleges, however, that he was led to believe that he had additional time in which to file his grievance through a series of e-mail communications with Jeff Black,Director of Human Resources. The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989), defined the type of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing “was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing this charge.” Id. This standard was adopted in and incorporated in this Grievance Board's decision in Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). See also Khoury v. Kanawha County Bd. of Educ., Docket No. 99-20-031 (Mar. 31, 1999).

Mr. VanKirk's February 21, 2001 letter to Mr. Miano informing him of the termination of his

employment clearly sets forth notification to him of his right to appeal the decision to the Grievance Board within 10 days of March 2, 2001, the effective date of his termination. Mr. VanKirk later advised Grievant on March 2, 2001, that his request to defer his termination had been granted and his separation would be deferred until April 30, 2001. There is nothing in either letter which would indicate that Mr. Miano's date for filing a grievance would be other than 10 days from the effective date of his termination.

The e-mail correspondence between Mr. Miano and Jeff Black to which Mr. Miano refers indicates that, on May 22, 2001, Grievant emailed Mr. Black stating he needed to complete his termination paperwork and that he was still interested in continuing State government employment if there were any opportunities available. Mr. Black's response states that the termination paperwork could be completed on Friday, and that there weresome new job postings, but none that Mr. Black could see that would apply to Grievant. Mr. Miano e-mailed Mr. Black again on June 2, 2001, requesting the necessary forms to file a grievance over his dismissal, and indicating that, if he was “limited to 10 days after the final day, this can be my initial step. (???).” Mr. Black responded on June 7, 2001, stating, “It's in the mail today.”

Although it appears from Grievant's e-mail that he was unclear as to the proper time for filing his grievance, there is nothing in Mr. Black's response to indicate any action on his part which would have given Grievant cause to delay filing his grievance. Therefore, the undersigned finds that Mr. Miano's grievance was untimely filed.

Even were the grievance timely, however, the grievance would be denied on the basis that Grievant was an at-will, classified-exempt employee of DOH. As such, he could be terminated for any reason at any time. DOH has presented ample evidence to demonstrate that Grievant was at-will, that he knew he was at-will, and as such, not covered by the Division of Personnel's merit system standards, nor entitled to the protections offered by the Division of Personnel Administrative Rule. See W. Va. Code § 29-6-10; 143 C.S.R. 1.3; Wendling v. W.Va. Real Estate Comm'n, Docket No. 94-REC-514 (Apr. 11, 1994); Wiley v. W. Va. Dept. of Transp., Docket No. 99-DOH-109 (Aug. 3, 1999).

As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Williams v. Precision Coil, Inc., 194 W. Va. 52,

459 S.E.2d 329 (1995); Harless v. First Nat'l Bank,162 W. Va. 116, 246 S.E.2d 270 (1978). In this regard, our Supreme Court of Appeals has declared:

> The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Court identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

West Virginia courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations [Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992)], refusing to conceal alleged environmental violations committed by the employer [Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D.W. Va. 1993)], filing a workers' compensation claim [Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)], attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act [Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)], and testifying as a witness in a civil action against the employer [Page v. Columbia Natural Resources, Inc.,198 W. Va. 378, 480 S.E.2d 817 (1996)], as involving substantial public policy interests. Similarly, this Grievance Board has applied a Harless-type analysis to dismissal of an at- will public employee when the employee presents credible evidence that he or she was dismissed for reporting alleged violations of the West Virginia Governmental Ethics Act [Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991)], or the termination decision was based on a prohibited consideration such as the employee's sex [Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995)], or national origin [Hendricks v. W. Va. Dept. of Tax &

Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996)].

Grievant alleges he was terminated for political patronage reasons, following the appointment of Commissioner VanKirk under the new Wise administration. While this may, under some circumstances, be found to sufficiently state a violation of a public policy, in this particular instance, Grievant has presented no evidence or testimony which supports his theory, while DOH has presented ample evidence to demonstrate that Grievant's duties and responsibilities could easily be assumed by low-ranking, and thus, lower paid, classified employees. As the stated reason for the reorganization of DOH upon Commissioner VanKirk's arrival was to pare down costs, it made economic sense to remove Grievant from a high-paid, high ranking position, and assign the duties associated with that position to classified employees. Grievant apparently failed to recognize that perhaps the reason he got his high-paying, high ranking position at DOH in the first place was due to political influence, but in any event, he failed to prove that his subsequent removal from that position was political motivated.

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. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

3. 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)(1). 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).

4. DOH has proven by a preponderance of the evidence that the time for filing a grievance began to run on April 30, 2001, Grievant's last official day of employment, but Grievant did not file his

grievance until June 11, 2001, more than ten days following that event.

5. 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 failureto file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); 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).

6. Estoppel against an employer's proof of untimely filing is available to an employee only when the untimely filing “was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing” the grievance. Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

7. Grievant has failed to establish any design or action on the part of DOH which would satisfy the Naylor standard so as to excuse his late filing.

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: June 27, 2002