THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ZACHARY HILL,

Grievant,

v. DOCKET NO. 2008-1013-MAPS

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL

COMPLEX,

Respondent.

DECISION

Grievant filed this grievance on January 1, 2008, stating, "[Mount Olive Correctional Complex] Supervisors and Senior Management violated operational procedure # 1.21 and WV DOC policy directive # 129.08 when said supervisors approved and then cancelled the previously approved leave." His stated relief sought is "In order to remedy this heinous act, I am requiring a monetary disbursement of $28,000 to compensate my time that was taken, that was to be spent with my family during the holidays." At the level three hearing, Grievant amended his relief sought by reducing his monetary demand to $9,000.00.

A level three hearing was held in the Grievance Board's Charleston office on October 2, 2008. Grievant appeared *pro se*, and Respondent was represented by counsel, Charles Houdyschell. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Synopsis

Respondent had approved a one-day leave request for Grievant, then mistakenly rescinded the approval when it "bumped" him in favor of a more senior employee. However, Grievant knew of the schedule change 17 days prior to his filing of the grievance, so his grievance is denied as untimely.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant was employed by Respondent at Mount Olive Correctional Complex (MOCC) as a Corporal.

2. Sometime in January 2007 Grievant submitted a leave request for December 23, 2007. It is normal procedure to request leave that far in advance for time around the holidays.

3. Grievant received no notice that his request was granted or denied until the Approved Annual Leave Roster was posted on November 25, which roster showed his leave had been approved.

4. On December 4, 2007, Grievant noted that the leave roster had been changed, and he was then scheduled to work on December 23, while Jane Stover was instead granted leave on that day.

5. Grievant worked as usual on December 23, and was paid for his time.

6. In the month of December 2007, the 24th was a half-day holiday, the 25th was a holiday, and the 31st was a half-day holiday. January 1, 2008, was a holiday.

7. The schedule change was made because Ms. Stover was newly added to the shift roster from another shift, and was entitled to “bump” a less senior employee because she also had previously approved leave for the same day. 8. Whomever made the schedule change mistakenly allowed Ms. Stover to bump Grievant. There was another employee on the shift, Buck Coleman, with even less seniority who should have been bumped instead.

9. Although Grievant was aware on December 4 of the change in schedule and that Mr. Coleman was also approved for leave that day, he claims he was not aware until sometime later that Mr. Coleman had less seniority than him. Grievant did not know what date he learned of the seniority issue.

10. Respondent asserted at levels one and two that this grievance was untimely.

11. Respondent's Operational Procedure No. 1.21 provides for annual leave to be granted based on seniority.

Discussion

Respondent asserts that this grievance should be dismissed as untimely. Timeliness is an

affirmative defense, and the burden of proving the affirmative defense is upon the party asserting the grievance was not timely filed. (See footnote 1) Where Respondent seeks to have a grievance dismissed on the basis that it was not timely filed, Respondent must prove such untimely filing by a preponderance of the evidence. Once Respondent has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse the failure to file in a timely manner. (See footnote 2) There is no dispute here that Respondent unintentionally violated its own policy by changing Grievant's approved leave rather than changing Mr. Coleman's approved leave, since he was less senior. (See footnote 3) Grievant knew on December 4, 2007, that his leave was no longer approved, but waited until January 1, 2008, to file his grievance. Since "days" means "working days exclusive of Saturday, Sunday or official holidays," (See footnote 4) this grievance was filed 17 days after Grievant knew of the schedule change. (See footnote 5) To be timely, a grievance must be filed "[w]ithin fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee." (See footnote 6) Respondent has proven, therefore, that the grievance was untimely.

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. (See footnote 7) Grievant stated that, although he knew the leave approval had been changed, it was some time later that month that he learned Mr. Coleman's leave was still approved and that hewas less senior. He argues that the date he found out about that error should be the date from which the grievance time calculation starts.

There are a few problems with that theory. First, "the date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice." (See footnote 8) Second, Buck Coleman's name appears on the approved annual leave roster right below Grievant's, and this is the roster Grievant admitted seeing on December 4, with his name crossed out and Ms. Stover's name added. Grievant did not testify that he was unaware Mr. Coleman was less senior than him until a later date. Third, it is Grievant's burden to rebut Respondent's affirmative defense, but he testified he did not know the date he supposedly learned of Mr. Coleman's inclusion on the approved leave roster. Grievant provided no

evidence of any statutory excuse to a late filing.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. (See footnote 9) Grievant was challenging the decision to change his approved leave, and he knew of that decision on December 4. He waited until almost a month later to challenge it, and most problematically, he waited until after he was "harmed" by the decision. Had he brought it to someone's attention in thetwenty or so days before the leave date, it's very likely the problem would have been fixed then and he would have nothing to complain about.

Respondent has proven this grievance was untimely, and Grievant has not shown any evidence that would excuse the untimely filing. For these reasons, the merits of the grievance may not be addressed herein. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed." (See footnote 10) For the same reason, it is not necessary to address Respondent's argument that this grievance is moot on the grounds that it had essentially been granted at level one, and the specific relief requested by Grievant is not available through the grievance procedure.

The following conclusions of law support this discussion:

Conclusions of Law

1. Where Respondent seeks to have a grievance dismissed on the basis that it was not timely filed, Respondent has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once Respondent has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse the 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). 2. To be timely, a grievance must be filed "[w]ithin fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee." W. Va. Code § 6C-2-4(a)(1).

3. As used in the West Virginia Public Employees Grievance Procedure, "days" means "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 6C-2-2(c).

4. "The date a Grievant finds out an event or continuing practice was illegal is not the date for

determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989)." *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997); *See Buck, supra.*

5. This grievance was filed outside the allowable time limit, and is untimely.

6. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra.*

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be includedso that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Noveber 6, 2008

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).

Footnote: 2

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).

Footnote: 3

MOCC Warden David Ballard admitted the procedural violation, and offered to grant Grievant an alternate day off, or a guaranteed annual leave day around any holiday Grievant chose. Respondent also offered to overlook a recent

occasion on which Grievant had reportedly failed to show up for work without reporting off, but that matter was resolved prior to the level three hearing.

Footnote: 4

W. Va. Code § 6C-2-2(c).

Footnote: 5

December 24 and 31, 2007, were half-day holidays, and January 1, 2008, the date the grievance was filed, was a holiday. Even if the half-days are counted as whole days, the grievance was filed outside the 15-day limit.

Footnote: 6

W. Va. Code § 6C-2-4(a)(1).

Footnote: 7

Higginbotham, supra; Sayre v. Mason County Health Dep't, Docket No. 95-MCHD- 435 (Dec. 29, 1995).

Footnote: 8

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997); See Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

Footnote: 9

Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002). 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).

Footnote: 10

Lynch, supra.