MARK VINCENT, et al.,

Grievant,

v. **Docket No. 97-DOH-519**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

DECISION

___ Mark Vincent, Terry McCloy, Terry M. Gabbert, James M. Lucas, and Traci Rosier Chocky (Grievants), employed by Respondent W. Va. Department of Transportation, Division of Highways (DOH) in Taylor County, filed grievances pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that their 1996 performance evaluations were not done in accordance with DOH policy and did not reflect their actual job performance. The consolidated grievances were denied at Level I by Supervisor Donna Gallaher on May 5, 1997. The grievance was denied at Level II by District Engineer H.E. Carr, Jr. on May 14, 1997. A Level III grievance hearing was held on July 31, 1997, before Susan Byrd, Chief Evaluator, Dennis Carpenter of District Six, and Richard White of District Seven. Grievant was represented at this hearing by Marilyn Kendall of the West Virginia State Employee's Union, and DOH was represented by attorney Jeff Miller. By correspondence dated November 13, 1997, the grievance was denied at Level III by DOH Acting Commissioner Samuel H. Beverage. A Level IV hearing was held on January 27, 1998, before Administrative Law Judge Jeffrey N. Weatherholt. (See footnote 1) This matter became mature fordecision on March 9, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcripts of the Level III and Level IV hearings, and documentary evidence admitted at Levels I through IV.

FINDINGS OF FACT

1.

Grievants are employed by DOH in District Four, Taylor County. Mark Vincent and James Lucas are equipment operators, Terry McCloy and Terry Gabbert work in the equipment shop as mechanics, and Traci Rosier Chocky is a laborer.

2. The 1996 performance evaluations were prepared in March, 1997 and shown to Grievants March 17 or 18, 1997.

3. The supervisory personnel who prepared the evaluations discussed each evaluation in meetings with each Grievant on March 17 or 18, 1997. Each Grievant agreed with all or some of his/her evaluation and each Grievant, except Mark Vincent, agreed that her/his evaluation was fair and impartial.

4. Each Grievant signed his or her evaluation form, confirming that the contents of each evaluation had been reviewed and discussed with each Grievant. Mark Vincent signed his evaluation on March 18, 1997. The other Grievants signed their evaluations on March 17, 1997.

5. Grievants filed their grievances on or about April 28, 1997.

DISCUSSION

___In a non-disciplinary grievance, the grievant has the burden of proving his grievanceby a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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).

Grievants contend that their 1996 performance evaluations were not done in accordance with DOH policy and did not reflect their actual job performance. However, their grievances were not filed until some 6 weeks after they received their evaluations, and DOH has raised a timeliness defense. W. Va. Code § 29-6A-4(a) provides as follows:

> 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.

"Days" is defined as "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c). A timeliness defense is an affirmative defense which the employer must establish

by a preponderance of the evidence. Pryor et al. v. W. Va. Dept. of Trans., Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997), West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). The testimony regarding the dates on which events germane to resolution of this issue transpired was consistent and unequivocal. The evaluations which form the basis of the grievances were shown to and discussed with all Grievants, save Mr. Vincent, on March 17, 1997. Mr. Vincent was shown his evaluation the following day, March 18th. However, the grievances were not filed until April 28, 1997, well beyond the ten working day limit imposed by statute.

Grievants argued, and the record showed, that Grievants did not obtain copies of their evaluations until the middle of April. However, the events upon which the grievances are based, the allegedly inadequate evaluations, were fully and unequivocally known to Grievants by March 18th. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). The undersigned notes that Grievants were not required to attach copies of their evaluation forms to their Level I grievance form, and so were not hindered in their filing of grievances by DOH's delay in providing copies of the evaluations.

Because they were not filed in a timely manner, the grievances must be dismissed.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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).

2. Grievants had ten working days in which to file their grievances. W. Va. Code § 29-6A-4(a).

3. A timeliness defense is an affirmative defense which the employer mustestablish by a preponderance of the evidence. Pryor et al. v. W. Va. Dept. of Trans., Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997), West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17,

1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

5. DOH has proven, by a preponderance of the evidence, that Grievants' grievances were not timely filed.

Accordingly, the grievances are DENIED.

Any party may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 13, 1998

Footnote: 1 *For administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge on March 18, 1998.*