JOHN SHANNON,

Grievant,

v. Docket No. 98-CORR-042

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, John Shannon, employed by the Division of Corrections (Respondent) as a Correctional Officer II assigned to the Pruntytown Correctional Center (PCC), filed a level one grievance dated February 12, 1997, in which he alleged “[b]ecause of the negligence of the supervising authorities at [PCC] I have been needlessly subjected to the harmful effects of breathing 'Second-Hand Smoke'. The 'Division of Personnel Policy' concerning 'Smoking Restrictions in the Workplace' clearly state the purposes for which this policy was established. . . . I also file discrimination on the part of the supervising authorities which have so recklessly discriminated against my health and well- being [by allowing some parts of the institution to have non-smoking areas] and have needlessly subjected and exposed me to the harmful effects of second hand smoke.” For relief, Grievant requests that Personnel's Smoking Policy be fully instituted at PCC, that “designated areas be set-up on all the units and buildings where officers and inmates use regularly”, and that the “appointing authorities be responsible for any ill effects that second-hand smoke has in any way affected [sic] my health and being now and in the future by whatever restitution is deemed fair in agreement with both parties.”

Grievant's immediate supervisor lacked authority to resolve the grievance at level one. After the grievance was denied at levels two and three, appeal was made to level four on February 17, 1998. An evidentiary hearing was conducted on April 8, 1998, in the Grievance Board's Morgantown office. Both parties waived the opportunity to submit proposed findings of fact and conclusions of law, and the matter became mature for decision on the same date. Grievant was represented by Jack Ferrell, of the Communications Workers of America. Respondent was represented by Cindy Quillen,paralegal, and Frank Phares, Deputy Warden at PCC.

The essential facts of this matter are undisputed and may be set forth as the following findings of

fact.

Findings of Fact

1. Grievant has been employed as a Correctional Officer at the Pruntytown Correctional Center for approximately seven years.

2. The current smoking policy on the men's unit at Pruntytown permits inmates to smoke in their living areas, dayrooms, and outside. In unit 18, the control room and dayroom are in the same area.

3. The current smoking policy in the women's unit permits inmates to smoke in their rooms and outside. They are not permitted to smoke in the hallways or common areas.

4. In response to Grievant's complaints regarding his exposure to second-hand smoke, Respondent has changed his work hours from midnight to day shift, and assigned him to the perimeter post. When he complained about that assignment, he was reassigned to dorms where there is the least amount of smoke.

5. Respondent has considered suggestions made by Grievant, including the installation of exhaust fans. This alternative was found not to be feasible, because it interfered with the heating and air-conditioning systems.

6. Respondent will be opening a new building in Fall 1998 which will be fully ventilated, resolving Grievant's complaint.

7. A level three decision was issued on June 17, 1997.

8. Grievant filed a level four appeal dated and postmarked January 13, 1998. A note on the envelope stated “[s]ent out on February 8, 1998 Smoking grievance”. The grievance was receivedby the Grievance Board on February 17, 1998.

Discussion

At the level four hearing, Respondent made a Motion to Dismiss. Evidence offered in support of the Motion was the level three decision, dated June 17, 1997, and the level four appeal, dated January 13, 1998, and received by the Grievance Board's Charleston office on February 17, 1998. Grievant's response to the Motion was simply that the matter had been appealed to level four previously, but had been remanded at his request for hearing at level three, and that he was not aware that it would be necessary for him to again file a level four appeal upon receipt of the level three decision.

The undersigned finds Grievant's response simply incredible given the experience that both he and his representative have acquired with the grievance procedure. W. Va. Code §29-6A-4(d) provides that if the grievant is not satisfied with the decision rendered at level three, he may appeal his claim to level four within five days of the written decision. Even if the message on the envelope is accepted, and the grievance was mailed on January 8, 1998, the appeal was filed approximately six months after the level three decision was issued. Therefore, the Motion to Dismiss is granted. Lambert/White v. Dept. of Environmental Protection, Docket No. 97-DEP-275 (Aug. 20, 1997).

Even if the grievance had been timely filed, Grievant is not entitled to a smoke free environment. Although Personnel's “Smoking Restrictions in the Workplace” policy generally prohibits the use of lighted tobacco products, and the subsequent exposure to second-hand smoke, Section III, Paragraph F, states in pertinent part that, “State facilities such as hospitals, mental hospitals, and/or prisons shall comply with the aforementioned policy to the maximum extent possible.” (Emphasis added). Major Gary Shaw testified at level four that taking cigarettes from the inmates would cause a security problem. Respondent unquestionably falls within the limited exception to the policy. Nevertheless, the evidence shows that efforts have been made to accommodate Grievant by assigning him to smoke free perimeter duty. He objected to that assignment based upon a vague and medically unsubstantiated allegation of knee pain. In any event, it appears that a new facility will provide better ventilation, and should alleviate Grievant's concerns, within a few months.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Grievant failed to file a level four appeal within five days of the level three decision as is required by W. Va. Code §29-6A-4(d), or to provide any persuasive reason for his delay of approximately six months prior to proceeding with this grievance.

2. Grievant has failed to prove that he is entitled to a smoke free work environment because prisons are required only to comply with the Division of Personnel “Smoking Restrictions in the Workplace” policy “to the maximum extent possible.”

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: April 29, 1998 _____

SUE KELLER

Senior Administrative Law Judge