JEFFREY SPROUSE and

WILLIAM CURRY,

Grievants,

v v.

Docket No. 04-HHR-164

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES

and DIVISION OF PERSONNEL,

Respondents.

DECISION

This is a consolidation of two grievances filed respectively by grievant Jeffrey Sprouse ("Sprouse") and grievant William Curry ("Curry"). Both Sprouse and Curry (sometimes collectively "Grievants") are employees of respondent West Virginia Department of Health and Human Resources ("HHR") assigned to work for the Bureau of Children and Families ("the Bureau"). The West Virginia Division of Personnel ("DOP") was joined as a respondent at Level IV because Grievants' complaints relate to an administrative rule promulgated by DOP that limits the number of hours of annual leave an employee can carry forward into the next calendar year. Both Curry and Sprouse complain that they accumulated excess annual leave hours because they were unable to reduce their respective work loads to the level where they were allowed to take leave. Sprouse requests "[r]einstatement of lost annual leave - 12 hours." Curry seeks relief in the form of monetary "compensation for the 38 hours of annual leave that were taken away from me." Sprouse filed his grievance on March 22, 2004. It was denied as untimely at the lower levels. The Level III decision noted that, even if his grievance

had been timely, Sprouse would not have prevailed on the merits. Sprouse filed a Level IV appeal with the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on May 3, 2004.

Curry filed his grievance on March 8, 2004. It was denied as untimely at Levels I and II. As with Sprouse, the Level III decision denied the grievance as untimely but also noted that it would have been denied on the merits, as well. Curry brought a Level IV appeal to the Grievance Board on May 5, 2004.

Upon consolidation of the two grievances and the joinder of Personnel, this grievance was brought on for a Level IV hearing in the Grievance Board's Charleston office on July 14, 2004. At Level IV, Grievants represented themselves. HHR was represented by Landon R. Brown, Senior Assistant Attorney General. DOP was represented by Karen Thornton, Assistant Attorney General. The parties declined the opportunity to file post- hearing submissions. Therefore, this grievance was mature for decision at the conclusion of the Level IV hearing.

Upon review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Sprouse is employed by HHR as a Child Protective Services Worker at the Bureau.

2 2. As of the end of 2003, Sprouse had been employed by HHR for over seven years and was accumulating annual leave at a rate of 1.5 days per month.

3 3. Based on his years of employment, Sprouse was allowed to carry 30 days (240 hours) of annual leave into 2004.

4 4. At some point in late 2003, Sprouse and his supervisor discussed the need for Sprouse to reduce the number of hours of annual leave he was carrying. Sprouse Level III Transcript at 5, 7-8. Sprouse used some leave during the Fall but intended to take additional time off

at Christmas. Sprouse Level III Transcript at 7-8. To that end, he submitted a request on November 18, 2003, for 32 hours of annual leave around Christmas 2003. Sprouse Level III Transcript at 2-4.

5 5. This leave request was approved contingent upon Sprouse's cases being current. Sprouse was unable to take the requested leave in December because he was unable to bring his cases up-to-date. Sprouse Level III Transcript at 2-3.

6 6. At the end of December 2003, Sprouse had accumulated 254.12 hours of annual leave. HHR Exhibit 1 at Level IV.

7 7. On February 2, 2004, Sprouse signed an Individual Attendance Report for January 2004, that reflected that only 240 hours of his accrued annual leave had been carried over from 2003. HHR Exhibit 2 at Level IV.

8 8. Although Sprouse claims that he lost 12 hours of annual leave, it appears that he actually lost 14.12 hours.

9 9.

As noted, Sprouse filed his grievance at Level I on March 22, 2004.

10 10.

Sprouse's explanation for his failure to file his grievance sooner was “just

my own ignorance.” Sprouse Level III Transcript at 12.

11 11.

Curry is employed by HHR as a Child Protective Services Worker at the

Bureau. 12 12.

As of the end of 2003, Curry had been employed by HHR for over 30

years and was accumulating annual leave at a rate of 2 days per month.

13 13.

Based on his years of employment, Curry was allowed to carry 40 days

(320 hours) of annual leave into 2004.

14 14. On December 1, 2003, Curry submitted a request to take 90 hours of annual leave in December 2003. His request was approved for 70 hours “contingent on currency.” Curry Exhibit 5 at Level IV.

15 15. Curry was unable to take the approved leave because he was unable to get his cases up-to-date.

16 16. By the end of December 2003, Curry had accumulated 358 hours of annual leave. Curry Exhibit 5 at Level IV.

17 17. At the beginning of February, Curry provided his supervisor with the time sheet he was required to fill out to report his work attendance and leave use for January 2004. It showed him carrying forward 358 hours of annual leave from the preceding year. Curry Exhibit 3 at Level IV.

18 18. This time sheet was rejected by the payroll section of HHR because the annual leave amount was incorrect.

19 19. On February 10, 2004, HHR issued a form for each employee entitled "Employee's Personal Leave Balance for Year Ending December 31, 2003" ("Leave Balance form"). Issuance of the Leave Balance forms was prompted by the submission of the January time sheet that did not accurately set forth Curry's leave balance.

20 20. Curry's Leave Balance form reflects that, at the beginning of January 2004, Curry had 320.00 hours of annual leave. Curry Exhibit 1 at Level IV. 21 21. Curry was at work on February 10, 2004, and every work day in February thereafter, with the exception of two one-day state holidays. Curry Exhibit 2 at Level IV.

22 22. Curry signed his Leave Balance form but added the notation "I do not agree with annual leave carry over rate." He then took the matter up with his supervisor who confirmed with payroll that he could not carry forward any annual leave beyond the 320 hours allowed under the pertinent DOP rule. W. VA. CODE ST. R. § 143-1-14.3(a) ("Rule 14.3(a)"). This was communicated to Curry on or about March 3, 2004.

23 23. According to Curry, the purpose behind his very large leave request in December 2003 (See footnote 1) was to prevent him "from going over the maximum allowed carry over rate of 30 days (See footnote 2) (W V Administrative Rule Section 14.3 a [sic])." Level IV Statement of Grievance. (See footnote 3)

24 24. As noted, Curry filed his grievance at Level I on March 8, 2004.

Discussion

Annual leave requests submitted by Grievants were approved upon the condition that their caseloads were current. Such conditional approval comports with Personnel's rule that "[a]ccrued

annual leave shall be granted at those times that will not materially affect the agency's efficient operation or when requested under the provisions of W. Va.Code §§21-5D-1 et seq., the Parental Leave Act and 29 U.S.C. 2601-2654, The Family and Medical Leave Act of 1993." W. VA. CODE ST. R. § 143-1- 14.3(c). Grievants are not challenging this policy of conditioning annual leave upon their work being up-to-date. (See footnote 4) Rather, their arguments focus on the loss of annual leave that results from the restriction on how much annual leave an employee is allowed to carry forward from one year to the next. This limitation on carrying forward annual leave, which is found in DOP's Rule 14.3(a), varies in amount depending upon the employee's years of service.

Sprouse complains that the loss of his excess accumulated annual leave has, in effect, taken money from his pocket because annual leave can have financial value to an employee. As such, Sprouse claims the reduction in his annual leave is punitive and should be accompanied by the same due process protections that would surround any disciplinary action. HHR takes issue with the substance of Sprouse's argument but, as an initial matter, asserts that his grievance was not timely filed.

This assertion that the grievance is untimely constitutes an affirmative defense that must be proven by HHR by a preponderance of the evidence. *Blethen v. Dep't of Revenue*, Docket No. 03-T&R-416 (Sept. 15, 2004)("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)"). In this case, HHR has met its burden by establishing that Sprouse was aware of the reduction in his accumulated annual leave byno later than February 2, 2004, when he signed his Individual Attendance Report for January 2004. (See footnote 5) As noted, this document reflected that only 240 hours of Sprouse's annual leave had been carried over from 2003.

A grievance must be filed within ten working days after the employee becomes aware of the basis for his grievance. W. Va. Code § 29-6A-4 ("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 . . . the grievant . . . may file a written grievance[.]") Sprouse did not file a Level I grievance until March 22, 2004, which falls outside of the ten-day window.

Although not timely, a grievance may still be addressed on the merits if the employee can

demonstrate some legitimate basis for failing to file within the requisite time period. In this case, Sprouse testified at Level III that the delay in filing was based on “[j]ust my own ignorance.” This does not provide sufficient justification for Sprouse's failure to file his grievance in a timely manner. Thus, Sprouse's grievance must be dismissed as not timely.

It should be noted that Sprouse seemed to be complaining that no one sought him out and advised him to file a grievance. He did, however, acknowledge that HHR staff members answered the questions he posed to them. In hindsight Sprouse may wish that he had more aggressively sought guidance about the grievance process but there is nosuggestion by Grievants that any HHR employee did anything to obstruct their rights to pursue their respective grievances.

HHR claims that Curry's grievance was not timely either. Curry asserts that he did not know he would be losing accumulated annual leave until March 3, 2004, when his supervisor confirmed that he would not be allowed to carry forward the excess hours of annual leave he had accumulated by the end of 2003. Curry filed his grievance on March 8, 2004. If March 3 were the measuring date, Curry's grievance would be timely. Curry faces problems in arguing that his ten working-day time limit should be counted from March 3, 2004. Curry is a long-term HHR employee who expressly stated in his Level IV statement of grievance that his efforts to take a large amount of annual leave in December 2003 were to prevent him “from going over the maximum allowed carry over rate of 30 days. (W V Administrative Rule 14.3 a[sic]).” (See footnote 6) This is obviously intended to be a reference to DOP's Rule 14.3(a), which contains a chart indicating how much annual leave can be carried forward by an employee. This figure is tied to the employee's years of service.

Although unsuccessful, Curry's efforts to reduce the level of his accumulated leave below the maximum number of carry-forward hours demonstrates that, prior to the end of 2003, Curry was well aware that there was a cap on the amount of annual leave he would be able to retain at the beginning of 2004. The only open question at that point was exactly how many excess hours of leave Curry would lose. This question was answered when Curry received a copy of his Leave Balance form, which was issued on February 10, 2004. It is plain from the face of the document that Curry was only being allowed to carry forward 320 hours of annual leave from the preceding year. Therefore, receipt of the Leave Balance form put Curry on clear notice that he was losing his excess annual leave. In fact, the Leave Balance form merely confirmed what Curry already knew, which was that he would not be able to carry all of his accumulated annual leave into 2004.

Curry clearly knew of the basis for his grievance on February 10, 2004, or within a day or two thereafter. (See footnote 7) It is disingenuous for Curry to suggest otherwise.

Based upon the foregoing, Curry's grievance was not timely. It thus falls to Curry to offer a satisfactory reason for his failure to file within the requisite ten-day period.

Curry attempts to justify the delay in filing his grievance by pointing to the fact that he took issue with the amount of annual leave reported in his Leave Balance form. The ensuing discussions with his supervisor may have been an attempt on Curry's part to resolve his dispute amicably and informally. While such efforts are laudable, they do not toll the deadline for filing a grievance. *Clifton v. Dep't of Health and Human Res.*, Docket No. 01-HHR-434 (Oct. 30, 2001). Nor should they. The pendency of a grievance does not foreclose the parties from continuing to seek an amicable resolution of the underlying dispute. If this was an informal settlement attempt, it does not excuse Curry's delay in filing his grievance. Curry also argues that he has previously been allowed to carry forward excess leave. (See footnote 8) This argument does not assist him in explaining his failure to file his grievance in a timely fashion. Past violations of the limit on the number of annual leave hours that can be carried forward would not create a precedent for allowing Curry to carry forward excess hours in 2004. Past wrongs and *ultra vires* acts do not create an entitlement to repeat those wrongs. *Canfield v. Div. of Corr.*, Docket No. 02-CORR-269 (April 18, 2003); *Parry v. Div. Of Corr.*, 00-CORR-102 (June 11, 2001). Nor do they establish a legitimate basis for Curry's failure to file this grievance within the ten work-day limit.

The only other explanation for Curry's delay in filing related to the loss of his father. Curry testified at Level IV that “[t]he reason there was a time frame of not discussing it with my supervisor is my father passed away during that period of time.” While it would be understandable that such a sad event would disrupt his work life, Curry's attendance report reflects that, in February 2004, he was at work on all but two of the days after the Leave Balance form was issued. The two days he missed, February 12 and 16, were both holidays. Curry has failed to establish a nexus between the loss of his father and the delay in filing his grievance.

Curry has failed to meet his burden of proving that the delay in filing was justifiable. Accordingly, this grievance must be dismissed as untimely. (See footnote 9) Based upon the foregoing findings of fact, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. DOP's rules define annual leave as “[a]n earned employee benefit of paid time off from work with prior approval of the appointing authority or designee.” W. VA. CODE ST. R. § 143-1-3.6.

2 2. “Carry Forward Days” are defined as “[t]he maximum number of annual leave days which can be accredited for use as of the first day of January based on an employee's years of tenure.” W. VA. CODE ST. R. § 143-1-3.13.

3 3. Under the controlling rule, an employee with Sprouse's years of experience is allowed 30 carry forward days and an employee with Curry's years of experience is allowed 40 carry forward days. W. VA. CODE ST. R. § 143-1-14.3(a).

4 4. “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.” *Greathouse v. Dep't of Transp.*, Docket No. 99- DOH-413 (Aug. 21, 2000) (citations omitted).

5 5. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

6 6. “Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to filein a timely manner.” *Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)(citations omitted).

7 7. Pursuant to West Virginia Code section 29-6A-4(a), a grievance must generally be filed “[w]ithin ten days following the occurrence of the event upon which the grievance is based[.]”

8 8. There is, however, a discovery provision in West Virginia Code section 29- 6A-4(a) under which “the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Little v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998).” *Butler v. Dep't. of Transp.*, Docket No. 99-DOH-084 (May 13, 1999).

9 9. For purposes of West Virginia Code section 29-6A-4, days are defined as “working days exclusive of Saturday, Sunday or official holidays.” W. Va. Code § 29-6A- 2(c).

10 10. The discovery provision of West Virginia Code section 29-6A-4(a) was triggered on

February 2, 2004, when Sprouse signed his January 2004 attendance report, which put him on notice that only 240 hours of accrued annual leave had been carried over from 2003.

11 11. HHR met its burden of proving, by a preponderance of the evidence, that Sprouse did not comply with the requirement that he file his grievance within ten working days after he had knowledge of the facts giving rise to his grievance.

12 12. Sprouse failed to prove that he had a good excuse for failing to comply with the ten work-day limitation for filing his grievance. 13 13. The discovery provision of West Virginia Code section 29-6A-4(a) was triggered on February 10, 2004, when Curry received his Leave Balance form, by which he was clearly informed about the loss of his excess accumulated annual leave.

14 14. Curry's informal efforts to persuade his supervisor that he should be allowed to carry forward extra annual leave did not change the date on which he had knowledge of the grievable event and did not toll the deadline for filing his grievance.

15 15. HHR met its burden of proving by a preponderance of the evidence that Curry did not comply with the requirement that he file his grievance within ten working days after he had knew of the facts giving rise to this grievance.

16 16. Curry failed to prove that he had a good excuse for failing to comply with the ten work-day limitation for filing his grievance.

17 17. Curry's grievance must be dismissed as untimely.

Accordingly, in light of the fact that each of the underlying grievances is subject to dismissal for having been untimely, this consolidated grievance is **DENIED** as to both Jeffrey Sprouse and William Curry.

Any party 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 West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party mustalso provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 27, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Curry claims that he requested 110 hours of annual leave. However, the "Application for Leave with Pay" that was submitted on December 1, 2003, indicates that Curry requested 90 hours and received contingent approval for 70 hours. Curry Exhibit 5 at Level IV.

Footnote: 2

Based on Curry's tenure, he could actually carry forward 40 days of annual leave, which would be 320 hours.

Footnote: 3

During the Level IV hearing, Curry adopted his Level IV statement of grievance, with attachments, as his substantive testimony.

Footnote: 4

This issue was resolved in an earlier grievance brought by Curry. Curry v. Dep't of Health and Human Res., Docket No. 98-HHR-149 (Mar. 31, 1999).

Footnote: 5

Actually, Sprouse had to have been aware of the limit on carrying forward annual leave before December 2003. As reflected in his testimony at Level III, at some point during Fall 2003, Sprouse and his supervisor had discussed the need to reduce his accumulated annual leave prior to the end of the year. Sprouse was simply unable to bring the number of hours down because his work was not current when he wanted to take annual leave.

Footnote: 6

See note 2, above.

Footnote: 7

Even allowing a day or two for distribution of the Leave Balance forms, Grievant still knew of the basis for his grievance too far in advance of March 8 for his grievance to have been timely.

Footnote: 8

Specifically, he presented evidence that he was allowed to carry 320.1 hours of annual leave over from 2001 and

324.7 hours of annual leave over from 1998.

Footnote: 9

Even if timely, Curry could not prevail on the merits because HHR is required to comply with DOP's Rule 14.3(a), limiting the amount of annual leave that can be carried forward. A differently-numbered version of this rule has survived earlier scrutiny. Clark v. Dep't of Transp., Docket No. 94-DOH-056 (July 14, 1994); Danter v. W. Va. Lottery Comm'n, Docket No. 90-LC-148 (Apr. 30, 1991).