**PATRICIA WENTZ, et al.,**

**Grievants,**

**v.**

**Docket No. 04-HHR-079**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,**

**Respondent.**

**DECISION**

Grievants (See footnote 1) are employed by Respondent Bureau for Children and Families ("BCF") in its Harrison County office. They initiated this grievance on May 9, 2003, alleging discrimination and favoritism with regard to the granting of level three grievances filed by employees of the Department of Health and Human Resources' ("DHHR") Bureau for Child Support Enforcement ("BCSE") in other counties, resulting in the granting of compensatory time or restoration of eight hours of annual leave taken as a result of a snowstorm which occurred in late February, 2003. Grievants seek to be granted compensatory time or restoration of leave time used on the day in question. The grievance was denied at levels one, two and three as untimely filed. Grievants appealed to level four on February 23, 2004. After several continuances were granted for good cause shown, a hearing was held in Westover, West Virginia, on August 30, 2004. Grievants were represented by Richard Patrick of AFSCME Council 77, and Respondent was represented by Robert Miller,Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 24, 2004.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

## Findings of Fact

1. Grievants are employed in the Harrison County office of BCF.

2. A winter storm occurred during the weekend of February 15 and 16, 2003, causing significant accumulations of snow (nearly two feet in some places) over many of the northern and central counties of West Virginia.

3. Monday, February 17, 2003, was a legal holiday, and state offices were closed for that reason.

4. During the weekend of February 15, 2003, Governor Wise declared a state of emergency for the counties affected by the winter storm, including Harrison. This declaration was for the purpose of implementing the state's Emergency Operations Plan and activating the state's Emergency Operations Center. It also made the state eligible for federal disaster funding. L IV, Respondent's Ex. 1.

5. Louis Palma is the Director for Region 1, comprising several northern counties of BCF, including Harrison, Marion and Monongalia Counties, along with several others.

6. On February 17, 2003, Mr. Palma contacted the community service managers in Marion and Harrison Counties regarding the road conditions in their areas. Both individuals represented to him that they had been able to “get out and about” that day. Mr. Palma lives in Marion County, and he drove several roads around the area, determining that they were not in “great” condition, but passable.

7. Based upon his own investigation and his communication with the community service managers, Mr. Palma determined that BCF offices would be open on February 18, 2003.

8. Grievants Wentz, Berry, and Moodispaugh worked their usual eight hours on February 18. Grievant Ash worked 2½ hours on that day and took 5½ hours of annual leave.

9. Grievants knew on February 18, 2003, that their office would be open that day, and that they would be required to use annual leave if they did not work.

10. Grievants filed this grievance on May 9, 2003, after BCSE employees in Monongalia County won a level three grievance, where it was held that it was arbitrary and capricious for DHHR

to keep offices open in that area on February 18, 2003. (See footnote 2)

## Discussion

Respondent asserts that the grievance was not filed within the statutory time lines. 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. 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 file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No.96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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).

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 obviously not filed within the ten-day time frame.

Grievants contend that they did not feel that they had been victimized until discovering that other employees had won their grievances at level three, resulting in all employees in those counties receiving either eight hours of compensatory time or restoration of their annual leave used. This argument is in the nature of a discovery rule exception as discussed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Spahr determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. *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 Res., Docket No. 98-HHR-092 (July 27, 1998). However, Grievants knew they were required to report to work or use leave time on February 18, 2003. Thediscovery 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. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); 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). The same analysis applies to grievances filed under W. Va. Code §§ 29-6A-1, *et seq.* Accordingly, the undersigned finds that this grievance was not filed in a timely fashion and must be dismissed on that basis.

However, even if it had been timely filed, Grievants cannot prove entitlement to the relief requested. As pointed out by Respondent, both DHHR and the Division of Personnel have enacted policies which state that employees may use annual leave when weather conditions prevent them from traveling to work, and they “may be released from work without loss of pay or charge to annual leave by Executive Declaration of the Governor” or when there is a state government shutdown. *See* DHHR Policy Memorandum 2103. Undisputedly, there was no shutdown of state government or any other declaration from the governor's office closing state offices on February 18, 2003. In such situations, DHHR's policy provides that, in cases of localized weather conditions, each department is authorized to determine whether or not offices will be closed. In this case, Mr. Palma, as regional director, ascertained the weather conditions in and around Harrison County, and determined that offices could be open on February 18, which was within his discretion. It should be noted that, in the level three grievance which prompted the filing of this case, it was concluded that DHHR and DOP policies had been followed “to the letter.” However, in Beckner, et al., v. Dep't of Health and Human Res., Control No. 030403-2 (Apr. 2, 2003), the hearing evaluator determined that it was arbitrary and capricious for DHHR officials to open the Monongalia County office on February 18, 2003, because a thorough investigation of the road conditions in that area was not accomplished. In the instant case, conversely, Mr. Palma personally traveled around the area and discussed road conditions with Grievants' manager, who had also personally driven on Harrison County roads, prior to making the decision to open the office. Therefore, the decision in this case cannot be found to be unreasonable.

Consistent with the foregoing, the following conclusions of law are appropriate.

## 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. 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 file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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). 2. An employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. The 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. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03- DEP-156 (Sept. 17, 2003); 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). 4. Respondent has established that this grievance was not timely filed.

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, and 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.

**Date: September 30, 2004** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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*Footnote: 1*

*Grievants are Patricia Wentz, Michele Berry, Justin Ash and Danny Moodispaugh.*

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*Footnote: 2*

*Apparently, a grievance was also granted at level three for Marion County employees, but that decision was not introduced as evidence. The undersigned is only aware of it because of its mention in Conner v. Dep't of Health and Human Res., Docket No. 03-HHR-142 (Dec. 12, 2003).*