THOMAS FELTON,

Grievant,

v. **Docket No. 05-HHR-004**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU OF PUBLIC HEALTH and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Thomas Felton ("Grievant"), employed by the Department of Health & Human Resources/Bureau of Public Health ("DHHR") as Chief Sanitarian, filed a level one grievance on October 7, 2004, in which he alleged:

Prior to my requesting and receiving an unpaid LOA in order to file for sheriff of Tucker County, I was informed by Administrative Services Asst. II Carolyn Dienst if I returned to State employment within 5 years I would have all of my accumulated sick leave reinstated. After I began my LOA, she told me she had misinformed me and it was up to one year return date I would receive it all.

For relief, Grievant requested that he receive all of his accumulated sick leave (300+ days) if he returns to work within five years, as he was advised prior to taking the leave of absence.

The grievance was denied at level one and level two, and was dismissed by Order dated January 3, 2005, based on Grievant's failure to timely file. Grievant advanced his complaint to level four on January 7, 2005. Grievant's counsel, William M. Miller, and Senior Assistant Attorney General B. Alan Campbell, on behalf of DHHR, agreed to submit the grievance for decision based upon the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 16, 2005. The following facts have been derived from a preponderance of the credible evidence contained in the lower-level record.

Findings of Fact

1. Grievant was employed by DHHR as Chief Sanitarian assigned to work in the Sanitation Division of the Bureau of Public Health in 2003. Grievant had accumulated 330 days of sick leave by this time.

2. In November 2003, Grievant requested information regarding his taking a leave of absence for the purpose of running for elective office. Carolyn Dienst, the Human Resources Officer for the Environmental Health Services Office, advised him that if he would return to State employment within five years, he could have all accumulated sick leave restored.

3. Grievant was granted a leave of absence from January 21, 2004, through November 3, 2004, and had his name placed on the ballot for the position of Sheriff of Tucker County.

4. On May 6, 2004, Ms. Dienst advised Grievant by e-mail that the information she had provided was in error, and that an employee must return to employment within one year to reinstate all accumulated sick leave, and after one year only thirty days of the leave would be reinstated. (See footnote 1) 5. Grievant won the nomination for Sheriff in the May primary election, and went on to win the general election in November 2004.

6. Grievant's term in the office of Sheriff is four years. Sick leave is not a benefit of the position.

___7. Grievant filed a level one grievance on October 7, 2004, and DHHR properly raised the issue at level two whether the matter had been timely filed.

8. Grievant returned to work on November 3, 2004, after learning of his election, and resigned his position as Chief Sanitarian effective December 31, 2004.

Discussion

DHHR asserts that the time frame to file a grievance began to run when Grievant read his e-mail on May 7, 2004, advising him the previous information given by Ms. Dienst was incorrect. Grievant argues that he had no cause to file a grievance until he knew whether he would be leaving DHHR's employment, but that he began these proceedings in October, after he was advised to do so by employees from the Office of Personnel Services.

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).

Grievant does not dispute DHHR's assertion that he was unequivocally notified on May 7, 2004, that he had initially been given incorrect information. His delay, until October 7, 2004, is clearly beyond the statutory time period for filing a grievance. Grievant's argument that it would have made no sense to file a grievance within ten days of May 6, because if he lost the primary, or even the general election, it would have been a moot point, is not persuasive. An employee must exercise due diligence in protecting his rights. Surely, he did not enter the race with an expectation of losing. Further, if the loss of his sick leave was the pivotal factor in determining his political career, Grievant could have withdrawn from the general election. Grievant opines that the grievable event was his leaving DHHR's employment December 31. Grievant left his employment of his own accord, and with the correct information regarding his leave. DHHR took no action onDecember 31, 2004, which adversely affected Grievant. Furthermore, this argument is inconsistent with Grievant's filing at level one in October 2004.

Grievant is understandably upset that he was provided incorrect information. However, there is no evidence that Ms. Dienst intentionally misled Grievant, or that the occurrence was anything other than a simple mistake. The Grievance Board has consistently refused to grant the type of relief Grievant seeks because a mistake made by another employee constitutes an ultra vires act, and because two wrongs do not make a right. See Guthrie v. W.Va. Dep't of Health and Human Res. Docket No. 95-HHR-277 (Jan. 31, 1996); Earnest and Hatfield v. Southern W.Va. Community College, Docket Nos. 91- BOD-352/290 (Sept. 30, 1992), *rev'd*, Circuit Court of Kanawha County, Civil Action No. 92-AA-296 (Apr. 23, 1993); Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec 18, 1989). See also Roberts v. W.Va. Dep't of Transp., Docket No. 96-DOH-017 (May 2, 1996), *aff'd*, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (May 25, 1997); Gilliam

v. W.Va. Dep't of Transp., Docket No. 96-DOH-511 (Apr. 24, 1997). In any case, Grievant was provided the correct information in May, too late to be removed from the ballot of the primary election, but far enough in advance to withdraw from the general election. After receiving the correct information he decided to continue with his political campaign, and to hold the office for which he was elected. Should Grievant return to state employment in the future, his accrued leave will be reinstated in compliance with Division of Personnel regulations. The following conclusions of law support this decision.

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 filingby 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. 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).

3. Grievant knew of the events giving rise to this grievance on May 7, 2004, and his filing of the grievance on October 7, 2004 was 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.

DATE: FEBRUARY 22, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Division of Personnel Administrative Rule 14.4(e)(2) states:*

All accumulated sick leave shall be cancelled as of the date of separation. If the employee returns to work within twelve (12) calendar months . . . all cancelled sick leave shall be restored. However, if the employee returns to work after more than twelve (12) calendar months from the effective date of separation of employment, no more than thirty (30) days ofcancelled sick leave shall be restored.