**KAREN STEWART,**

**Grievant,**

**v.**

**DOCKET NO. 04-CORR-430**

**DIVISION OF CORRECTIONS/STATEMENT.**

**MARYS CORRECTIONAL CENTER.**

# D E C I S I O N

Grievant, Karen Stewart, filed this grievance against her employer, the West Virginia Division of Corrections/Statement. Marys Correctional Center ("Corrections") on October 14, 2004. Her Statement of Grievance reads: (See footnote 1)

> I feel Warden, [sic] William Fox and Associate Warden of Operations, Don Springston have violated Policy Directive 138.00, by not ensuring annual service ratings are complete. Mr. Springton's lack of interest, ability, and repeated violating of Policy Directive 139.00 and Operational Procedures 1.38A may have effected Ms. Stewart's career opportunities.
>
> Relief sought: To be made whole in every way in regards to the Associate Warden of Operation's [sic] inability to follow Policy Directive and Operational Procedures.

A Level II conference was held on November 3, 2004, and by Decision dated November 8, 2004, Deputy Warden Tony LeMasters found the grievance to be untimely filed, but as the grievance had merit he granted it anyway. He directed Mr. Springston to complete all outstanding evaluations.

At Level III, the Hearing Examiner sought clarification as to what Grievant was seeking as the grievance had been granted. Grievant indicated she wanted the grievance to be held as timely filed, requested an audit of all St. Marys Correctional Center merit increases, an investigation into Mr. Springston's credentials and competency to hold theposition, and a statement that she would have

received a merit increase if her performance evaluation had been completed on time. This grievance was denied at Level III. Grievant filed to Level IV on December 10, 2004. A pre-hearing conference was held on March 29, 2005, and Level IV hearing was held on April 4, 2005. Grievant was represented by David Ray, a co-worker, and Corrections was represented by Charles Houdyschell, Senior Assistant Attorney General. This case became mature for decision on April 15, 2005, after receipt of the parties' proposed findings of fact and conclusions of law.

## Issues and Arguments

At Level IV, this grievance appeared to have morphed into another grievance, and Grievant now wishes to have Mr. Springston disciplined, sent to a refresher course for supervisors, and for Mr. Springston's unprofessional behavior toward her to cease. She also wanted her salary to be increased to the same level as other supervisors in the facility. Grievant is paid within her pay grade.

Since there was no testimony on Grievant's current compensation as compared to other supervisors, and since the only requirement is that Grievant is to be paid within her pay grade, this issue will not be addressed. Grievant also wanted to add evidence at Level IV of her harassment grievance that had been settled, and as Corrections did not agree to allow Grievant to amend her grievance, this request was denied. Additionally, Grievant's allegation that she was not selected for a position with the Division of Highways because of her lack of performance evaluations was dropped.

Respondent asserts this grievance has been granted, and the issues now raised by Grievant are an attempt to bootstrap other issues to this grievance. It should be noted Grievant did not testify at either Level III or IV, accordingly, there was no testimony to support some of Grievant's allegations. Because the Level II Decision granted this grievance, the undersigned Administrative Law Judge has assumed Grievant's supervisor did not complete her evaluations in a timely manner. Since Grievant did not testify at any point about how she was treated by Mr. Springston, there is no data to support allegations of unprofessional treatment of her other than his failure to complete her evaluation in a timely manner. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievant has been employed as a Supervisor at St. Marys Correctional Center since

September 1998.

2. Grievant is classified as a Supervisor I and as such has received training on how to complete the performance evaluations. The performance evaluation policy requires the supervisor to complete an evaluation on a yearly basis, and to discuss the performance evaluation with the supervisee. The supervisee is to sign the performance evaluation after this discussion.

3. On September 15, 2004, Grievant checked her personnel file and found only one evaluation. She asked Mr. Springston for her performance evaluations, and of course they had not been completed.

4. Grievant was aware long before she checked her personnel file that she had not received evaluations on a yearly basis.

5. One month later, on October 14, 2004, Grievant filed this grievance. 6. There have been times when some Corrections supervisors have been lax in completing evaluations because there has been very little money for merit increases.

7. Since the facility opened seven years ago in 1998, there have been only five merit increases given, and these have been given to employees who have assumed additional responsibilities. (See footnote 2) There are 249 employees at the St. Marys Correctional Center.

8. Grievant has applied for, but has not been selected for several in-house positions. Grievant's lack of performance evaluations did not prevent her from receiving these positions. When one of the applicants does not have evaluations, all the evaluations are thrown out for all applicants and are not considered by the review board. Testimony, LeMasters at Level IV.

9. Mr. Springston did not perform the evaluations of his supervisees in a timely manner. He has now completed all the past evaluations of his supervisees, and has been counseled by Corrections. Grievant's performance evaluations are now up-to-date.

10. The Division of Personnel found Mr. Springston minimally qualified for the position he now holds. After this finding by Division of Personnel, Mr. Springston was selected by a Corrections review board.

11. As Grievant elected not to testify, there was little evidence to support her allegation Mr. Springston acted in an unprofessional manner toward her other than the failure to complete her evaluations in a timely manner.

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

**I. Timeliness**

Corrections contends this grievance was untimely filed as it was not initiated within the time frame contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis 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. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); 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 StateCollege, 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 timeliness issue is governed by the timelier set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> 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 . . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

In this case, Respondent demonstrated Grievant did not file within the required ten- day time period. Grievant, as a Supervisor, was aware that evaluations were to be done on a yearly basis, and that she had not received yearly evaluations. Even after she checked her personnel file on September 15, 2004, she did not file this grievance until a month later on October 14, 2004. Thus, Grievant has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner.

Grievant asserts Mr. Springston's failure to perform performance evaluations was a continuing practice and as such can be grieved at any time. This assertion is incorrect. The directions from the Division of Personnel are clear that performance evaluations are to be done on a yearly basis, and are to be discussed within certain time frames. Additionally, Corrections' policy directs the completion of these evaluations within certain time lines. W. Va. Code § 29-6A-4(a) provides for a "discovery rule," in that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Even if Grievant could demonstrate this was a continuing practice, she appears to assert she was unaware that she did not have these evaluations until she checked in September. Once she became "aware" she had a duty to file in a timely manner. This she did not do.

**II. Disciplinary action**

Grievant has requested disciplinary action be taken against Mr. Springston. The Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Education and State Employees Grievance Board. Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). This Grievance Board may award relief against the employer based upon conduct of which the employer is aware and, which it in effect, "condones." White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). "However, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992)." Rice v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-288 (Apr. 30, 1997). See Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999).

A decision concerning disciplinary action resides with the employer, and it is a management determination. "A grievant's belief that his supervisor's managementdecisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). See Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). Accordingly, the undersigned Administrative Law Judge is without authority to grant this requested relief.

As Grievant's Statement of Grievance stated, the issue was her supervisor's failure to complete timely evaluations. Since these evaluations have now been completed, this grievance is resolved. It appears Grievant now wants some form of compensation, either through a salary adjustment or a merit increase. Grievant has failed to meet her burden of proof and demonstrate this relief should be granted.

The above-discussion will be supplemented by the following Conclusions of Law.

## Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. This grievance was untimely filed.

3. Grievant was unable to provide an excuse for her untimely filing.

Accordingly, 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 are a party to such appeal andshould 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.

**JANIS I. REYNOLDS**

**ADMINISTRATIVE LAW JUDGE**

**Date: May 31, 2005**

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*Footnote: 1*

*Grievant's representative stated the lengthy attachment to the Statement of Grievance was not a portion of the original grievance.*

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*Footnote: 2*

*Warden LeMasters initially informed Grievant there had been no merit increases since the facility opened, as this was the information he had been given by the Human Resources Department. Later he found out he was wrong, and although he thought these increases had been salary adjustments, they had been put forward as merit increases. Additionally, after the Level II conference and decision, he recommended his secretary for a merit increase, and this recommendation was accepted.*