THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KAREN L. DYER,

Grievant,

v. **Docket No. 2013-0885-DOT**

OFFICE OF ADMINISTRATIVE HEARINGS,

Respondent.

DISMISSAL ORDER

Grievant, Karen Dyer, filed an expedited Level Three grievance against her employer, Respondent Office of Administrative Hearings, dated December 17, 2012, stating, "[s]uspension ending Nov 26, 2012 was inappropriate." As relief sought, Grievant requests "[t]o be made whole including but not limited to removal of suspension from record. All benefits & wages related."

Respondent filed a Motion to Dismiss on January 10, 2013, alleging that the grievance was untimely filed, serving the same upon Grievant and her Representatives. Grievant filed no response to Respondent's Motion to Dismiss. A telephonic hearing on the Motion to Dismiss was conducted by the undersigned administrative law judge on January 28, 2013, at which Respondent appeared by counsel, Doren Burrell, Senior Assistant Attorney General, and Grievant appeared by her representatives, Steve Thompson and Kris Mallory. This matter is now mature for consideration.

Synopsis

Grievant filed her expedited Level Three grievance fifteen days after her suspension ended. Grievant contends that her filing was timely, arguing that the statute allows for the filing of a grievance fifteen days from any time during the suspension, or

even from the last day of such. Respondent asserts that the grievance was untimely filed as it was filed more than fifteen days after the Grievant had been notified of her suspension, and, as such, has moved to dismiss this grievance. For the reasons more fully set out below, Respondent's Motion to Dismiss is granted.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant filed this expedited Level Three grievance challenging her suspension without pay on December 17, 2012.

2. On or about November 16, 2012, Respondent provided Grievant with written confirmation that she was being suspended without pay.

3. Grievant began serving her suspension on November 19, 2012.

4. Grievant returned to work on November 26, 2012.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). The issue before the undersigned is the Respondent's Motion to Dismiss.

Respondent contends that this grievance is untimely because it was not initiated within the timelines set forth in WEST VIRGINIA CODE § 6C-2-4(a)(1). Timeliness is an affirmative defense. 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. *See, 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); *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).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See generally,* W. VA. CODE § 6C-2-1 *et seq*. There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997), *aff'd, Circuit Court of Kanawha County,* No. 97-AA-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See Kessler v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-445 (July 28, 1997).

WEST VIRGINIA 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-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

> 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 . . . .

W. VA. CODE § 6C-2-4(a)(1). "An employee may proceed directly to level three upon the agreement of the parties or when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in these matters." W. VA. CODE § 6C-2-4(a)(4).

In this matter, the Grievant argues that the word "occurrence" in the above statute can be interpreted to allow her to file a grievance through the last day of her suspension. The parties do not dispute when Grievant was informed of her suspension, the dates of the suspension, or the date of filing of the grievance. The parties only dispute whether the filing was timely pursuant to statute. According to Grievant's representatives, Grievant chose to wait to file her grievance until the end of her suspension believing that the definition of the word "occurrence" would allow her to do so. However, the event upon which this grievance is based is the act of suspending Grievant. Such is the event, or occurrence, triggering the start of the fifteen-day period

for filing the grievance. Therefore, Grievant failed to file her grievance within the fifteen-day time limit. Grievant misunderstood when the fifteen-day time period began to run. Unfortunately, the undersigned cannot find any basis for excusing Grievant's untimely filing. Therefore, the Respondent's Motion to Dismiss is granted, and this grievance, dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. "Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

2. 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. Once the employer has demonstrated that 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. *See, 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); *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. WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

> 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 . . . .

W. VA. CODE § 6C-2-4(a)(1).

4. "An employee may proceed directly to level three upon the agreement of the parties or when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in these matters." W. VA. CODE § 6C-2-4(a)(4).

5. Grievant failed to timely file her expedited Level Three grievance. Grievant has offered no proper basis to excuse the late filing.

Accordingly, this 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 Order. *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 (eff. July 7, 2008).

DATE: February 27, 2013.

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Carrie H. LeFevre
Administrative Law Judge