

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEVEN MESSER
Grievant,

v.

Docket No. 2018-0936-CONS

DIVISION OF HIGHWAYS
Respondent.

DECISION

Grievant, Steven Messer, is employed by Respondent, Division of Highways ("DOH") in the classification of Transportation Worker 2, Equipment Operator ("TW2EO"). Grievant is assigned to DOH Organization 250, with its main facility in the city of Wayne in Wayne County. Mr. Messer filed a series of grievances related to his employment with DOH, three of which are the subject of this decision.

Mr. Messer filed two Level One grievance forms dated January 20, 2017. One grievance was given the docket number. 2018-0438-DOT. In that grievance he alleged that he had filed three separate Equal Employment Opportunity ("EEO") complaints with the Human Resources office in Organization 205. Grievant states that the witnesses he listed were not contacted and he did not receive any decision related to these complaints in a timely manner. As relief he seeks an answer to all the EEO claims he has filed.

In the second Level One Grievance filed on January 20, 2017, Grievant alleged:

On 1-20-17 I spoke with Raymond Watts who informed me Keith Viers had received travel pay. Also, he told me Josh Farley was getting travel time. Both were provided a State vehicle to travel in. I traveled from Jenny's Creek to Wayne for over a year with no pay or vehicle.

Grievant seeks, “back pay for all the time I traveled past a substation, with no time or vehicle provided from State. This was 1 hour and 15 minutes-drive one way.” Grievant alleged that this occurred over the period of time from December 1, 2015 through the middle of May 2016. He calculated that Respondent owes him \$15,559.00 in lost pay for travel time during that period.¹ That grievance was given the docket number 2018-0437-DOT.

Mr. Messer filed a Level One grievance form dated August 8, 2017 alleging:

“I received an Employee Performance Appraisal this morning out of my file 8/28/17. I noticed Mr. Watts gave me 2 appraisals for the same day. He made one better than the other. This was all due to Beecher Robertson scoring higher than me, which is his family. I asked how Beecher scored higher than me, and he must have changed my appraisal. He made my Appraisal higher, so I would keep my mouth shut.”

As relief, Grievant seeks, “For Mr. Watts to treat employees the same, including his family members. I am asking all my Employee Performance Appraisal reports be re-evaluated. This grievance was given the docket number 2018-0305-DOT.

A Level One hearing was held on October 12, 2017, on 2018-0438-DOT related to the EEO complaints on October 12, 2017. A decision was issued on October 27, 2017, denying the grievance because the chief administrator ruled the agency had no authority over the State EEO office. Grievant appealed to Level Two on October 31, 2017, and a mediation was held in December 21, 2018. Grievant appealed to Level Three on January 8, 2018.

¹ Grievant reached that number by calculating 2 hours per day five days a week for the period of December 1, 2015, through mid-May 2016, totaling 720 hours of travel time missed multiplied by the hourly rate he received at that time which was \$12.80 per hour.

A Level One hearing was held on 2018-0437-DOT related to Travel pay and was also held on October 12, 2018. A decision denying the grievance as being untimely filed was issued on October 27, 2017.² Grievant made a timely appeal to Level Two and a mediation was conducted on December 21, 2017. Grievant also appealed this grievance to Level three on January 8, 2018.

A Level One hearing was held in 2018-0305-DOT related to the Employee Performance Appraisals was held on September 20, 2017, and a decision denying the grievance as untimely filed was issued on October 12, 2018. Grievant's Level Two appeal was filed on October 17, 2018, and a mediation was conducted on November 22, 2017. Grievant appealed to level three on November 30, 2017.

Respondent moved that the grievances be consolidated for hearing and decision at Level Three. An Order consolidating the grievances with the docket numbers, 2018-0304-DOT,³ 2018-0305-DOT, 2018-0437-DOT, and 2018-0438-DOT and giving the consolidated grievances the docket number, 2018-0936-CONS as set out in the case style above.

A Level Three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on January 28, 2019. Grievant, Steven Messer appeared, *pro se*.⁴ Respondent DOH appeared through Kathleen Dempsey, Human Resources ("HR") Director for DOH District 2 and was represented by Keith Cox, Assistant

² Respondent raised the defense that the grievance was not filed within the statutory time period in both 2018-0305-DOT and 2018-0437-DOT at Level One.

³ This grievance was settled and dismissed prior to the Level Three hearing.

⁴ "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Attorney General. The Parties waived their right to file Proposed Findings of Fact and Conclusions of Law. Consequently, this matter became mature for decision on January 28, 2019.

Synopsis

Grievant has three claims that have been consolidated for resolution in this decision. Grievant claims that all his Employee Performance Appraisals must be reevaluated because his supervisor gave him a second higher EPA on the same day after Grievant complained that the first appraisal was invalid as too low. Grievant claims that he should have received travel time for a period where he was required to drive past the Crum substation to report to work in Wayne. Respondent proved that both these grievances were filed months after the time mandated for filing established by statute. These grievances must be DISMISSED.

Grievant also claims the Respondent violated policies and guidelines related to processing of Equal Employment Opportunity complaints. Grievant failed to meet the burden of proof for this claim by failing to cite or provide any guideline or policy which Respondent is alleged to have violated. This grievance must be DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter. Because this matter involves three discrete claims the facts for each will be listed separately with facts which are applicable to all three listed first.

Findings of Fact

1. Grievant, Steven Messer, is employed by Respondent, Division of Highways ("DOH") in the classification of Transportation Worker 2, Equipment Operator

("TW2EO"). Grievant is assigned to DOH Organization 250, with its main facility in the city of Wayne in Wayne County.

2. Grievant has been employed by the DOH for approximately five years. He has been assigned to Organization 250 in District 2 for the duration of his employment. Grievant originally was assigned to report to the Crum Substation in Southern Wayne County but was later transferred to report to the Wayne facility in North Central Wayne County.

Employee Performance Appraisal – 2018-0305-DOT

3. On January 21, 2016, Grievant received an Employee Performance Appraisal ("EPA") from his supervisor, Raymond Watts. The appraisal was completed on a form EPA 3 which reflects the employee's performance for the previous work year.

4. Grievant received an overall rating of 2. This rating reflected that Grievant met expectations. It is an average rating which does not require comments by the evaluator explaining areas where Grievant excelled or where his performance was deficient.

5. Grievant discussed his appraisal with his crew leader and compared his score with those received by other workers in the organization. Grievant and his crew leader felt that Grievant's appraisal score was too low and together they met with Mr. Watts to discuss this issue.

6. Following the discussion, Mr. Watt agreed to reevaluate Grievant's performance. Either that day or the next day, Mr. Watts gave Grievant a new EPA 3 with an overall score of 2.22. In addition to the higher overall rating, Mr. Watt added favorable

comments regarding areas of Grievant's job performance to justify a rating above the average of 2.⁵

7. Subsequent to receiving the second evaluation Grievant was an unsuccessful applicant for a posted position.⁶ While reviewing his file on August 29, 2017, Grievant was reminded of the fact that he had received two EPA's from Raymond Watts on or about January 21, 2016.

8. Mr. Messer filed a grievance on August 29, 2017 alleging that the two evaluations demonstrated that Mr. Watts did not treat employees the same in making evaluations and that he favored employees who were his relatives. He seeks to have all his EPA reports reevaluated.

9. At Level one Respondent raised the affirmative defense that this grievance was not timely filed.

Pay for Travel Time: 2018-0437-DOT

10. When Grievant was initially employed by DOH his home was on Jenny's Creek in Mingo County. Grievant was assigned to report to the District 2 substation at Crum, West Virginia. The Crum Substation is located in southern Wayne County and was approximately a fifteen minute or less drive from Grievant's home.

11. While Grievant was working at the Crum substation, James Williamson was assigned to work there from another DOH organization. Grievant and Williamson had

⁵ Mr. Watts testified that the EPA was completed on a computer program. If the employee receives a rating of 2 in any area the evaluator was not required to add a comment. However, if the evaluator gave a rating in a particular area which was above or below 2, the program requires the evaluator to include a comment explaining the high or low rating.

⁶ Grievant's non-selection for that position is the subject of a separate grievance and is not discussed herein.

confrontations which ultimately led to Grievant being assigned to the Wayne facility located in North Central Wayne County.⁷ Being relocated to the Wayne facility caused Grievant to travel approximately one additional hour to get to work from his home and one hour to return each workday.

12. Grievant's reassignment to the Wayne facility became effective on December 1, 2015. In the middle of May 2016, Grievant moved from Jenny's Creek to a home close to the Wayne facility so he would not be required to drive the extra two hours per day to get to and from his work station.

13. Josh Farley is a TW2EQ employed in DOH District 2. He also has lived and may continue to live on Jenny's Creek in Mingo County. During the period of December 1, 2015 through May 2016, Mr. Farley was permitted to park his personal vehicle at the Crum Substation near his home each morning.

14. At that location, Mr. Farley picked up a DOH truck and drove to Wayne to pick up Grievant, any other workers for the day's crew and equipment the crew might need.

15. At the end of the workday, Mr. Farley would drop Grievant and others off at Wayne and drive the truck back to the Crum substation where he would pick up his personal vehicle and drive home.

16. Mr. Farley was paid from the time he picked up the truck at Crum until the time he dropped the truck off and picked up his personal vehicle at the substation.

⁷ Grievant testified that Mr. Williamson was the source of their conflicts by among other things calling Grievant a liar, hypocrite, and a snitch. Mr. Watts remembered the conflicts but did not remember what they were about.

Consequently, he was paid for approximately two more hours of work each day than Grievant.

17. During that period Grievant was also living on Jenny's Creek but was required to drive his vehicle to Wayne to report to work and home from Wayne at the end of the day. Grievant was fully aware that Mr. Farley was being allowed to Drive the DOH truck from the Crum substation because he and Mr. Farley often worked together on jobs such as operation the large mowers along the highways during the summers.

18. During that time period Grievant approach Raymond Watts about being allowed to pick up a vehicle at the Crum station so that he did not have to put excessive mileage on his personal vehicle and so that he could receive pay beginning when he picked up the truck. At some point during this period Grievant also discussed this request with Scott Epling, District Manager for District 2. He was required to continue to drive his personal vehicle to Wayne and back to report to work.⁸

19. On January 20, 2017, Grievant confirmed with Mr. Watts that Josh Farley and another worker, Keith Viers were being allowed to pick up DOH vehicles at substations and receive pay for driving those vehicles to pick up workers and equipment to and from work sites. Grievant had moved closer to Wayne to avoid the drive from Jenny's Creek approximately eight months prior to this conversation.

20. The same day Grievant held this conversation with Mr. Watts he filed a grievance claiming back pay for the period of December 1, 2015 through the middle of May, 2016, when he drove to and from Wayne from Jenny's Creek while Mr. Farley was allowed to pick up a DOH vehicle at the Crum substation.

⁸ Grievant's Level Three testimony.

21. Respondent raised the affirmative defense that the grievance was not timely filed at the Level One hearing.

22. The WV DOH Division of Highways Policy: *Vehicle Management and Usage Policy*, Policy No. DOH 4.2 states in part:

Vehicles assigned to personnel (e.g. maintenance, right-of-way and construction personnel) who work at a project site or have predominantly field-based assignments shall be pooled at a secure DOH facility which is nearest to the employee's domicile. District Engineers/Managers may permit pooling at a West Virginia State operated facility (if available) in cases where the distance from the employee's domicile to a DOH facility exceeds 50 miles. Any such permission must be documented in writing and may be made only by the District Engineer/Manager.⁹

Id. Section 3 General Criteria, subsection 3.3.

Unprocessed Equal Employment Opportunity (EEO) Claims.

23. Grievant filed at least two and perhaps more EEO complaints with the District 2 HR office alleging harassment by coworkers bases upon his religion and political affiliation.

24. The forms provided by Grievant indicate that the initial incident complained of occurred on August 15, 2015, with additional incidents occurring on January 20, 2016

⁹ At the Level Three hearing Grievant argued that DOH was violating this policy by not allowing him to park his vehicle at the Crum substation and pool with Mr. Farley to the field jobs they worked. However, he did not have a copy of the policy. District 2 HR Director Dempsey testified that the DOH assignment of vehicles was controlled by the Division of Personnel vehicle usage policy and that there was not a discrete policy for the DOH. The record was left open for the sole purpose of allowing Grievant to submit a copy of the DOH policy which he provided electronically the next day. Grievant had made notations on the copy he provided. The undersigned found a clean copy of the policy on line and included the entire policy in the record as Grievant Exhibit 1.

and June 6, 2017. The original intake forms were signed by Nichole McKissick, Personnel Specialist in DOH District 2.

25. Grievant alleges that his claims were never investigated, the witnesses he listed were never contacted and he received no response regarding the outcome of his complaints.

26. Grievant received one response from Harold Jones dated January 27, 2016. Harold Jones was the DOH District 2 HR Director at that time. Mr. Jones stated that he had revised Grievant's complaints and found that they were not issues within the purview of the EEO office but rather allegations of policy violations which needed to be addressed by Grievant's supervisors.

27. No policy related to EEO complaints was placed in the record. There is no evidence related to how DOH EEO complaints must be investigated or whether they are referred to the State EEO Office for resolution.¹⁰ Nor was there any evidence related to any appeal process that may exist if a claimant is not satisfied with the way the complaint is processed.

Discussion

Respondent has raised the affirmative defense of that the grievances related to employment performance appraisals and travel time were not filed within the mandatory time limit for raising claims set out in grievance statute. Indeed, both grievances were found to be untimely at Level One. Because this is an affirmative defense, Respondent

¹⁰ The State EEO Office is an independent administrative agency which is separate and distinct from the DOH.

has the burden of proving by a preponderance of the evidence that the grievances were not timely filed. W. VA. CODE R §156-1-3. *Burden of Proof*.

To be considered timely, and, therefore, within the jurisdiction of the grievance procedure, a grievance must be filed within the time limits set forth in the grievance statute. 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).

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).

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).

Grievant claims that he received two EPA 3s in one day for the same year causing all the EPAs he received from Mr. Watts to be suspect. There is no factual dispute that Mr. Watts gave Grievant an EPA 3 on January 20, 2016, with an overall rating of 2. Grievant and his Crew Chief met with Mr. Watts the same day and Mr. Watts gave Grievant an updated EPA 3 for the same period giving Grievant a higher score. The testimony demonstrates that Grievant unequivocally knew that two EPAs for the same work period were issued to him on the same day. In fact, Grievant wrote on his grievance form that “He made the Appraisal higher so I would keep my mouth shut. The statutory time period for filing a grievance related to EPAs began on January 20, 2016, but the grievance was not filed until August 29, 2017, eighteen months later. The grievance was not filed within the statutory time limit of fifteen days of the occurrence upon which the grievance was based.

Grievant appears to attempt to invoke the “discovery rule” by stating that he noticed that Mr. Watts gave him two EPAs on the same date when Grievant was reviewing his personnel file on August 29, 2017, the same day the grievance was filed. The statutory phrase “within fifteen days of the date upon which the event became known to the employee” is cited as creating a discovery exception in W. VA. CODE § 6C-2-4(a)(1).

Under the “discovery rule” exception to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance.

Grievant appears to imply that he did not discover that he had received the two EPAs until reviewing his file on August 29, 2017, making his grievance timely since he filed it on that day. However, Grievant’s testimony and his questioning of witnesses shows unequivocally that he was aware of receiving the two EPAs for the same employment term on January 20, 2016. The discovery rule does not apply to this case because Grievant did not first find out about the event giving rise to the grievance when he reviewed his file on August 29, 2017. He may have been reminded of the event upon reviewing his personnel file, but he was fully aware of the event when it occurred on January 20, 2016. When discussing the discovery rule the Grievance Board has routinely held that “if [the grievant] knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice.” *Lynch v. Dept. of Trans./Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997); *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). Grievant knew he received two EPAs on one day when the incident occurred, and he was obliged to file any grievance related to that event within fifteen working days. The EPA grievance was not filed within the statutory time limit and must be DISMISSED.

The same is true of the “travel time” grievance. Grievant testified that he was not paid travel time like other employees for the period of December 1, 2015, through the middle of May 2016. At that point Grievant moved close to the Wayne County office and

by his own admission would no longer be entitled to travel time. The last day of the occurrence of the event giving rise to this Grievance was on or about May 15, 2016. The grievance was not filed until January 20, 2017, at least seven months past the mandatory time frame of fifteen working day. One again, Grievant attempts to invoke the discovery rule by stating that he was told by Mr. Watts on January 20, 2017, that Keith Viers and Josh Farley were receiving travel pay and the use of a State vehicle. Grievant filed his claim on that day. However, Grievant was aware of those facts long before that day.

The testimony of Grievant was that he knew that Josh Farley was receiving the use of a State vehicle well before May 2016. He often worked on the same crew with Mr. Farley during that time. Mr. Farley was picking up the DOH truck at the Crum substation and driving to Wayne to get Grievant and supplies. Grievant testified that he spoke to Mr. Watts and Scott Epling about being allowed to drive a DOH vehicle from the Crum substation and receive travel time while he was still living on Jenny's Creek and received no relief. See FOF 18 *supra*. Grievant knew of the events and practices upon which this grievance is based before mid-May 2016 and had to be file within fifteen days of the event or occurrence to meet the statutory time lines. *Lynch v. Dept. of Trans./Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997); *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). The grievance was not filed within the mandatory time frame set by statute and must be DISMISSED.

In the third claim Grievant alleges that Respondent violated EEO policies by failing to investigate his EEO complaints and inform him how they were resolved. Grievant claims that he filed three EEO complaints with the EEO officer in the DOH District 2 Human Resources office and did not receive a reply concerning any of them. Grievant

did receive a reply to one of the claims dated January 27, 2016, from Harold Jones, who was the DOH District 2 HR Director at that time. See FOF 26 *supra*.

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant made several allegations that the failure to timely investigate his complaint violated policy related to EEO claims. However, he did not introduce any such policy into evidence or provide citations as to where they might be found. This is particularly troubling because it appears that DOH may handle some complaints in its Human Resources office and some may be referred to the State EEO Office which is a completely independent agency. The two agencies may have different policies or guidelines outlining how such claims would be handled. Without these policies being part of the record it is not possible to determine if Respondent violated them.¹¹ Where a party is alleging a violation of policy, it has not meet the burden of proof that a policy was violated if the party fails to introduce the policy alleged to be violated. *Combs v. Dep't of Health & Human Ser.*, Docket No. 2013-0497-DHHR (Sept. 23, 2013). Grievant did not

¹¹ This problem was exacerbated when Grievant knowingly failed to comply with an Order to provide Respondent with a copy of his EEO complaints prior to the Level Three hearing so it could attempt to confirm the existence and determine that true status of each one in preparation for the hearing.

prove by a preponderance of the evidence that Respondent violated any policy related to the processing EEO complaints. Accordingly, the grievance is DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See, W. VA. CODE R §156-1-3. Burden of Proof.* "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. Respondent asserts the affirmative defense of timeliness. Respondent has the burden of proving by a preponderance of the evidence that the grievances were not timely filed. *W. VA. CODE R §156-1-3. Burden of Proof.*

3. 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).

4. 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).

5. 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).

6. The statutory phrase “within fifteen days of the date upon which the event became known to the employee” is cited as creating a discovery exception in W. VA. CODE § 6C-2-4(a)(1). Under the “discovery rule” exception to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance.

7. Respondent proved by a preponderance of the evidence that Grievant failed to file either the grievance related to Employee Performance Appraisals or Pay for Travel Time within the mandatory time line established by statute after he became aware of the events giving rise to the grievances.

Accordingly, these grievances are DISMISSED.

8. Where a party is alleging a violation of policy, it has not meet the burden of proof that a policy was violated if the party fails to introduce the policy alleged to be violated. *Combs v. Dep’t of Health & Human Ser.*, Docket No. 2013-0497-DHHR (Sept. 23, 2013).

9. Grievant did not prove by a preponderance of the evidence that Respondent violated any policy related to the processing EEO complaints.

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

DATE: MARCH 8, 2019.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**