

JAMES DAVIDSON,

Grievant,

v.

Docket No. 00-CORR-189

WEST VIRGINIA DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

James Davidson (Grievant), a Correctional Officer II (CO II) employed by the West Virginia Division of Corrections (CORR) at the Mount Olive Correctional Complex (MOCC), grieves MOCC's failure to pay him at the maximum of the salary range for his class specification. This grievance was denied at Level I, on April 28, 2000, by Watch Commander Captain Joseph Wood; and at Level II, on May 8, 2000, by MOCC Warden Howard Painter.

A Level III hearing was held on May 22, 2000, before Captain V. Wayne White. CORR was represented at this hearing by Jamie Carte, and Grievant represented himself. This grievance was denied at Level III, by Hilda Williams for Commissioner Paul Kirby, on May 30, 2000.

A Level IV hearing was conducted, before the undersigned administrative law judge, at this Grievance Board's Beckley office, on July 20, 2000. Grievant again represented himself, and CORR was represented by Leslie Kiser Tyree, Esq. The parties were given until August 28, 2000, to submit proposed findings of fact and conclusions of law, Grievant did so, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed as a CO II by CORR at MOCC.
2. Grievant has some 20 years experience, has been a CO II for some six years, and currently earns \$22,800 per year.
3. The salary range for a CO II is from \$ 18,465.00 to \$30,072.00 per year.

4. This grievance was filed on April 28, 2000.

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 alleges that he should be paid at the maximum of the salary range for his class specification, \$30,072.00, and that CORR's failure to do so constitutes falseadvertising, because CORR listed that maximum salary when it posted Grievant's position. CORR responds that Grievant is paid in accordance with the policies of the West Virginia Division of Personnel, and that this grievance was not timely filed. Grievant seeks to be paid at the maximum rate for his class specification, retroactive to March, 1994.

With regard to CORR's contention that this grievance was not timely filed, 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, CORR's allegedly misleading posting for the position of CO II, apparently took place some six years ago. This grievance was filed on April 28, 2000. The undersigned finds it reasonable to conclude that the grievable event became fully and unequivocally known to Grievant several years ago. 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 some six years after his promotion to CO II, and because Grievant submitted no evidence to rebut the proof that his grievance was not timely filed, Corrections has established that it was untimely.

Even if this grievance had been timely filed, however, Grievant cited no authority, and the undersigned is aware of none, for the proposition that the salary range for his class specification is anything other than just that: the range of possible salaries for a CO II. This salary range does not mandate that a classified employee be paid that maximum rate at any particular time, and Grievant's argument is without merit.

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. 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).

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

5. CORR proved, 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: September 12, 2000