KENNETH BOWLES,

Grievant,

v. DOCKET NO. 03-CORR-271

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Kenneth Bowles (Grievant) filed this grievance August 7, 2003, against his employer, the Division of Corrections/Mount Olive Correctional Complex (MOCC or Respondent). He stated:

> Written reprimand issued that falsely alleges abandonment of post that lead to not being allowed to interview for Administrative Services Manager. I then received notice that I was eligible to interview for Corrections Program Specialist Senior. MOCC failed to follow their own Policy Directive 132.00 Non-Correctional Officer Promotion Guidelines. Both applications were turned in at same time and date and both are higher pay grades. I received denial letter for Administrative Services Manager 1 within two days but received a letter with an interview time within two weeks for the Corrections Program Specialist Senior application being turned in. I feel that the reprimand was wrongly placed against me as well as being used to keep me from advancing in a particular job.

As relief, Grievant seeks, "Investigation and removal for written reprimand from all files with written verification upon the completion of this task and the right to interview for the Administrative Services Manager I position."

After being denied at all lower levels, a level four grievance hearing was held October 22, 2003, at the Grievance Board's Charleston office. Grievant representedhimself, and Respondent was represented by counsel, Charles Houdyschell, Jr., Assistant Attorney General. The parties agreed to submit their proposed findings of fact and conclusions of law by November 14, 2003, whereupon the matter became mature for decision. (See footnote 1)

Based upon a preponderance of the evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a computer and communications system administrator. His immediate supervisor is Associate Warden for Administration Stacy Thomas.

2. On Friday, January 17, 2003, Grievant had a disagreement with Ms. Thomas regarding her denial of his request to purchase manuals needed to help set up some new computers.

3. Grievant went to Ms. Thomas' office, where the two had a heated discussion, in which Grievant lost his temper and told Ms. Thomas he quit, gave her his radio and identification, told her, "[F***] this, I don't need this," and left.

4. On the way out of the building, he threw his pager at the receptionist, stopped to phone his assistant, then went back to apologize to the receptionist and give her his keys. He then left the facility and went home.

5. The following Monday, Grievant's assistant called him and said the Warden wanted him to call. Grievant called and the Warden asked him to call Ms. Thomas andwork things out, so he could come back to work. Grievant called Ms. Thomas, and they agreed Grievant would return to work, and she would consider it as if he never left. Grievant asked if he would be reprimanded, and Ms. Thomas told him she did not know. Grievant expected to be reprimanded.

6. Grievant used annual leave to cover the portions of January 17 and January 21 that he was away from work, at Ms. Thomas' direction.

7. Ms. Thomas then met with Deputy Warden Michael Coleman, who told her she should issue a reprimand for Grievant's conduct. On January 28, 2003, she did so. The reprimand cited portions of MOCC Operational Procedure 1.28 and stated the specific offenses as leaving his assigned post without approval of his supervisor, and insubordination.

8. The reprimand explicitly referred Grievant to the Education and State Employee Grievance Procedure, W. Va. Code § 29-6A-1 *et seq.*, as the method of appealing the disciplinary action.

9. Grievant spoke with Mr. Coleman after he received the reprimand, but did not file a grievance. Mr. Coleman said he would look into the matter, but did not promise a resolution and did not instruct Grievant not to file a grievance. He did say it would be possible to remove the reprimand, but it was too soon to do so.

10. Division of Corrections Policy Directive 132.00 renders an employee ineligible for

promotion for two years from the date of a written reprimand or more serious disciplinary action.

11. Grievant knew of this policy, and applied for several jobs with the intent of being turned down, so he could file a grievance regarding his reprimand. For one position,he was denied an interview because of the existence of his reprimand. For another, he was mistakenly scheduled for an interview, but was not interviewed after further review of his file revealed the reprimand.

12. Respondent asserted this grievance was untimely filed at levels two, three and four. At the level three hearing, Grievant admitted the grievance was untimely filed.

DISCUSSION

___The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent has asserted that this grievance is untimely, which also burdens it with the proof of this assertion. 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. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

A grievance must be filed with the immediate supervisor of the grievant “[w]ithin 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 ofthe most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code § 29-6A-4(a). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).

Given the seven-month period between the reprimand and the filing of this grievance, and Grievant's own admission that this grievance was untimely, Respondent has met its burden of proof. Grievant offered no excuse for his failure to timely file, other than his attempt to work the matter out

with Mr. Coleman. However, he also testified he knew by May, 2003, the reprimand would not be rescinded. He spoke to an attorney, who advised him to apply for positions in order to bring the reprimand back into play so he could grieve it. Unfortunately, this was very bad advice, as these job denials did not render the reprimand a new grievable event. Grievant is not arguing a misapplication of Policy Directive 132.00, or that this policy is invalid. Instead, he argues he should not have been reprimanded for insubordination because at the time he left used insubordinate language and left his post, he had said, "I quit," and was therefore no longer an employee. Even if his grievance had been timely filed, this specious argument would not have prevailed.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, DocketNo. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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. Heckler v. Randolph County Bd. of Educ., Docket No. 97- 42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997)

3. Grievant filed this grievance challenging his reprimand more than ten days after he was unequivocally notified of the reprimand, and that it would not be rescinded. It is untimely.

For the foregoing reasons, this grievance is hereby **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, and 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.

Date: November 25, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

No brief was received from Grievant.