THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEREMY MELTON,

Grievant,

v. **Docket No. 2016-1405-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Jeremy Melton, filed a level one grievance against his employer, Respondent, Division of Highways ("DOH"), dated March 4, 2016[1], stating as follows: "Grievant was not given Crew Leader upgrade when supervising inmates as others have been." As relief sought, Grievant states as follows: "[t]o be made whole in every way including back pay with interest."

A level one conference was conducted on March 31, 2016. The grievance was denied by decision dated April 13, 2016. Grievant appealed to level two on April 15, 2016. A level two mediation was conducted on September 14, 2016. On that same date, Grievant perfected his appeal to level three. Respondent filed a Motion to Dismiss on January 3, 2017, and served the same on Grievant's representative by first class mail. On January 3, 2017, the Grievance Board informed the parties by email that any response Grievant wished to file was to be submitted by close of business January 10, 2017. Grievant did not submit a response to Respondent's Motion to Dismiss. A level three hearing was held on January 12, 2017, before the undersigned administrative law judge

[1] The statement of grievance was clocked in at the Grievance Board on March 5, 2016, as such was the date of the postmark on the envelope.

at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and by his representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Xueyan Palmer, Esquire, DOH Legal Division. Given that the Respondent's Motion to Dismiss was filed days before the hearing, the undersigned allowed the parties to present their arguments regarding the Motion to Dismiss at the commencement of the level three hearing. This matter became mature for decision on February 21, 2017, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Worker 3 Mechanic. Grievant alleged that he was being denied the opportunity to receive temporary upgrades when he supervised inmate work crews when other employees were granted the same. Thus, Grievant raised a claim of discrimination. Respondent originally asserted that Grievant was not eligible to receive temporary upgrades because his job description included supervisory work. However, Respondent later conceded that Grievant was eligible to receive temporary upgrades for supervising inmate work crews, and agreed to pay him for four hours at the upgrade rate for inmate supervision performed on February 22, 2016. The parties did not dispute that Grievant supervised the inmate crew for eight hours that day, but Respondent argued that it was required to split the upgrade between Grievant and another employee who supervised the inmate crew that day; therefore, Grievant could only receive upgrade pay for four hours. Grievant failed to prove his claim of discrimination by a preponderance of the evidence. Grievant failed to prove that he was due compensation for inmate crew supervision performed prior to February 22, 2016.

Respondent failed to present evidence to support its defense that Grievant could only be paid four hours for supervising the inmate crew on February 22, 2016. Therefore, this grievance is GRANTED IN PART, and DENIED IN PART.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 3 Mechanic. Grievant is currently assigned to work at Respondent's Elkview, West Virginia, garage, and has been so assigned for the last ten years. In this position, Grievant supervises the work of one mechanic in the shop. At one time, Grievant was assigned to work in the District 1 mechanic shop in Charleston, West Virginia. Grievant has been employed by Respondent since December 18, 2000.

2. Brodis Brown is employed by Respondent as a Highway Administrator 2. Mr. Brown is Grievant's direct supervisor, and has supervised Grievant since October 6, 2014.

3. Respondent regularly uses crews of inmates who are on work-release to perform work for the agency. Inmate crews are used at Respondent's Elkview, West Virginia, garage and worksites.

4. Greg Young is employed by Respondent as a Transportation Worker 2, and has been assigned to supervise inmate crews when they are working in Elkview. Mr. Young receives a temporary upgrade to Transportation Worker 3 crew chief while performing this duty.[2]

[2] *See*, testimony of Brodis Brown.

5. At times, inmate crews work in the Elkview garage under Grievant's supervision in the shop while Mr. Young is not present. There have been times when an inmate crew has been split so that part of the crew works with Mr. Young, and the other part of the crew works with Grievant in the garage. During those times, Grievant alone supervises the inmates assigned to him. Grievant had not been permitted to receive temporary upgrades for supervising these inmates.

6. District mechanics employed by Respondent may receive temporary upgrades for temporarily supervising other employees. Grievant has been aware of this since he became employed by DOH in 2000. Upon information and belief, they do not supervise inmate crews. Grievant is not a district mechanic, and he has not asserted otherwise.

7. Over the course of the last ten years, Grievant had asked his various supervisors for temporary upgrades for the times he supervised inmate crews at the shop. However, such requests were denied because Margie Stover Withrow, the District 1 Human Resources Director, explained to Grievant and Brodis Brown that Grievant was not eligible to receive temporary upgrades based upon his job description because supervisory work was included therein.[3] Upon information and belief, Grievant did not previously grieve Respondent's refusals to grant him temporary upgrades.

8. Given what Ms. Stover-Withrow had told him and his supervisor(s), Grievant never included the pay code for supervising inmate crews on his timesheets because that would have amounted to claiming a temporary upgrade. However, at times, Grievant would note on the back of his preventative maintenance forms when he had supervised

[3] *See*, testimony of Brodis Brown; testimony of Grievant.

inmates in the shop. Grievant did not do this for the entire ten years he has been working in Elkview.[4] Despite his testimony that he had these records, Grievant did not present them as evidence at the level three hearing.

9. At level one, Respondent apparently asserted that Grievant was not entitled to an upgrade in pay when he supervised inmates because his job description states that he may serve as a working shop leader in a county garage. Thus, Respondent asserted that Grievant, by virtue of his job description, could not receive a temporary upgrade for supervising anyone. The level one grievance evaluator denied the grievance on the merits concluding that Grievant failed to prove his claim of discrimination.

10. On February 22, 2016, an inmate crew was performing work at DOH's Elkview facility. The inmate crew was, at least for a time, split between Mr. Young and Grievant. Grievant had at least some of the inmates working in the shop with him that entire day under his supervision alone. However, at some point during the day, Greg Young had to be offsite to deal with a rock slide on a highway. During the time Mr. Young was offsite, Grievant supervised the entire inmate crew alone.[5]

11. In compliance with the prior directives of Ms. Stover-Withrow, Grievant did not list that he supervised the inmate crew on his DOT-12 Daily Work Report, or timesheet, on February 22, 2016. If he had, such would have constituted an attempt to receive a temporary upgrade.

12. Sometime after the level one hearing was held and the decision issued, Brodis Brown, District Manager Aaron Gillispie, and Xueyan Palmer, counsel for

[4] *See*, testimony of Grievant.
[5] *See*, testimony of Brodis Brown; testimony of Grievant; Respondent's Exhibit 1.

Respondent, met to discuss the issue of Grievant's temporary upgrade for supervising inmates. During that meeting, it was decided that Grievant could be granted temporary upgrades for those times when he supervised inmate crews, but only when Greg Young was not onsite. It was decided that there could only be one upgrade per inmate crew, regardless of how many people were supervising them.[6] It was Mr. Brown's understanding that only Mr. Young would get the upgrade so long as he was somewhere on the facility grounds, or onsite. If he were away from the facility, someone else would get the upgrade.[7]

13. At level three, Respondent changed its position regarding the temporary upgrade issue, asserting that Grievant could receive a temporary upgrade for supervising an inmate crew at the Elkview garage on February 22, 2016, for 4 hours, but not for any other date or time. At the commencement of the level three hearing, counsel for Respondent announced that Respondent would stipulate that Grievant was entitled to receive said temporary upgrade, and that it would pay Grievant for the same. Thus, Respondent abandoned the claim it articulated at level one, and conceded that Grievant could be eligible for temporary upgrades for supervising inmate crews.

14. Grievant called no witnesses other than himself in his case in chief. Kathleen Dempsey, Aaron Gilliespie, Margie Stover-Withrow, and Greg Young were not called as witnesses at the level three hearing. Further, neither party presented any policies or job descriptions as evidence in their cases in chief.

[6] *See*, testimony of Brodis Brown.
[7] *See*, testimony of Brodis Brown.

Discussion

At the commencement of the level three hearing, the undersigned permitted the parties to present their arguments regarding Respondent's Motion to Dismiss, as the same was filed days before the level three hearing, and as Grievant had not filed a written response. After hearing the arguments, the undersigned denied the Motion to Dismiss, and informed the parties that the same would be noted in the level three decision.

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." W. VA. CODE ST. R. § 156-1-6.2 (2008). WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

> Within 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, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *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).

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. 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. *See 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 also 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). If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997), *aff'd,* Circuit Court of Kanawha County, No. 97-AA-110 (Jan. 21, 1999).

In its written motion, Respondent argued that this grievance was untimely filed, and did not address its stipulation that Grievant should be granted a four-hour temporary upgrade for inmate crew supervision on February 22, 2016. At the hearing, counsel for Respondent appeared to argue that any date on which Grievant claims to have supervised inmates that occurred more than fifteen days before February 22, 2016, was untimely; therefore, the grievance should be dismissed. Grievant argued that this matter was not untimely filed, and asserted that Respondent had, for years, told him and his supervisors that he was not eligible to receive temporary upgrades because of his job description. Such is consistent with what occurred at level one. Nonetheless, sometime after the filing of this grievance and the issuance of the level one decision, Respondent

changed its position.

Respondent's argument that any instance of supervision that occurred more than fifteen days before February 22, 2016, is time barred fails. Pursuant to statute,

> [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, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). This grievance was dated March 4, 2016, and was postmarked March 5, 2016. The Grievance Board received the same on March 7, 2016, but the postmark date is observed as the filing date. While Grievant did not use the word discrimination in his statement of grievance, he, nonetheless, raised a discrimination claim by alleging he has been denied the upgrades that other employees have been granted. Grievant presented his claim as a continuing practice. The discrimination claim is addressed in the level one decision. There is no reference to February 22, 2016, in either the statement of grievance or the level one decision. Even if February 22, 2016, was the date of the last occurrence, the grievance was filed within 15 days of the same. A grievance must be filed within 15 days *after* an event or occurrence, and that appears to have been done. Again, Grievant presented his claim as a continuing practice of discrimination. Grievant has alleged that he was wrongly denied upgrades when others were granted the same for years. February 22, 2016, may have been the last time he was denied the temporary upgrade, but that does not render anything 15 days *before* that untimely. This grievance is not simply about pay. Grievant raised a discrimination claim, which was addressed and ruled upon at level one. Lastly, the fact that Respondent

changed its position after the level one decision was issued, and is now granting Grievant an upgrade for four hours on February 22, 2016, does not change Grievant's claim, or render the grievance untimely filed.

Further, the West Virginia Supreme Court of Appeals has stated that "[t]he grievance process is intended to be a fair, expeditious, and simple procedure, and not a procedural 'quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra,* indicates the merits of the case are not to be forgotten. *Id.* at 743. *See Edwards v. Mingo County Bd. of Educ.,* Docket No. 95-29-472 (Mar. 19, 1996). Accordingly, Respondent's Motion to Dismiss was denied.

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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).

This grievance evolved significantly following the level one hearing in that Respondent conceded that Grievant is eligible to receive temporary upgrades for supervising inmate crews. Respondent has now agreed to grant Grievant a temporary upgrade for four hours of work on February 22, 2016, when he supervised an inmate crew, and has stipulated to the same at the level three hearing. Respondent had previously taken the position that Grievant's job description rendered him ineligible for temporary upgrades. Grievant still argues that he should have received temporary upgrades each time he supervised inmate crews and that he has been treated differently than the district mechanics which constitutes discrimination. Respondent's position appears to be that Grievant should not be granted temporary upgrades for supervising inmate crews for any date other than February 22, 2016. Respondent does not address the discrimination claim in its proposed Findings of Fact and Conclusions of Law.

"'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008). Therefore, the first issue is whether Grievant is being treated differently from similarly situated employees.

Grievant appears to argue that he is being treated differently than the district mechanics in that he has been denied temporary upgrades for supervising inmate crews, and that such constitutes discrimination. Grievant alleges that district mechanics are allowed to receive temporary upgrades when temporarily supervising other employees. Grievant is a Transportation Worker 3 Mechanic. The undersigned was presented no evidence regarding the actual classification of the district mechanics, or their job descriptions. Grievant's job description was not presented at level three, either. Further, there was no evidence presented to suggest that the district mechanics received temporary upgrades for supervising inmate crews. Accordingly, the undersigned cannot find that Grievant is similarly situated to those to whom he compares himself. For these reasons, the undersigned cannot find that Grievant has proved his claim of discrimination.

Respondent has now conceded that Grievant is eligible for a temporary upgrade on February 22, 2016, but only for four hours. Grievant testified that he has supervised inmate crews for many years, but was told he was ineligible for temporary upgrades. Grievant's supervisor confirmed that Grievant supervised inmate crews while he has been Grievant's supervisor. Grievant's supervisor also confirmed that Ms. Stover-Withrow had told them that Grievant could not receive temporary upgrades because of his job description. Grievant further testified that he had kept his own records of when he supervised the inmate crews, but did not attempt to claim such on his timesheet, or DOT-12, because he had been told he was ineligible for the same. However, while Grievant

may have these records, and may have provided them to Respondent, Grievant did not produce them at the hearing, so the undersigned has not seen them. Grievant gave general testimony that he had supervised inmate crews for years, but gave no testimony as to the specifics, such as the dates on which he supervised them, or how long he supervised them on those dates. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/ Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Therefore, Grievant has failed to prove by a preponderance of the evidence that he is due compensation for supervising the inmate crews prior to February 22, 2016.

There was testimony that Grievant supervised the inmate crew for eight hours on February 22, 2016, and one page of the Respondent's Exhibit 1, a handwritten statement by Grievant, supports the same. It appears that Respondent does not dispute that Grievant supervised the inmate crew for eight hours on February 22, 2016. However, Respondent asserts that the upgrade had to be split between Mr. Young and Grievant. Mr. Brown testified that based upon his understanding from the meeting he attended after the level one hearing, neither could get the upgrade for the full eight hours. Mr. Brown testified that it was his understanding that there could only be one temporary upgrade given per inmate crew. In other words, it does not matter how many people supervise the one inmate crew; there will be only one temporary upgrade that is to be split among those supervising. Respondent presented no policy, rule, regulation, or law to support the splitting of the temporary upgrade between Mr. Young and Grievant. Given that Respondent has conceded that Grievant is eligible to receive temporary upgrades when

he supervises inmate crews, that it is undisputed that Grievant supervised the inmate crew for eight hours on February 22, 2016, and Respondent presented no evidence to support its position that the temporary upgrade has to be split between Mr. Young and Grievant, the undersigned finds that Grievant should have received the temporary upgrade for the actual hours he supervised the inmate crew on February 22, 2016. Accordingly, the grievance is GRANTED, IN PART, and DENIED, IN PART.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant failed to prove his claim of discrimination by a preponderance of the evidence.

4. Respondent has conceded that Grievant is eligible to receive temporary upgrades when he supervises inmate crews. The parties agree that Grievant supervised an inmate crew for eight hours on February 22, 2016. Respondent failed to present evidence to support its defense that Grievant could only be paid four hours at the upgrade rate for supervising the inmate crew on February 22, 2016. Grievant failed to prove by a preponderance of the evidence his claim that he is due compensation for supervision of inmate crews prior to February 22, 2016.

Accordingly, this Grievance is **GRANTED IN PART, AND DENIED IN PART**.

Respondent is hereby **ORDERED** to grant Grievant a temporary upgrade for supervising the inmate crew on February 22, 2016, for eight hours and pay Grievant for the same, plus interest. In the event that Respondent has already paid Grievant four hours at the upgraded rate for the inmate crew supervision performed on February 22, 2016, Respondent would only be required to pay Grievant four additional hours at the upgrade rate, plus interest.

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 included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: June 7, 2017.

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Carrie H. LeFevre
Administrative Law Judge