THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ROBERT RUCKER,

Grievant,

v. **Docket No. 06-DOH-330**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Robert Rucker ("Grievant"), employed by the Division of Highways ("DOH") as an Equipment Operator 2, filed a level one grievance on January 11, 2005, in which he alleged a violation of *W. Va. Code* § 29-6-10, and unspecified DOH policies and procedures, when he was not selected for a day-shift assignment. For relief, Grievant requests that all day shift positions be filled based on seniority. (See footnote 1) The grievance was denied at all lower levels, and appeal was made to level four on September 28, 2006. An evidentiary hearing was conducted in the Grievance Board's Westover office on January 10, 2007. Grievant appeared *pro se*, while DOH was represented by Barbara L. Baxter, Esq. The parties declined the opportunity to file post hearing proposals, and the grievance became mature for decision at the conclusion of the hearing.

The following facts have been derived from a preponderance of the credible evidence made part of the level four record.

Findings of Fact

1. Grievant has been employed by DOH since July 17, 1995, and has been classified as an Equipment Operator 2 at all times pertinent to this grievance.

2. DOH uses inmates from the state's correctional institutions as laborers. DOH employees

performing as crew leaders supervise the inmates. The use of inmates is limited to daylight hours.

3. During Snow Removal/Ice Control ("SRIC") season, from October 31 through April 15, DOH assigns employees to work on night crews, as well as the regular daytime work schedules.

4. In March 1998, Grievant presented a physician's statement explaining that due to his medical problems it would be in his best interest to terminate his duties supervising the inmates. Nevertheless, Grievant continued to occasionally supervise the inmates when needed. Grievant has not submitted a subsequent physician's statement releasing him to act as a full-time inmate supervisor. 5. Roger Setler, an employee scheduled to work the night shift, was moved to day shift for the remainder of SRIC season the week of November 29, 2004. Mr. Setler signed an agreement on March 10, 2003, to work as a Transportation Crew Chief, specifically for the purpose of supervising a crew of inmates.

6. Grievant filed this grievance on January 11, 2005, the day following his first night shift assignment.

7. DOH raised the issue of whether the grievance was timely filed at all three lower levels.

Discussion

Since level one, DOH has contended that this grievance was not filed in a timely fashion. 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; *Buck v. Wood County Bd. of Educ*., Docket No. 96-54-325 (Feb. 28, 1997).

W. Va. Code § 29-6A-4(a) provides:

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 grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be

held to discuss the grievancewithin 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. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

DOH argues that the time frame for filing this grievance began on November 29, 2004, when Mr. Setler was assigned to day shift. Grievant responds that he had been hospitalized from November first through the tenth, and was not released to return to work until December 5, 2004. Grievant further asserts that January 10, 2005, was the first time he worked a night shift, and believes that constituted the grievable event.

Because the issue is whether Grievant should have been assigned to day shift rather than Mr. Setler, the assignment itself constituted the grievable event, not the date Grievant first worked the night shift. Although his time on sick leave extended Grievant's time frame to file the grievance, he still delayed filing for approximately one month after he returned to work. For this period of time, Grievant offers no explanation other than his misunderstanding of what constituted the grievable event. Therefore, DOH has proven the grievance was untimely filed.

Although the grievance was not timely filed, some discussion of the merits may assist in clarifying what appears to be a general misunderstanding among DOH employees regarding assignments being based on seniority. Grievant relies on *W. Va. Code* § 29-6- 10(4), which provides in part:
For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increasein salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective

employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be.

On February 20, 2004, then-DOH Secretary/Commissioner Fred VanKirk issued a “Statement on Seniority” in which he advised the phrase “any benefit” as used in the above-referenced statute was to be construed broadly. As such, he cautioned that when two or more employees are substantially equally or similarly qualified, seniority must be considered.

In the present grievance, Grievant was not similarly qualified to Mr. Setler. Grievant had presented a doctor's statement exempting him from supervising inmates. By comparison, Mr. Setler had agreed to work with the inmates. Employees who supervise inmate work crews must be assigned to day shift. Although Grievant indicated at the level four hearing that he might again be amenable to working with inmates, a doctor's statement releasing him for such an assignment is necessary. Under these circumstances, Grievant has not established a valid basis for obtaining the relief he seeks, either that he be placed in the assignment currently held by Mr. Setler, or that shift assignments be determined solely on the basis of seniority.

Consistent with the foregoing findings of fact and discussion, the following conclusions of law are made in this matter.

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).

2. 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. *W. Va. Code* § 29-6A-4(a).

3. DOH has proven that Grievant did not file at level one within the statutory time frames.

4. Grievant failed to demonstrate a proper basis to excuse his failure to file in a timely manner.

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." 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. Theappealing 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: FEBRUARY 28, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant was the only one of thirteen level three grievants who advanced to level four.