CHARLES PARKINS,

Grievant,

v. **Docket No. 03-DEP-156**

WEST VIRGINIA DEPARTMENT

OF ENVIRONMENTAL PROTECTION,

Respondent.

D E C I S I O N

Grievant, Charles Parkins, filed this grievance about his termination from the Department of Environmental Protection ("DEP") on June 11, 2003. His Statement of Grievance asserts he was terminated in "defiance" of W. Va. Code § 23-5-3, as he was either receiving or was eligible to receive temporary total disability benefits ("TTD'S") at the time of his discharge. The relief sought is "back pay and benefits and reinstatement in a comparable job."

After this grievance was filed, DEP filed a Motion to Dismiss asserting the grievance was untimely filed. A Level IV hearing had already been scheduled for July 27, 2003, and the parties requested that date be used to hear and respond to the Motion. As the parties did not want to file any post-hearing briefs, this case became mature for decision on the date of the hearing. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was hired as an at-will employee on July 16, 2001. His position was as an Environmental Ombudsman, and this job was within the Executive Offices of DEP. Resp. No. 1.

2. On July 27, 2001, Grievant received a letter from Deputy Secretary William Adams, informing him he was dismissed from his position at close of business that day. This letter stated Grievant served "at the will and pleasure of the administration," and he could be "dismissed from employment with or without cause at any time." Resp. No. 1.

3. Grievant did not assert he filed a grievance prior to his June 11, 2003 filing.

4. On March 26, 2002, approximately eight months later, Grievant's attorney wrote Deputy Secretary Adams noting Grievant had been terminated on July 27, 2001, and asserting this termination was in violation of the Workers' Compensation statutes as the Grievant had been injured on July 25, 2001, and he was receiving or eligible to receive TTD's. The letter noted Grievant was available to return to work and requested an assignment comparable to his former position. Grt. No. 3.

5. Grievant's attorney received no response from this letter, and he sent the same letter to Deputy Secretary Adams again on April 23, 2002. (See footnote 2) Grt. No. 3.

6. Still receiving no response, Grievant's attorney wrote Workers' Compensation Commissioner Robert Smith on July 9, 2002. Grt. No. 3.

7. Next, on September 5, 2002, Grievant's attorney wrote Attorney Benjamin Yancey who he stated represented the state in Workers' Compensation claims. Grt. No. 3. 8. On October 10, 2002, Grievant, through his attorney, filed a Notice of Claim with the West Virginia Court of Claims. (See footnote 3) Attachment to grievance form.

9. Respondent filed a Motion to Dismiss with the Court of Claims asserting Grievant had not exhausted his administrative remedies and had failed to file either a grievance or a complaint with the Human Rights Commission. Grt. No. 1.

10. Following a May 23, 2003 hearing on the matter, the Court of Claims, in June 2003, dismissed Grievant's claim, stating they did not have subject matter jurisdiction. (See footnote 4) Grt. No. 2.

11. Grievant wrote his first letter concerning his termination on March 26, 2002, filed with the Court of Claims on October 10, 2002, and filed this grievance on June 11,

2003.

Issues and Arguments

Grievant, an at-will employee, asserts his termination violated West Virginia's Workers' Compensation statutes. Grievant also asserts the timelines in which to file a grievance are unconstitutional, the discovery rule discussed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990) should apply, and this grievance should not be dismissed. Respondent argues Grievant filed his grievance almost two years after his termination, and it should be dismissed from the dockets of the Grievance Board. Additionally, Respondent maintains the discovery rule does not apply because Grievant knew of his termination on July 27, 2001, when he received the termination letter.

Discussion

Although the West Virginia Rules of Civil Procedure do not apply to proceedings conducted before this Grievance Board, the same principles of law contained in Rule 12(b) of the Rules may be applied to a Motion to Dismiss which could be dispositive of a grievance filed under W. Va. Code §§ 29-6A-1, et seq. See Salmons v. W. Va. Dep't of Transp., Docket No. 93-DOH-443 (Sept. 30, 1994). Therefore, for purposes of ruling on this motion, the pleadings will be viewed in the light most favorable to Grievant. See Chapman v. Dep't of Health and Human Resources/ Huntington Hosp., Docket No. 99-HHR-132 (June 3, 1999). See also John W. Lodge Distributing Co. v. Texaco, 161 W. Va. 603, 245 S.E.2d 157 (1978); Sticklin v. Kittle, 168 W. Va. 147, 287 S.E.2d 148 (1981).

The issues raised by the parties will be addressed one at a time.

A. Timeliness

DEP contends this grievance is untimely filed 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 ordinarily has the burden of demonstrating such untimely filing by a preponderance of the evidence. Should the employer demonstrate that a grievance has not been timely filed, the employee may nonetheless demonstrate a proper basis to excuse his failure to file ina timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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). As previously stated, because this matter is being decided on a motion without a Level IV hearing, any disagreements over the facts must be resolved in Grievant's favor. Chapman, supra.

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 time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). 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 was not filed within the ten day time frame.

Grievant asserts the discovery rule discussed in Spahr, supra should apply in this case, and a procedural quagmire should be prevented. Spahr determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. (See footnote 5) See, e.g., Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July27, 1998). Discovery of a legal theory to support a grievance, or

learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance within the intent of W. Va. Code § 18-29-4 as interpreted in Spahr. Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991).

According to the facts established by the record in this matter, Grievant became aware of his termination on July 27, 2001. Grievant did not file this grievance until almost two years later on June 11, 2003. The letters and filing with the Court of Claims in 2002 did not toll the statute of limitations. Even if these actions could be seen as tolling the statute, these were still filed too late to be of any assistance to Grievant. Since Grievant sat on his rights and delayed filing for such a lengthy period of time, without any legal excuse, this grievance must be dismissed as untimely filed. See Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997).

B. Constitutionality of the timelines

Grievant's claim that the statute of limitations in the grievance procedure is unconstitutional involves a matter which falls outside the jurisdiction of the West Virginia Education and State Employees Grievance Board. (See footnote 6) This Board is an administrative body which functions within the executive branch of state government. Therefore, the Grievance Board has no authority to declare legislation, or regulations which have been promulgatedthrough the legislative rule-making process, invalid or unconstitutional. Boyles v. Bureau of Employment Programs/Workers' Compensation Div., Docket No. 98-BEP-027 (July 15, 1998); Wilson v. W. Va. Dep't of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dep't of Transp., Docket No. 89-DOH-605 (May 22, 1990).

The above-discussion will be supplemented by the following 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 ordinarily has the burden of demonstrating such untimely filing by a preponderance of the evidence.

2. Should the employer demonstrate that a grievance has not been timely filed, the employee may nonetheless demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS- 018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, 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. 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).

4. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. ofEduc., 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).

5. The discovery rule set out in Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), dates the time of filing from the time of unequivocal notice, i.e., when the grievant knows of the facts giving rise to the grievance.

6. Grievant was aware of all the facts giving rise to this grievance for almost two years before he filed this grievance; thus, this grievance is untimely filed.

7. The Grievance Board has no authority to declare legislation, or regulations which have been promulgated through the legislative rule-making process, invalid or unconstitutional. Boyles v. Bureau of Employment Programs/Workers' Compensation Div., Docket No. 98-BEP-027 (July 15, 1998); Wilson v. W. Va. Dep't of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dep't of Transp., Docket No. 89-DOH-605 (May 22, 1990).

Accordingly, this grievance is **DISMISSED**.

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. Theappealing 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 17, 2003

Footnote: 1

Grievant was represented by James Coleman, Esq., and Respondent was represented by Steven Dragisich, Esq., Assistant Attorney General.

Footnote: 2

Grievant's attorney stated on the record that there was no response to any of these letters, but there was no testimony on this issue.

Footnote: 3

This document does not appeared to be signed by Grievant as required, but since there was no objection, the undersigned Administrative Law Judge accepts the information as Grievant having filed on that date with the Court of Claims.

Footnote: 4

Although Grievant did not place into evidence the final decision of the Court of Claims, he did submit a letter from the Court of Claims dated May 28, 2003, stating what the Order would say when it was sent in June 2003. See Grt. No. 2.

Footnote: 5

The Spahr grievance was filed under the education grievance statutes, and the time limit for filing in those grievances is fifteen days.

Footnote: 6

It should be noted Grievant made limited argument to support this theory, but did cite to Spahr, supra, which by its rulings confirm the validity of the statute of limitations.