KEITH BAILEY,

Grievant,

v. **Docket No. 00-CORR-376**

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Keith Bailey (Grievant) was employed by the West Virginia Division of Corrections (Corrections), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC), until 1997. He filed this action on November 30, 2000, alleging that Corrections violated the Americans with Disabilities Act. 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 a hearing was held, at the Grievance Board's Beckley office, on January 12, 2001. Corrections was represented at this hearing by Leslie Tyree, Esq., and Grievant represented himself. The parties declined to submit proposed findings of fact and conclusions of law, and this grievance becamemature for decision at the conclusion of the Level IV hearing. 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 was employed by Corrections as a Correctional Officer at MOCC until 1997.
2. Grievant filed this grievance on November 30, 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 § 4.21 (2000); 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 reinstatement to his former position and replacement of vehicles and family heirloom guns he was forced to sell after his employment with Corrections ended. However, his grievance was filed some three years after his employment with Corrections was terminated, 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, the end of Grievant's employment by Corrections, occurred sometime in 1997. (See footnote 1) The undersigned finds it reasonable to conclude that this grievable event became fully and unequivocally known to Grievant at that time. 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 at least three years after his employment with Corrections ended, and because

Grievant submitted no evidence to rebut the proof that his grievance was not timely filed, Corrections has established that it was untimely.

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 § 4.21 (2000); 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. 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. 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.

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ANDREW MAIER

Administrative Law Judge

Dated: January 17, 2001

Footnote: 1

The record in the grievance is extremely sparse, and does not reflect the date or circumstances of Grievant's departure from Corrections' employment.