BRANDON JONES,

Grievant,

v. DOCKET NO. 03-CORR-379

DIVISION OF CORRECTIONS/

ST. MARYS CORRECTIONAL CENTER,

Respondent.

DECISION

On May 30, 2003, Grievant filed a grievance against his employer, claiming he was working in a hostile working environment due to an incident that occurred August 29, 2002, between Grievant and his supervisor.

As relief, Grievant sought, among other things, an outside investigation of the incident, paid administrative leave during the investigation including 24 hours of overtime per pay period, protection from harm and retaliation for himself and any witnesses, return of sick and annual leave, payment of medical expenses, payment “for being forced to work under these conditions,” transfer to a new position including a step up in rank and at least a 20% raise, and removal of his supervisor from his position. At the beginning of the level four hearing, Grievant clarified that there is no relief he is currently seeking and that he simply wants to make a record of the incident he complained to ensure he is not retaliated against. Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on April 20, 2004. Grievant was represented by Captain Steven Berryman. Respondent was represented by counsel, John Boothroyd, Assistant Attorney General. The matter became mature for decision May 20, 2004, the deadline for submission of the parties' fact/law proposals.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Sergeant at St. Marys Correctional Center.

2. On August 29, 2002, Grievant, who at the time was a corporal, was involved in an incident with his supervisor that Grievant believed to have been harassment. After Grievant refused to obey a direct order, Grievant's supervisor shoved past Grievant in a doorway, making physical contact with Grievant and pushing him out of the way.

3. Grievant has not since been subjected to any further incidents of harassment from his supervisor, and has not since felt threatened or intimidated, and has not been subjected to retaliation.

4. Grievant no longer seeks the relief he asked for in his grievance filing, but simply wants to make a record of the events.

5. Respondent asserted this grievance was untimely at levels two and three.

DISCUSSION

"An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." *Lynch v. W. Va. Dep't of Transp./Div. ofHighways*, Docket No. 97-DOH-060 (July 16, 1997). Respondent objected to consideration of this grievance on the basis that it was untimely filed. The incident Grievant complains about occurred August 29, 2002, but the grievance was not filed until May 30, 2003. Grievant testified there has been no ongoing harassment. 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*, *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). This grievance was filed well beyond the ten-day time limit, and Grievant has not raised the issue of a continuing practice or proffered any excuse as to why he did not timely file. He stated that the matter had been resolved to his satisfaction shortly after he filed an incident report, and he currently has "a very wonderful working relationship" with his supervisor, who Grievant says has gone out of his way to be the best supervisor he can.

This grievance is an excellent example of a gross abuse of the grievance process. Grievant has no claim to make, and has been informed at every level that, even if he did, he is not entitled to the grievance process because he sat on his right to file for almost a year. Nevertheless, he has pursued his non-claim through every level of the process, wasting the time and resources of his employer and the Grievance Board. He testified at level four that he simply wanted to prevent further harassment and retaliation, but that inall the time since the original incident he complains of, he has not been subject further to anything he considers harassment. Despite his exploitation of the grievance process, his filing of an Equal Employment Opportunity complaint and even a criminal complaint against his supervisor, he has not been subject to any retaliation, and has even been promoted. The merits of this grievance will not be considered.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. 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).

2. 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).

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. Respondent proved this grievance was untimely filed.

For the foregoing reasons, 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, 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: May 26, 2004

M. Paul Marteney

Administrative Law Judge