**JAMES MARCUM,**

**Grievant,**

**v.** **DOCKET NO. 04-ADJ-005**

**DEPARTMENT OF MILITARY AFFAIRS**

**AND PUBLIC SAFETY/ ADJUTANT**

**GENERAL'S OFFICE,**

**Respondent.**

## DECISION

Grievant James Marcum filed this grievance against the Department of Military Affairs and Public Safety/Adjutant General's Office (Respondent) on January 6, 2004, stating: “Wrongful discharge from my job as a state employee.” Grievant stated the relief sought as: “Re-instatement as a state employee in a position at my previous pay rate.”

The grievance was filed directly at level four, and a hearing was held in the Grievance Board's Charleston office on March 5, 2004. Grievant appeared *pro se*, and Respondent was represented by counsel, Lt. Col. James Barber. This matter became mature for decision at the close of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence adduced at the hearing, I find the following material facts have been proven:

## FINDINGS OF FACT

1. Respondent terminated Grievant from his employment as a firefighter effective September 30, 2003. Grievant's work location was the 130th Airlift Wing Fire Protection Unit, in Charleston.

2. The sole reason for Grievant's dismissal was his medical disqualification from the West Virginia Air National Guard (WVANG). Military membership is a prerequisite qualification for Grievant's former position.

3. Grievant filed this grievance directly at level four on January 6, 2004.

4. Bernard Settle worked at the 130th base fire department as an Assistant Chief, and retired from the WVANG and his position at the fire department when he reached the mandatory retirement age of 60. He was subsequently employed by the federal government in a temporary position as a civilian "technical advisor," and was assigned by his employer to the base fire department in that capacity. He is not now a firefighter. Grievant learned of this January 2, 2004, but mistakenly assumed Mr. Settle had been rehired by Respondent as a firefighter.

5. In a policy memorandum dated May 7, 2003, Adjutant General Allen E. Tackett ordered, "It is the policy of this department that all firefighters and security forces at the Charleston and Martinsburg air bases be members of the WVANG." He further stated that waivers may be granted "in extraordinary cases." Grievant's Exhibit No. 1.

6. On February 26, 2003, in anticipation of his upcoming medical disqualification from the WVANG, Grievant sent a letter to the Adjutant General requesting a waiver of the military membership requirement for his firefighter position. Grievant was notified that he had been medically disqualified from the WVANG on April 24, 2003. On May 30, 2003,Grievant was told in a meeting with his supervisor that a waiver would not be granted, and was offered another position outside the fire department as a building mechanic.

DISCUSSION

Respondent filed a motion to dismiss this grievance on the grounds that it was untimely filed. 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. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-060 (July 16, 1997). "An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." Lynch, *supra*. 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 of the most recent occurrence of a continuing practice giving rise to a grievance. . . .” W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified

of the decision being challenged. Seifert, *supra*. *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).

Respondent asserts that this grievance should have been filed no later than October 10, 2003, and although this assertion confuses calendar days with "days" as defined by the grievance procedure, the grievance was in fact filed almost three months later. Grievant argues that he did not discover the basis of his grievance until January, 2004, when he learned Mr. Settle had been hired despite his civilian status, and therefore his filing is permitted by the discovery rule. “W. Va. Code, [§] 29-6A-4(a). . . contains adiscovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance.” Barthelemy v W. Va. Div. of Corrections, Pruntytown Correctional Center, 207 W. Va. 601; 535 S.E.2d 201 (2000).

Grievant knew of every fact upon which his termination was based prior to his actual termination. He was notified in writing that he would be terminated on September 25, 2003, and was actually terminated effective September 30, 2003. Leading up to his termination letter, Grievant was kept informed of the decision-making process, and had several meetings with his superiors, so the termination did not come as a surprise. He knew of the Adjutant General's Policy Memorandum dated May 7, 2003, that requires firefighters and security forces at the Charleston air base to be members of the WVANG. As early as February, 2003, he was attempting to obtain a waiver of the WVANG-membership requirement from the Adjutant General. He knew the both the reason for his upcoming termination and the fact that he had been denied a waiver long before the actual end of his employment.

The discovery rule applies to the discovery of the "event upon which the grievance is based." What Grievant discovered in January, 2004 was not the grievable event or even evidence supporting his grievance, but instead was an event that happened after Grievant was terminated, that he wishes to use to support a new legal theory by which to challenge his termination. Further, the event he "discovered" did not actually happen -- Grievant's belief that Mr. Settle had been rehired by Respondent as a firefighter was false.

Grievant's filing is clearly untimely, and therefore the merits of his case need not be addressed.

Even if Grievant were permitted to proceed on the merits of his case, he could not prevail. His

claim is based on a mistake of fact, that Mr. Settle was rehired by Respondent. Mr. Settle was not rehired by Respondent, but by the federal government, an entity over which this Grievance Board has no jurisdiction and over which Respondent has no control. Too, Mr. Settle was not rehired as a firefighter and has no firefighting duties, contrary to Grievant's claim. Grievant presented no law or policy establishing his right to be employed in his former position without military membership, absent a waiver that is only granted in "extraordinary circumstances." Lastly, Grievant was unable to establish that any similarly- situated employees of Respondent had been retained as civilian employees.

The following conclusions of law support this decision.

CONCLUSIONS OF LAW

1. 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 of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." W. Va. Code § 29-6A-4(a). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Seifert, *supra*. *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).

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. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-060 (July 16, 1997). 3. "An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." Lynch, *supra*.

4. "W. Va. Code, [§] 29-6A-4(a) . . . contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Barthelemy v W. Va. Div. of Corrections, Pruntytown Correctional Center, 207 W. Va. 601; 535 S.E.2d 201 (2000).

5. The filing of this grievance was untimely, and was not tolled by the discovery rule.

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, and such appeal must be filed within thirty 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: March 23, 2004**

**M. Paul Marteney**

**Administrative Law Judge**