CARROLL STEVEN FINCHAM,

Grievant,

v. Docket No. 05-CORR-400

DIVISION OF CORRECTIONS/

HUTTONSVILLE CORRECTIONAL CENTER and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Carroll Steven Fincham ("Grievant"), employed by the Division of Corrections ("DOC") as a correctional officer at the Huttonsville Correctional Center, filed a level one grievance on September 13, 2005, in which he stated:

On June 27th 2002, I suffered a critical head injury during a Division of Corrections training class at Huttonsville Correctional Center. Due to this injury I was absent from work for 3 months under Doctor's care. During these 3 months I was off work on Workers' Compensation, but I received no credit for years of service and I also did not receive any annual leave credit during this time period. Due to a recent Supreme Court ruling, just called to my attention on Sept. 10th 2005, concerning "Canfield, et al. verses West Virginia Division of Corrections case #32287, the Supreme Court ruled that the Division of Personnel policies and rules prohibiting employees from accruing credit for years of service and annual leave while receiving Temporary Total Disability violated the equal protection clause of the West Virginia Constitution.

For relief, Grievant requested three months credit for years of service and an additional forty-two hours of annual leave he would have accrued if not on temporary disability, and attorney fees. The grievance was denied at level one. The grievance was denied at level two in part based upon timeliness. Following a hearing at level three, DOC granted a Motion to Dismiss filed by the Division of Personnel ("DOP"). The grievance was appealed to level four on October 28, 2005. DOC filed a "Motion to Dismiss" under cover letter dated November 23,

2005. A conference call was conducted on December 12, 2005, to allow the parties an opportunity to address the Motion. Grievant represented himself,Charles Houdyschell, Esq., appeared for DOC, and Karen O'Sullivan Thornton, Assistant Attorney General represented DOP. All the parties waived the opportunity to file any additional argument, summary, or proposals at the conclusion of the call.

The following facts are not in dispute.

Findings of Fact

1. Grievant has been employed by DOC as a correctional officer at all times pertinent to this grievance.

2. Beginning June 27, 2002, Grievant was off work receiving Workers' Compensation benefits.

3. Grievant did not receive years of service credit or accrue leave while he was absent from work due to a Temporary Total Disability, consistent with DOP policy in effect at that time.

4. In July 2005, the West Virginia Supreme Court determined that DOP policies which prohibited employees on Workers' Compensation from accruing credit for years of service and annual leave violated the equal protection clause of the West Virginia Constitution. Canfield, et al. v. W. Va. Div. of Corr. and W. Va. Div. of Personnel, 617 S.E.2d 887 (W. Va. 2005). The Court did not indicate that the ruling was to be applied retroactively.

5. Grievant filed this complaint on September 13, 2005, shortly after learning of the Canfield, supra, decision.

6. The issue of timeliness was properly raised at levels two and three.

Discussion

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96- DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley,

et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-445 (July 28, 1997). 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). As an untimely filing may defeat a grievance, it is necessary to address whether Grievant timely filed his grievance at level one.

W. Va. Code § 29-6A-4(a) provides:

At the request of the grievant or the immediate supervisor, and within ten days following the occurrence of the event uponwhich 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, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Grievant concedes that he filed this grievance after learning that other employees had prevailed on the issue in Canfield, supra. The Grievance Board has repeatedly held that it is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines. Childers v. Dep't of Health and Human Res., Docket No. 98-HHR-447 (Feb. 24, 1999); Galloway v. Dep't of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Stratton v. Mingo County Bd. of Educ., Docket No. 97-29- 387 (Oct. 21, 1997); Edwards v. Clay County Bd. of Educ., Docket No. 96-08-064 (July 9, 1996). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Grievant knew that he did not accrue seniority or leave time in 2002, therefore, this grievance is untimely.

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. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). 2. A grievance must be initiated within 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. The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, 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). Grievant knew that he would not accrue seniority or leave time in 2002. 4. This Grievance Board has repeatedly held that it is not the discovery of a legal theory, but the event or practice which is the basis of the grievance, that triggers the statutory time lines. Childers v. Dep't of Health and Human Resources, Docket No. 98- HHR-447 (Feb. 24, 1999); Galloway v. Dep't of Banking, Docket No. 98-DOB-167 (Sept.22, 1998); Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997); Edwards v. Clay County Bd. of Educ., Docket No. 96-08-064 (July 9, 1996). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

5. Grievant's failure to file this grievance until September 2005, renders his grievance untimely.

Accordingly, the Motion to Dismiss is GRANTED.

Any party or the West Virginia Division of Personnel may appeal this decision to theCircuit 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.

DATE: DECEMBER 22, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE