LESLIE HARPER,

Grievant,

v. DOCKET NO. 05-CORR-076

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant Leslie Harper filed a grievance on February 2, 2005, in which he stated, “This grievance is being brought due to the disparate treatment concerning Employee Performance Appraisal on January 24, 2005.” As relief, he is seeking to have the performance appraisal “pulled from file (all files) and to be reviewed and done over, because the rating period should start on August 1, 2004. The appraisal is not correct.” Mr. Harper also stated that his supervisor discussed his performance appraisal in front of other coworkers, and assigned him an unreasonable amount of work, which necessarily affected his performance. He requested as additional relief that he be assigned to another unit, and that a settlement agreement for a prior grievance was breached when he was assigned to his supervisor's unit.

At level three, the relief requested by Grievant was granted, with the exception of his reassignment from the supervision of William Kincaid, his current supervisor. At level four, this was the only issue. A level four hearing was held in the Grievance Board's office on April 1, 2005. Grievant was represented by William Fruit, and Respondent was represented by counsel, Charles Houdyschell, Assistant Attorney General. The matter became mature for decision on April 29, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

At issue is whether Grievant's challenge to being assigned to the supervision of William Kincaid, on the grounds that it violates a prior settlement agreement, is untimely.

Based on a preponderance of the evidence adduced at the hearing, I find the following material

facts have been proven:

Findings of Fact

1. Mr. Harper is employed by Respondent at Mount Olive Correctional Complex as a Correctional Counselor 2.

2. In 2002, Grievant agreed to a settlement of a grievance, then at level three of the grievance procedure, in which he would be removed from a unit supervised by William Kincaid.

3. In August, 2004, Grievant was nevertheless reassigned to a unit with Mr. Kincaid as his supervisor.

4. Respondent asserted at level two, three and four that this part of the grievance was untimely.

Discussion

Although this is a non-disciplinary grievance in which Mr. Harper would ordinarily bear the burden of proof, Respondent has asserted that his claim is untimely. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by apreponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 1)

A grievance shall be filed within the times specified in [W. Va. Code § 29-6A-4] and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment. (See footnote 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. . . ." (See footnote 3)

Mr. Harper never placed in evidence the settlement agreement on which he bases his grievance claim, although Respondent does not dispute it called for Mr. Harper to be reassigned to a supervisor other than Mr. Kincaid. Mr. Harper was reassigned, but in August 2004 Respondent placed him back in a unit under Mr. Kincaid's supervision. Mr. Harper did not complain then, and made no complaint

until February, 2005, when he filed this grievance, because he felt Mr. Kincaid had given him an unfair performance evaluation. (See footnote 4) The delay in filing the grievance was unexplained by Grievant, althoughRespondent amply evidenced that it was untimely by almost six months. "An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." *(See footnote 5)*

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 shall be filed within the times specified in [W. Va. Code § 29-6A- 4] and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article is the maximum number of days allowed . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment. W. Va. Code § 29-6A-3(a)(1).

3. 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). 4. This grievance was filed well in excess of ten days after the event upon which it was based, the purported violation of the settlement reached in Mr. Harper's prior grievance.

5. "An untimely filing will defeat a grievance, and it is necessary to resolve that issue before addressing the merits of the grievance." *Lynch*, *supra*.

6. Respondent has met its burden of proving this grievance is untimely, and Grievant has failed to show cause why the untimely filing should be excused.

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.

June 3, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

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).

Footnote: 2

W. Va. Code § 29-6A-3(a)(1).

Footnote: 3

W. Va. Code § 29-6A-4(a).

Footnote: 4

Grievant was rated 1.83, "meets expectations."

Footnote: 5

Lynch, supra.