STEPHEN HAMRICK,

Grievant,

v. Docket No. 04-CORR-426

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

Stephen Hamrick ("Grievant") initiated a grievance on October 20, 2004, challenging his removal from the canine unit at Huttonsville Correctional Center ("HCC"). After denials at level one and two, a level three hearing was conducted on November 23, 2004. Subsequently, the grievance was denied in a decision dated November 29, 2004. Grievant appealed to level four on December 6, 2004.

On January 3, 2005, Respondent filed a motion to dismiss this grievance due to untimeliness. Accordingly, a telephonic hearing was conducted by the undersigned on January 21, 2005, to address that issue. Grievant represented himself, and Respondent was represented by counsel, Charles Houdyschell Jr.

The following facts have been proven by a preponderance of the evidence contained in the lower level record and as adduced during the telephonic hearing.

Findings of Fact

1. Grievant has been employed by the Division of Corrections ("DOC") as a correctional officer since approximately 2001.

2. In May of 2002, Grievant was accepted for training as a canine handler. Aftercompletion of a training course at Pruntytown Correctional Center, Grievant was to be assigned to the canine unit at HCC.

3. In August of 2002, Lt. Steven Buzzard, who was in charge of Grievant's training, contacted Grievant's supervisor at HCC, J.T. Murphy. It was recommended that Grievant be removed from the canine training program, because Lt. Buzzard did not believe Grievant had the personality to become a canine handler.

4. Grievant met with his supervisor in August of 2002 and was advised of this recommendation and agreed to voluntarily leave the program, rather than being removed. 5. In August of 2002, Grievant knew that there was a grievance procedure for state employees, he knew of other DOC employees who had filed grievances, and he had attended a grievance procedure training session.

6. Grievant decided to file a grievance challenging his removal from the canine program in October of 2004, after researching his employee handbook.

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 Pub. 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).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. 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. Whalen v. Mason County Bd. of Educ., Docket No. 97-26-234 (Feb. 27, 1998); Kessler v. W. Va. Dep't of Transp., 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). This grievance was obviously not filed within the ten-day time frame, and was, in fact, filed over two years after Grievant's removal from canine training.

Grievant's explanation for his significant delay in filing was that he was a relatively new employee

in 2002 and did not fully understand his rights. However, he admitted that he received a “brief” grievance training session at the beginning of his employment, and he knew other employees who had filed grievances. He ultimately filed this grievance in 2004 after cleaning out a closet, finding his evaluations from the canine training program, and investigating whether or not his removal was appropriate. The West Virginia Supreme Court has recognized a “discovery rule” which will toll the time limitations for filing grievances. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). Spahr determined an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. *See* , *e.g* ., Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Res., Docket No. 98-HHR-092 (July 27, 1998). The discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, doesnot constitute discovery of an "event" giving rise to a grievance within the intent of W. Va. Code § 18-29-4 as interpreted in Spahr. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03-DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95- DOE-507 (Apr. 26, 1996). The same analysis applies to grievances filed under W. Va. Code §§ 29-6A-1, *et seq.*

Grievant has failed to prove that the discovery exception applies to his situation. He knew of the grievable event, which was his removal from canine training, in August of 2002 when it occurred. He only filed a grievance over two years later after conducting research and becoming more familiar with the grievance process. As stated above, discovery of a theory which supports a grievance is not sufficient cause for tolling the grievance time requirements. Accordingly, this matter must be dismissed.

The following conclusions of law support this decision.

Conclusions of Law

1. 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 Pub. 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). 2. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a).

3. An employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). *See* , *e.g* ., Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dep't of Health & Human Res., Docket No. 98-HHR-092 (July 27, 1998).

4. The discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance. Parkins v. W. Va. Dep't of Environ. Protection, Docket No. 03- DEP-156 (Sept. 17, 2003); Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996).

5. Grievant knew of the events giving rise to this grievance in August of 2002, and his filing of the grievance in October of 2004 was untimely.

Accordingly, this grievance is **DISMISSED.**

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." 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 suchappeal 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: January 26, 2005 _____

DENISE M. SPATAFORE

Administrative Law Judge