THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBERT WEBB,
Grievant,

v. **Docket No. 2013-0319-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DISMISSAL ORDER

Grievant, Robert Webb, filed this grievance on September 8, 2012, alleging that he was dismissed from his employment without good cause. He seeks as relief to be made whole, including back pay with interest and benefits restored. This grievance was filed directly to level three. Respondent filed a Motion to Dismiss Grievance as Untimely Filed on March 26, 2013. Grievant was provided with an opportunity to respond to the Motion to Dismiss, and did so on May 9, 2013. Respondent was represented by its counsel, Harry C. Bruner, Jr. Assistant Attorney General. Grievant appeared by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. This matter is now mature for consideration.

Synopsis

The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based. Accordingly, this grievance is dismissed.

The following findings of fact are made pursuant to the record of this grievance.

Findings of Fact

1. Grievant was employed at the William R. Sharpe, Jr. Hospital as a Health Service Trainee. A facility operated by the Department of Health and Human Resources.

2. The record demonstrates that as of July 10, 2012, Respondent had not received any contact from the Grievant concerning his intent to return to work since he had last reported on June 29, 2012. Having received no information from Grievant about whether he intended to return to work since June 29, 2012, the Hospital dismissed Grievant for job abandonment by letter dated July 10, 2012.

3. Grievant filed the instant case on September 8, 2012, asserting that he had been dismissed without good cause. The Respondent's Grievance Unit received and date-stamped the Grievance Form on September 10, 2012.

4. Respondent terminated Grievant's employment by letter dated July 10, 2012. Respondent asserts that by United States Postal Service records of Certified Mail delivery, Grievant received the dismissal letter on July 17, 2012.

5. Grievant asserts that the contention that he received the dismissal letter on July 17, 2012, is not supported by facts in evidence, and Respondent's contention that Grievant did not timely file his grievance is, therefore, speculative.

Discussion

Respondent has asked that this grievance be dismissed as untimely filed. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

"The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *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." WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

> Within fifteen days[1] 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. . . .

---

[1]Pursuant to W. VA. CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

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). *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).

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).

The time frame for filing this grievance began to run when Grievant learned of his dismissal. Respondent asserts in its motion that Grievant became aware of his dismissal on July 17, 2012, as reflected by the United States Postal Service records of Certified Mail delivery. Grievant counters that assertion is merely a proffer of counsel and is not supported by facts in evidence. In short, Respondent did not attach a copy of the Certified Mail Receipt as an exhibit in its motion. This may be true, but, in any event, a reasonable prudent person would have most certainly come to the conclusion that his or her employer would consider their failure to return to work for weeks on end as job abandonment.

Grievant does not dispute that this grievance was not filed directly to level three until September 8, 2012. That is over two months since Grievant last reported to work for Respondent as a Health Service Trainee. Viewing this argument in a light most favorable to the Grievant, it is without sufficient merit to excuse a late filing of this grievance. The Respondent has met its burden of proving, by a preponderance of the evidence, that this grievance was untimely filed. A preponderance of the evidence demonstrates that Grievant was aware that he had abandoned his employment after his failure to report to work weeks after his last appearance for his job duties, and was also aware of his dismissal on or about July 17, 2012.

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

Conclusions of Law

1. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

2. 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).

3. Pursuant to the requirements of W. VA. CODE § 6C-2-4(a)(1), a grievance must be filed within fifteen days of the event upon which it is based.

4. Grievant's filing of the level three grievance was untimely. Grievant failed to provide a reasonable justification for his untimely filing of this grievance, which was more than fifteen days after the occurrence of the event upon which the grievance is based.

Accordingly, the Respondent's motion to dismiss is hereby **GRANTED**, and this grievance is **DISMISSED** from the docket of the Grievance Board.

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: June 3, 2013

_____
Ronald L. Reece
Administrative Law Judge