JAMES A. GRAGG, et al.

Grievants,

v. **Docket No. 98-CORR-330**

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievants, fifty-five individuals employed by the Division of Corrections (Respondent), as Correctional Officers, filed level one grievances January through October 1998, alleging discrimination relating to salary increases. The grievances were advanced to level four following denials at levels one through three. Evidentiary hearings were conducted in the Grievance Board's Elkins office, after which the matters were consolidated for decision. The final grievance became mature on March 12, 1999, the due date for Grievant's submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following findings of fact are based upon a review of the record in its entirety, including testimony and exhibits admitted at level four and the lower-level transcripts and decisions.

Findings of Fact

1. Grievants are employed by the Division of Corrections as Correctional Officers assigned to Huttonsville Correctional Center, Pruntytown Correctional Center, St. Mary's Correctional Complex, and Denmar Correctional Center.

2. Grievants are all classified as Correctional Officer II (COII), or higher.

3. Grievants have all completed the Officers Apprenticeship Program (OAP), sometimes referred to as the Correctional Officers Apprenticeship Program (COAP).

4. A number of Grievants were promoted to COII during a statewide reclassification in April 1994. Some of these individuals had not completed the OAP at that time.

5. Effective 1994, Respondent required that all new COI employees complete the OAP as a condition of continuing employment. Upon completion, the employee is eligible for promotion to COII, in accordance with Division of Personnel Administrative Rule 4.07. The promotion and salary increase is not effective until Personnel Action Form WV- 11 receives final approval. Previously,

completion of the OAP was optional.

6. In Spring 1996, a number of Grievants filed a complaint relating to a five percent pay increase upon completion of the OAP. Settlement agreements state that compensation was paid to a number of Grievants for back pay from April 1994, to the date that the five percent increase was granted due to the completion of the OAP. A few similar settlement agreements were finalized in 1997 and 1998.

7. Grievants took no further action following the finalization of the settlement agreements until they learned of a level four decision issued in the matter of Livesay v. Div. of Corrections., Docket No. 96-CORR-459 (Nov. 4, 1997).

Background and Argument

A chronological review of events is helpful in understanding the present case. Effective April 1, 1994, the Division of Personnel's (DOP) reclassification plan for the Division of Corrections became effective. At this time, positions in the correctional officer series were restructured, in part, to enhance training requirements. Part of the new classification system required that newly-hired COIs enroll in and complete the OAP within two years. Upon completion of the OAP, the COI would be eligible for promotion to COII with an attendant five percent salary increase. Current COI staff who had completed the OAP were “reallocated” as COIIs. Consistent with DOP reclassification procedures, COIs reclassified in this manner were given salary upgrades to the entry level of COII, if their salary was below that level, and no increase if their salary was above that level. Officers who had already advanced beyond COI and had either completed the OAP prior to April 1, 1994, or were scheduled to complete it within a few months after April 1, 1994, were not given any specific salary consideration in the reclassification process relative to their OAP training.

After those officers who had received less than a five percent salary increase expressed their dissatisfaction, Respondent and DOP determined, that in the interest of fairness, all newly-reclassified COIIs who complained would receive a salary adjustment equaling an overall five percent increase, with back pay retroactive to April 1, 1994. Following this action, some officers who had voluntarily completed, or nearly completed, the OAP at a time when no salary increase had been mandated, expressed dissatisfaction because they had received nothing. Respondent subsequently awarded those officers a prospective, five percent merit increase, effective September 1, 1995, in recognition of theircompletion of the OAP. These officers filed a grievance alleging discrimination,

and requested backpay to either April 1, 1994, for those who completed the OAP prior to that time, or from the date after April 1, 1994, when they completed the program.

In Whorton v. West Virginia Division of Corrections, Docket No. 96-CORR-078 (June 25, 1996), the Grievance Board held that the grievants had proven discrimination in that all of the salary increases were for the same reason, completion of the training, but that one group of employees had received backpay while another group had not. The ALJ determined Respondent's reason for the difference, that the first raises were for reallocation purposes, and the second for merit raise purposes, was pretextual in nature. In conclusion, the grievance was granted, and Respondent ordered to pay the grievants back pay for the period of time in question.

In January 1997, a level four hearing was conducted in the matter of Livesay,supra, in which a group of correctional officers alleged discrimination when they did not receive a five percent salary increase upon completion of the OAP. Respondent asserted that the OAP is required of all COIs, and upon completion, the employee is reclassified to COII, with the appropriate salary change. Citing Whorton, the grievance was granted, based upon a conclusion that grievants had proven a case of discrimination, and Respondent's reason for the difference in treatment was pretextual. Respondent was ordered to provide grievants a five percent salary increase, plus interest, retroactive to the date the individual had completed the OAP.

All of the current complaints were filed as a result of the Livesay decision. Grievants assert that they are entitled to a five percent pay raise effective the date of completion of the OAP, plus interest. They claim that Respondent's acceptance of the Livesay decision,and subsequent payment of those employees, but not Grievants, results in discrimination. Respondent argues that many of the Grievants entered into settlement agreements which granted them backpay to April 1, 1994, and that all remaining Grievants were awarded the appropriate salary increases upon reclassification. Respondent also asserts the affirmative defense that the grievances were not timely filed, and relies upon prior decisions of the Grievance Board which hold that an employee may not file a grievance based on the outcome of another grievance. (See footnote 2)

Discussion

Initially, Respondent contends these grievances were not timely because they were not initiated within the time limits set forth in W. Va. Code §29-6A-4(a). 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. Hawranick v. w. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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 HumanServ., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code §29-6A-4(a) provides in pertinent part:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The evidence of record establishes that the majority of the Grievants were aware of the facts upon which the claim is based in 1994. Grievant Rise did not complete the OAP until July 1, 1997 (date on certificate); however, he also delayed filing until learning of the Livesay decision. The grievances were not filed, in most instances, until more than four years after the facts were known to Grievants.

W. Va. Code §29-6A-4(a) provides for a “discovery rule”, addressed in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. This rule provides that “the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance.” Thus, “it is not the discovery of a legal theory which triggers the statute, but the event.” Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997). By Grievants' own admissions, the facts were known to them for as long as four years, but the legal theory was not discovered until a co-worker prevailed in a similar claim in November 1997. “[T]he

date a grievant finds out an event or continuing practice was illegal is not the date for determining whethera grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989) (emphasis in original). (See footnote 3)

The Grievance Board has specifically held that "learning of the success of another employee's grievance . . . does not constitute discovery of an 'event' giving rise to a grievance." Pryor, et al. v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH- 341(Oct. 29, 1997); Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996) at 7. Grievants offer no reason for their delay in filing other than their belated discovery of a viable claim in the Livesay decision.

Two of the grievances require separate review because their factual situation is somewhat unique. Grievants Barthelemy and Rogers did not complete the OAP until July 10, 1998, by Respondent's account. They filed level one complaints on October 15, 1998. Respondent argues that these grievances are also untimely filed; however, these Grievants presented memos they received from T.D. Melton, Coordinator of Apprentices at the West Virginia Corrections Academy. In this document, Mr. Melton advised that "necessary processing to complete your upgrade to CO-II may take from 30 to 60 days. If you have any questions regarding your status after that period of time, feel free to contact the Academy or your facility business office for an update."

Grievant Barthelemy testified that on July 31, 1998, she spoke with Helen Clevenger, Business Manager, who advised her a salary increase could go through withinsixty days and to wait and see. Grievant Rogers testified that he also interpreted the memo to state that his increase could take sixty days to process. When no salary increase was forthcoming on their October 15, 1998, paychecks, Grievants began these proceedings. (See footnote 4)

Grievants' reason for the delay was reasonable. Unfortunately, even accepting their delay of sixty days based on the memo, the grievances were still untimely filed. The memo was dated July 10, 1998. Sixty days later would be approximately September 10, 1998. Any salary increase would have appeared on or before the September 15 paycheck. Grievants did not file at level one until thirty days later.

Because Respondent has proven the grievances were untimely filed, the merits of these cases need not be addressed.

Conclusions of Law

1. Timeliness is an affirmative defense which a respondent must establish by a preponderance of the evidence. Pryor, et al. v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-341(Oct. 29, 1997); Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996).

2. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based, or within days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of acontinuing practice giving rise to a grievance. W. Va. Code §29-6A-4(a).

3. Compliance with the statutory timelines for processing a grievance is not triggered by a grievant's discovery of a legal theory to support his or her claim or the success of another employee's grievance, but by the event or practice which is the basis of the grievance. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1; Pryor, supra; Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE- 507 (Apr. 26, 1996).

4. Untimely filing will defeat a grievance in which case the merits need not be addressed. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997).

5. Grievants knew of the events giving rise to their grievances more than ten days prior to the date upon which they initiated these proceedings.

6 6.

Grievants offered no viable reason for their untimely filings.

Accordingly, the 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 partymust 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: March 26, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Some Grievants were represented by Jack Ferrell of CWA, and Basil Legg, Esq. The remainder represented themselves. Respondent was represented by Charles Houdyschell, Jr., Assistant Attorney General.

Initially, forty-five employees from HCC filed at level four. Four additional Grievants were consolidated into the matter styled as Gragg, et al. v. Div. of Corrections, which became mature for decision upon receipt of Mr. Ferrell's post-hearing brief, on November 13, 1998. Although he signed the original complaint, a separate level four hearing was conducted for Grievant Randall Shreve on December 9, 1998. Shreve v. Div. of Corrections became mature on December 9, 1998, after the parties waived the opportunity to file post-hearing proposals. For administrative reasons, these matters were transferred to the undersigned in February 1999, and were consolidated with the related grievances of Barthelemy, and Rogers, which became mature on February 26, 1999, Hatton and Rise, which became mature on February 23, 1999, Channell, which became mature on February 19, 1999, and Currence which became mature on March 12, 1999.

Footnote: 2

Respondent properly raised the issue of timeliness at or before level two in those grievances which were filed after July 1, 1998.

Footnote: 3

W. Va. Code §18-29-4(a) is the companion statute to Code §29-6A-4(a) in the education grievance statute. The only difference in the provision allows education employees fifteen rather than ten days to initiate the grievance process.

Footnote: 4

Respondent pointed out that these Grievants already held the classification of COII, and the memo did not state they would receive an additional salary increase for completion of the OAP. Of course, Grievants' expectations were based on other sources.