THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRY R. GOODWIN,
Grievant,

v. **Docket No. 2011-0604-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant Terry R. Goodwin is employed by the West Virginia Division of Highways (DOH) as a Transportation Worker/Equipment Operator 3. Mr. Goodwin filed a level one grievance form dated October 26, 2010, alleging the following that he was "[n]ot selected for a foreman position." As relief Grievant seeks "[t]o be made whole including selection for the foreman position."

Respondent DOH filed a Motion to Dismiss the grievance at level one on November 22, 2010. The motion claimed that the grievance was not filed within the time period allowed pursuant to the statutory grievance procedure. The Motion to Dismiss was granted in a level one decision that was issued on December 8, 2010. Grievant appealed the decision to level two on December 14, 2010, and the parties agreed to April 21, 2011, as a date to hold a level two mediation.

On December 30, 2010, Respondent DOH filed a renewed Motion to Dismiss the grievance. A telephonic hearing was conducted pursuant to the motion on February 17, 2011, through the Charleston office of the West Virginia Public Employees Grievance Board. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia State Workers Union, and Respondent was represented by Barbara L. Baxter, Esquire DOH

Legal Division. The parties agreed to submit the matter for decision based upon their oral arguments.

There is no dispute regarding the material facts.

Findings of Fact

1. Grievant is employed by the DOH as a Transportation Worker/Equipment Operator 3.

2. Respondent DOH posted a vacant position for a Transportation Crew Supervisor 1 position. An employee in that classification is commonly referred to as a foreman.

3. Grievant and other employees of the DOH applied for the vacant foreman position.

4. By letter dated April 30, 2010, the DOH District 3 Administrative Services Manager informed Grievant that he was not selected for the Transportation Crew Supervisor 1 position.

5. In October 2010, Grievant was told that he was not selected for the position because he was near retirement.[1]

6. Terry Goodwin filed a Grievance on October 26, 2010, contesting his non-selection for the foreman position.

Discussion

Respondent DOH asserts that the grievance brought by Mr. Goodwin was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and therefore it must be dismissed.

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[1] It was not made clear who relayed this information to Grievant.

When an 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. *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).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Respondent notes that Grievant was unequivocally notified that he was not selected for the foreman position on April 30, 2010, by letter from the DOH District 3 Manager. DOH argues that the Grievance which was filed on October 26, 2010, is clearly outside the fifteen working day limit provided by W. VA. CODE § 6C-2-4 (a) (1).

Grievant counters that he did not discover the crucial fact giving rise to his grievance until he was told in October that the reason he did not get the position was that he was near retirement. Grievant argues that the time for filing his grievance began on that day and he filed his grievance within fifteen days of that event, making it timely. This argument appears to be that the delay would fall under the "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990). Under this exception, 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.

In *Spahr* a group of teachers was not receiving a salary supplement that was being paid to other teachers who were similarly situated. The West Virginia Supreme Court held that the event giving rise to the grievance was the different payment of teachers performing the same tasks and the time for filing the grievance did not begin to run until the grievants discovered that they had not been paid the same supplement.

When applying the discovery rule the Grievance Board has consistently held "the date a Grievant finds out an event or continuing practice was <u>illegal</u> is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice." *Lynch*

v. Dept. of Trans./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997); *Harris v. Lincoln County Bd. of Educ.,* Docket No. 89-22-49 (Mar. 23, 1989).

In this case, the event giving rise to the grievance was the selection of another candidate for the foreman position. Grievant was unequivocally notified that he was not selected for the position on or shortly after April 30, 2010. He was required to file his grievance within fifteen working days of that date. Had he done that he would have been entitled, through discovery, to learn all the reasons for the selection of the successful candidate. Instead he waited until October 26, 2010 to file the grievance which was several months after the statutory deadline. Consequently the grievance was not timely filed and must be DISMISSED.

Conclusions of Law

1. When an 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. *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).

2. The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

3. Respondent proved by a preponderance of the evidence that Grievant did not file this grievance within the time period allotted by W. VA. CODE § 6C-2-4 (a) (1), after he was unequivocally notified that he was not selected for the foreman position.

4. Grievant failed to demonstrate a proper basis to excuse his failure to file in a timely manner.

Accordingly, the Grievance is DISMISSED.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: MARCH 4, 2011.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE