THOMAS CHENOWETH,

Grievant,

v.

DOCKET NO. 99-CORR-152

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Thomas Chenoweth, a Correctional Officer at the Huttonsville Correctional Facility, filed the following grievance on March 19, 1999:

> Checked personnel file on March 17, 1999[,] and found that I had not recieved [sic] pay increase for completion of Apprenticeship Program. Attached - Copy of Apprenticeship Certificate - Grievance Board decision of officer Michael Livesay - Personnel Action Form 12/01/94 moved from COI to COII due to meeting minimum qualifications.
>
> Relief sought: Request 5% pay increase with back pay to November 15, 1995[,] with intrest[sic][,] completion date of apprenticeship program.

The grievance was denied at level one by Captain J. T. Murphy on March 19, 1999, and a level two decision by Deputy Warden Keith Weese on March 23, 1999, also denied the grievance. A level three hearing was conducted on April 6, 1999, and the grievance was denied by Grievance Evaluator, James J. Ielapi. Grievant appealed to level four on April 23, 1999, and a level four hearing was conducted in the Grievance Board's Elkins, West Virginia, office, on June 28, 1999. This matter became mature for decision on July15, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant appeared pro se, and the Division of Corrections ("Corrections") was represented by Charles Houdyschell, Jr., Assistant Attorney General. (See footnote 1)

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Certificate of Completion of Apprenticeship Program of Thomas Chenowith, dated November 15, 1995.

Ex. 2 -

WV-11 Personnel Action Form for Thomas Chenowith, effective, December 1, 1994.

Ex. 3 -

Grievance Board Summary, Livesay v. W. Va. Dept. of Corr., Docket No. 96-CORR-459 (Nov. 4, 1997).

Level Three Corrections' Exhibit

Ex. 1 -

March 30, 1999 letter from Charles Houdyschell, Jr., to All Wardens, Administrators and Grievance Evaluators.

Level Four Grievant's Exhibits

Ex. 1 -

Settlement Agreement between Diana Miller and Corrections, dated February 17, 1998.

Ex. 2 -

WV-11 Personnel Action Form for Thomas Chenowith, effective December 1, 1994.

Testimony

Grievant testified in his own behalf. Corrections presented no additional testimony.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed as a Correctional Officer at Huttonsville Correctional Center.

2. Since 1994, all Correctional Officer Is employed by Corrections have been required to complete an Apprenticeship Training Program (OAP), which consists of two years (4,000 hours) of on-the-job training and 400 hours of related studies.

3. Effective April 1, 1998, Corrections adopted Policy Directive 442.00, which establishes procedures for the administration and management of the OAP.

4. Policy Directive 442.00 provides, in Section 2.02, as follows:

> The Director of the Academy shall request a Certificate of Completion of Apprenticeship from the [U.S. Department of Labor] upon the officers['] completion of the program. This certificate shall be the basis for initiating a process to reallocate the journeyman Correctional Officer I to the classification of Correctional Officer II.
>
> **Additional pay or promotion shall not be effective until compliance with the following:**
>
> **1. Proof of completion of Apprenticeship Program (Certificate)**
>
> **2. Submission and final approval of a West Virginia Personnel Action Form WV-11.**

(Emphasis added).

5. Grievant was reallocated from Correctional Officer I to Correctional Officer II during the statewide reclassification project, effective December 1, 1994, and received a commensurate 5% pay increase at that time.

6. Grievant received his Certificate of Completion of the OAP from the U.S. Department of Labor on November 15, 1995. 7. Grievant did not receive a 5% pay increase following completion of the OAP.

8. Lt. Diana Miller completed the OAP in April 1994, and Corrections submitted a WV-11 Personnel Action Form, effective April 1, 1998, which paid her retroactively for completing the program, back to April 1, 1994, as a result of a Settlement Agreement dated February 17, 1998.

DISCUSSION

In a non-disciplinary matter, Grievant must prove the allegations of his complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). Grievant contends he should have received a 5% salary increase effective on the date he completed the OAP, November 15, 1995. Corrections argues that Grievant received a 5% pay increase when he was reallocated from COI to COII in 1994. Corrections contends that the 5% pay increase associated with completion of the OAP occurs because of the promotion from COI to COII, not merely because of the completion of the OAP. Consequently, Corrections argues, Grievant already received his 5% pay increase associated with promotion in 1994, and is not entitled to another 5% pay increase simply because he completed the OAP.

Additionally, Corrections asserts that this grievance is untimely filed. Timeliness is an affirmative defense which the employer must establish by a preponderance of the evidence. Hundley v. W. Va. Div. of Corrections, Docket No. 98-CORR-218 (Sept. 2, 1998). Furthermore, a 1998 amendment to W. Va. Code §§ 29-6A-1, et seq, provides that the employer must raise the timeliness defense at or prior to a level two hearing, or thatdefense is deemed waived. W. Va. Code § 29-6A-3(a)(2) (1998). (See footnote 2) The level two decision dated March 23, 1999, from Keith Weese, Deputy Warden, asserts the grievance is not timely submitted. Thus, Corrections has complied with the amended statute and must prove its timeliness defense by a preponderance of the evidence.

A grievant must bring his claim within 10 days of the date that he became aware of the facts giving rise to the grievance. W. Va. Code § 29-6A-4(a); Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Moreover, facts that give rise to the claim cannot be the learning of a similarly situated party prevailing on his claim. Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999); Pryor v. W. Va. Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997). Rather, the time begins when the Grievant learns of the facts. In this case the operative facts are (1) the completion of the OAP; and (2) alleged failure to receive the 5% pay increase. The record

indicates that Grievant was aware of his claim for a 5% pay increase in November 1995. Grievant was paid twice monthly with check stubs indicating his rate of pay. Grievant was on notice that he did not get an additional 5% pay raise. Further, Grievant was aware of a grievance filed by a large number of officers at the Huttonsville Correctional Center on this same issue, and he did not join, or file his own grievance, at that time. See Gragg, supra. Additionally, Grievant claimed he was informed at a level three hearing that the pay raise was granted for the unrelated grievance, yet he waited more than 10 days from that hearing to file hisgrievance on this issue. Hundley, supra. Corrections has established that this grievance was untimely filed, and Grievant offered no legal defense for his delay in filing.

CONCLUSIONS OF LAW

1. A grievant must bring his claim within 10 days of the date that he became aware of the facts giving rise to the grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).
2. Grievant was aware of the fact that he did not receive a 5% pay increase following completion of the OAP in November 1995, but did not file this grievance until March 1999. Therefore, this grievance is untimely filed.
3. Grievant offered no legal defense as to why his claim should be considered timely filed.

Accordingly, this 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 party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: August 3, 1999

Footnote: 1

This case was transferred to the undersigned on May 27, 1999, for administrative reasons.

Footnote: 2

The Grievance Board recognizes that there is not normally a level two hearing in cases involving Corrections, but only a conference.