MICHAEL HUNDLEY,

Grievant,

v. **Docket No. 98-CORR-218**

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Michael Hundley (Grievant) was employed by the West Virginia Division of Corrections (Corrections), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC), until his dismissal on April 17, 1997. He filed this action on June 26, 1998, alleging he had been denied reimbursement for travel expenses by Corrections. Corrections refused to process this grievance at Levels I, II, and III because Grievant was no longer an employee of Corrections at the time it was filed. This grievance was appealed to Level IV, where Grievant waived his right to a hearing. The parties were given until August 24, 1998, to submit proposed findings of fact and conclusions of law, and the matter became mature for decision at that time. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by Corrections as a Correctional Officer until his dismissal on April 17, 1997. 2. Grievant filed this grievance on June 26, 1998.

3. While employed by Corrections, Grievant traveled 2,315 miles between his home in Powellton, West Virginia, and the 85th State Basic Corrections Class at the West Virginia Corrections Academy at West Liberty State College in Ohio County.

4. Grievant was not reimbursed for this travel.

DISCUSSION

As this grievance does not involve a disciplinary matter, 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant seeks reimbursement for mileage expenses he incurred while driving between his home and the 85th State Basic Corrections Class at the West Virginia Corrections Academy at West Liberty State College in Ohio County. However, his grievance was filed more than 14 months after his employment with Corrections was terminated, (See footnote 1) and Corrections 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. Dep't of Transp., 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. Dep't 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).

The event upon which this grievance is based, Corrections' failure to reimburse Grievant for mileage expenses he incurred while driving between his home and the 85th State Basic Corrections

Class, occurred during his employment with Corrections. Although the record does not reveal the year in which this class took place, the undersigned notes that the 84th State Basic Corrections Class took place in 1994. Ferrell, et al. v. W. Va. Div. of Corrections/W. Va. Penitentiary, Docket No. 94-CORR-1062 (Dec. 29, 1997). (See footnote 2) Theundersigned finds it reasonable to conclude that the grievable event became fully and unequivocally known to Grievant before his dismissal on April 17, 1997. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). Because Grievant did not file this grievance until more than 14 months after his employment with Corrections was terminated, and because Grievant submitted no evidence to rebut the proof that his grievance was not timely filed, Corrections has established that it was untimely.

Grievant argues that this grievance is controlled by the outcome in Ferrell, supra. In that grievance, discrimination was found when two correctional officers were reimbursed for their travel expenses to and from the State Basic Corrections Class, but grievants were not. However, that grievance was timely filed.

Because this grievance was not filed in a timely manner, it must be denied.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, 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); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Grievant had ten working days in which to file his grievance. W. Va. Code § 29-6A-4(a).

3. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Pryor et al. v. W. Va. Dep't 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. Dep't 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 defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17,

1993).

5. Corrections has proven, by a preponderance of the evidence, that this grievance was not timely filed.

Accordingly, the 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. 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 September 2, 1998

Footnote: 1 *Grievant has grieved his termination, and other issues, in Hundley v. W. Va. Div. of Corrections, Docket No. 98-CORR-218, which is not yet mature for decision. Because of the decision in the instant grievance, it is not necessary for the undersigned to know whether Grievant was properly terminated by Corrections, or was still its constructive employee, at the time this grievance was filed. See Jackson v. W. Va. Div. of Corrections/Div. of Personnel, Docket No. 97-CORR-345, Jan. 30, 1998.*

Footnote: 2 *The record in the grievance is extremely sparse, consisting of Grievant's Level IV grievance form, two letters from Corrections refusing to process this grievance, a one page letter from Grievant's representative, Jack Ferrell, CWA FieldRepresentative, and a one page Motion to Dismiss submitted on behalf of Corrections by Leslie K. Kiser, Esq.*