PATRICK GALLOWAY,

Grievant,

v. **DOCKET NO. 98-DOB-167**

DIVISION OF BANKING,

Respondent.

DECISION

This grievance was filed by Grievant Patrick Galloway against the Division of Banking, Respondent ("Banking"), challenging his performance appraisal for the year ending November 30, 1997, because, he alleged, it incorrectly stated that he did not meet performance expectations. As relief, he sought to have his performance appraisal corrected to reflect that "all performance expectations were met and a Supervisor's Worksheet that is filled out based on the entire appraisal period." (See footnote 1) Respondent asserted the grievance was not timely filed, and was an attempt to relitigate a previous grievance. The Level IV hearing held on August 17, 1998, was solely for the purpose of taking evidence on these issues.

The following findings of fact have been properly made from the record developed at Level IV.

Findings of Fact

1. Grievant has been employed by Banking since 1993, and is currently employed as a Financial Institution Examiner, Assistant.

2. On March 5, 1997, Grievant and his supervisor, George Mullins, Director of Bank Supervision, signed the "Performance Expectation Work Sheet" for Grievant, which set forth the expectations of him which would be reviewed in evaluating his performance. The expectations were: continued progression as an examiner, maintain quality work, and assist co-workers. Under "[m]aintain quality work," the standards were: "[u]tilize the 12th hour checklist," "[d]ouble check own work for accuracy," and "[f]ollow up on items to assure completeness." This expectation was to be

measured by "[a]ccuracy of reports" and "[f]eedback from EIC and review examiners."

3. On December 19, 1997, Grievant received a copy of his performance appraisal for the year ending November 30, 1997, and met with Mr. Mullins and his second-level supervisor, Rose Conner, Director of Regulatory Operations, regarding his performance appraisal. This meeting lasted from 3:15 p.m. until approximately 4:45 p.m.

4. Grievant was given an opportunity to read the performance appraisal, and then Mr. Mullins and Ms. Conner went through the highlights of the performance appraisal with Grievant, and discussed it. They discussed Grievant's good qualities, good workperformance, that his performance on one particular assignment was less than satisfactory and was very damaging to his overall performance, and his failure to meet job expectations. They also went over some of the comments in the appraisal. They did not state specifically which expectations had not been met. Mr. Mullins conveyed everything to Grievant he deemed necessary regarding his performance. Grievant had a previous engagement that day, and needed to leave, but Grievant stated he still had some questions. It was agreed they would meet again to discuss Grievant's remaining questions.

5. Part IV of the performance appraisal was completed in narrative form by Mr. Mullins. The form states with regard to this section, "[l]ist expectations accomplished (include significant achievements)." That section noted, among other things, that one report prepared by Grievant during the year contained a significant error in that it listed the wrong person as president of the subject institution. It also noted that one examination was not completed in a satisfactory manner, stating, "[s]ignificant issues exist with regard to examination processes and procedures, preparation of the report, and Pat's application of skills and principles in that examination. (Refer to comments on page 5, for additional discussion of this matter.)"

6. The performance appraisal contains extensive discussion by Grievant's supervisors of the problems encountered in the completion of the examination which was not completed in a satisfactory manner. The commentary is clear in detailing that Grievant had turned in an incomplete and inaccurate report, and had not followed up on items to assure completeness, even though these exact words are not used. It is clear from reading the performance appraisal that Grievant's supervisors found he did not meet theperformance expectations of maintaining quality work or continued progression as an examiner.

7. Grievant's supervisors added nothing to the performance appraisal after December 19,

1997, except their signatures.

8. On December 23, 1997, Grievant filed a grievance. The statement of grievance reads:

> My most recent performance appraisal for the period, stated on the appraisal form, from 11-31-96 (sic) to 11-31-97 (sic), dated 12-19-97, is in error. My classification title is Financial Institution Examiner, Assistant. The performance appraisal form, on pages 3, 7,8,9, and 13, refers to work I performed during the actual evaluation period, from 11-30-9 [sic] to 11-30- 97, that is not part of the West Virginia Division of Personnel Position Description number 9183, for a Financial Institution Examiner, Assistant. Specifically, I was the Examiner-in-Charge of ___ Credit Union. (See footnote 2) ___ is a complex financial institution as evidenced by the Management rating in the previous Report of Examination of 3, the fact that regulatory action was taken in regard to the credit union, and that the credit union is on the Division of Banking Problem Institution List. The West Virginia Division of Personnel Position Description 9183, for a Financial Institution Examiner, Assistant, states, "Employees assigned to this class may also be placed in charge of examinations of non-complex financial institutions and may be responsible for the preparation of the final examination report for experience and training purposes." The West Virginia Division of Personnel Position Description 9184, for a Financial Institution Examiner states, "Incumbents may be assigned examiner-in-charge responsibilities for complex financial institutions for experience and training purposes." The Examiner-in-Charge responsibilities for complex institutions are specifically listed as part of the Financial Institution Examiner job and are not part of the Financial Institution Examiner, Assistant job. Therefore, my work as examiner-in-charge of ___ Credit Union are [sic] not part of my job and can not be considered in the performance appraisal of an employee classified as a Financial Institution Examiner, Assistant.As relief Grievant sought, "[a] performance appraisal for the period from 11-30-96 to 11-30- 97 for a Financial Institution Examiner, Assistant."

9. The grievance was denied at Level I on January 7, 1998. It was denied at Level II on January 26, 1998. A hearing was held at Level III on February 10, 1998, and the grievance was denied at Level III on February 13, 1998. Grievant did not appeal the Level III decision to Level IV.

10. On March 23, 1998, Grievant met with Mr. Mullins and Ms. Conner to complete the discussion of his performance appraisal. The parties had not scheduled this meeting earlier because of the pending grievance. Grievant's supervisors did not discuss anything in that meeting which was substantively different from what was discussed at the December 19, 1997 meeting.

11. At the March 23, 1998 meeting, Grievant asked his supervisors what performance expectations he had not met. He had not asked them to state this in December. Ms. Conner told Grievant that part of meeting expectations was completing work satisfactorily.

12. On April 2, 1998, Grievant filed this grievance. The statement of grievance reads:

> My most recent Performance Appraisal for the one-year period ending November 30, 1997 is inaccurate. I met with Director, Bank Supervision George Mullins and Director, Regulatory Operations Rose Conner on December 19, 1997 and March 23, 1998 to discuss the appraisal. The appraisal incorrectly indicates that I did not meet the performance expectations that Mr. Mullins and I agreed upon on March 5, 1997. My self- monitoring worksheet included in the appraisal indicates that I have met all performance expectations. When I asked Mr. Mullins and Ms. Conner why this was not completed correctly, Mr. Mullins replied that I "did not meet expectations." Ms. Conner

> replied that, "Part of meeting expectations is work for meeting expectations is completed satisfactorily." Ms. Conner latersuggested that a good performance expectation for the next appraisal period would be to complete examiner in charge duties without any significant errors. When I asked Mr. Mullins and Ms. Conner about which of the expectations were not met, I did not receive a response. Ms. Conner also indicated that the responses on the Supervisor's Worksheet section of the appraisal was based [on] my performance on the __ Credit Union job and not on all jobs for the year ending November 30, 1997.

Discussion

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> 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. . . ..

Only working days are counted in determining when the 10 day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c). Grievant argued it was not until he met with his supervisors on March 23, 1998, that he knew he had met all of the goals agreed to by Mr. Mullins and him on March 5, 1997, and that his performance appraisal was wrong. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

In this case, Grievant knew how his evaluation had turned out in December 1997, as is evidenced by the fact he filed a grievance contesting the manner in which his performance appraisal was done within 10 days of receiving it. It is clear from the performance appraisal itself that whether Grievant

has met performance expectations (goals) is also being evaluated, and that he did not, in fact, meet the performance expectations of continued progression as an examiner or maintaining quality work. Grievant learned nothing new from the March 23, 1998 meeting. He grieved the performance appraisal once, trying to get the one examination removed from it. When that theory was not successful, he discovered a new legal theory, and filed a second grievance. "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993). The time period for filing this grievance began to run on December 19, 1997, when Grievant received his performance appraisal, and his supervisors discussed it with him. (See footnote 3) The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. A grievant must file his grievance within 10 working days of the date of the event, the discovery of the event, or the most recent occurrence of a continuing practice. W. Va. Code § 29-6A-4(a).

3. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." "It is not the discovery of a legal theory which triggers the statute, but the event . . .." Lynch v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997). See also Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324 (May 22, 1997); and Adkins v. Boone County Bd. of Educ., Docket No 93-03-023 (Apr. 8, 1993).

4. This grievance was not timely filed, as Grievant knew of the events giving rise to the grievance in December 1997, but did not file his grievance until April 1998.

5. No facts were shown which would excuse Grievant's late filing.

Accordingly, this grievance is **DISMISSED** and stricken from the docket of the Grievance Board.

Any party or the West Virginia Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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.

-

BRENDA L. GOULD

Administrative Law Judge

Date:

September 22, 1998

Footnote: 1

Apparently, Levels I and II were combined, and a decision denying the grievance at Level II was issued on April 20, 1998, without a hearing, noting that the grievance was not timely filed, and that Grievant was attempting to revive a previous grievance. Grievant appealed to Level III, where a decision was issued on May 8, 1998, denying the grievance on the grounds Grievant was attempting to revive a previous grievance, and this grievance was not timely filed. Grievant appealed to Level IV on May 27, 1998. A Level IV hearing was held on August 17, 1998. Grievant appeared pro se, and Respondent was represented by Robert Lamont, Esq. This case became mature for decision at the conclusion of the Level IV hearing.

Footnote: 2

The parties agreed that the name of the credit union should be kept confidential, and all documents admitted into evidence had the name of the credit union redacted.

Footnote: 3

No evidence was presented, or argument made, that Respondent took some actionwhich might have led Grievant to delay the filing of this grievance, or that Grievant, in fact, failed to timely file his grievance because he had relied in any way on Respondent's conduct or representation, or that he was not working from December 19, 1997, until the time this grievance was filed.