WARREN KNOTTS,

Grievant,

v. **Docket No. 03-DEP-354**

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondent.

DECISION

Warren Knotts ("Grievant") initiated grievances at level two on May 16, 2003, and on September 9, 2003, which were consolidated for consideration. Grievant has made the following allegations in his grievances:

-- That he was intentionally exposed to a "pepper spray" type of substance by an unidentified person on two occasions, once at his workplace and once during a training event in Norfolk, Virginia.

-- That he has been discriminated against in a retaliatory manner by his supervisor, by the withholding of information critical to the performance of his job, and that he was forced to adhere to "unreasonable travel arrangements" to attend the training in Norfolk Virginia, on May 13, 2003.

As relief, Grievant seeks to have the "acts of violence" against him immediately cease, requests that his supervisor be directed to cease harassment and discrimination against him, and reimbursement for the travel expenses he incurred for the Norfolk trip.

The grievances were denied at level two on September 22, 2003, and a level three hearing was conducted on October 9, 2003. The grievances were denied in a level three decision dated November 3, 2003. Grievant appealed to level four on November 26, 2003, and was subsequently assigned to the undersigned administrative law judge for hearing and decision. A level four hearing was held in Charleston, West Virginia, on January 20,2004. Grievant represented himself, and

Respondent was represented by Senior Assistant Attorney General Doren Burrell. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 23, 2004. (See footnote 1)

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by the Department of Environmental Protection ("DEP") as a Project Manager in the Division of Land Restoration (“DLR”), Office of Environmental Remediation. He is responsible for overseeing and coordinating the cleanup of federal Superfund projects involving hazardous waste, in conjunction with the United States Department of Defense.

2. Grievant's immediate supervisor is Donald Martin, Assistant Director of the DLR. Mr. Martin reports to the Director of DLR, Ken Ellison.

3. Mr. Martin requested that Grievant attend a training session in Norfolk, Virginia, to be held on May 13 and 14, 2003.

4. Mr. Martin made the travel arrangements for the Norfolk trip, which was to include himself, Grievant, and Tom Bass, another Project Manager. The three men were to travel together in a Jeep Cherokee state vehicle, which was assigned to Mr. Martin's office. Mr. Martin arranged for two nights of accommodations, and the group was to make the return trip at the end of the second day of training, arriving in Charleston late thatevening.

5. Grievant did not believe that the Jeep Cherokee was large enough to comfortably accommodate three men, their luggage and laptop computers for the trip to Norfolk. When he voiced this objection to Mr. Martin, his request that a larger vehicle be utilized was refused. Thereafter, Grievant independently reserved a Dodge Caravan minivan from the state's vehicle fleet, and informed Mr. Martin that he could ride along with him if he so chose. When Mr. Martin discovered that Grievant had reserved the minivan, he canceled the vehicle reservation, instructing Grievant that he would have to ride in the Jeep Cherokee.

6. Grievant refused to travel to Norfolk in the Jeep Cherokee after Mr. Martin advised him that he had canceled the minivan reservation. He then advised Mr. Martin that he would drive his personal vehicle on the trip.

7. Mr. Martin advised Grievant in advance of the Norfolk trip that he would not receive mileage

reimbursement for driving his personal vehicle, and that he would be limited to two days of lodging and three days of meals reimbursement.

8. Because Grievant believed that it was unnecessary and unsafe to drive back to Charleston at the end of the second day of training, he stayed one extra night at the hotel in Norfolk. He submitted a travel reimbursement form requesting payment for all of his expenses, which Director Ellison refused to approve until Grievant removed the extra day's expenses. Grievant refused, and incurred interest accrual for non-payment of his credit card statement for a period of at least two months.

9. Grievant initiated a grievance alleging discrimination, retaliation, withholding of information by his supervisor, and unreasonable travel arrangements on May 16, 2003. 10. While attending the training in Norfolk on May 14, 2003, Grievant was seated at a conference table for a group discussion with Mr. Bass and Mr. Martin. For reasons unknown, Grievant began experiencing a stinging sensation in his eyes, difficulty focusing, and irritation of his nose and throat. Grievant immediately administered eye drops, and he did not call this occurrence to the attention of anyone else in the room. No other person in the vicinity experienced similar symptoms.

11. On August 21, 2003, Grievant walked into his office and experienced symptoms similar to those described above. He again administered eye drops, and did not report the incident to anyone until he filed a grievance.

12. After Grievant initiated a grievance in September of 2003, first mentioning the alleged “pepper spray” incidents to his superiors, an investigation was launched at the direction of Mr. Ellison. Sandy Kee, Human Resources Manager, attempted to contact Grievant to investigate his allegations, but he was unresponsive. However, upon investigation, Ms. Kee could find no evidence to substantiate Grievant's claims. Specifically, a bottle of eye wash that Grievant claimed he used from the first aid kit near his office was found by Ms. Kee to be unopened and sealed, and no recent purchases had been made by anyone in his office.

13. One of the projects under Grievant's supervision for the past several years has been the abandoned Pantasote Superfund site, which is located in close proximity to the water treatment plant for the city of Point Pleasant, West Virginia.

14. On April 6, 2001, the Pantasote site was sold to a private individual after non- payment of taxes. Mr. Martin did not notify Grievant of the sale until the day after it occurred, although Mr. Martin

had known the sale was pending for about a month. Subsequent to the sale, DEP and federal contractors have had difficulty obtaining access to the site, due to the owner's refusal to allow them onto it. Federal warrants had to be obtained to force the property owner to comply. Grievant has not been admonished or disciplined in any respect as a result of the difficulties with the Pantasote property owner.

15. It is not Grievant's responsibility to provide property buyers with information that their property is or has been a federal Superfund hazardous waste site.

16. Grievant is responsible for preparing periodic budget and progress reports for the federal agencies that monitor the Superfund projects. He must determine the man hours and equipment needs for specific projects and keep track of expenditures.

17. In 2002, the Department of Defense ("DOD") changed the reporting cycle for its projects administered by DEP. Pursuant to the previous schedule, Grievant provided Mr. Martin with his semi-annual report in July of 2002, although it was not required until late October. Although Mr. Martin knew about the change in the reporting schedule, he did not inform Grievant until October 18, 2002, when he told Grievant that the report was due within two weeks.

18. Grievant was not admonished or disciplined in any respect for submitting his project report for 2002 after the deadline. However, Grievant did contact officials from the Army Corps of Engineers (the agent of the DOD that DEP works with) regarding the reporting deadlines and his report, without Mr. Martin's or Mr. Ellison's permission, and provided DOD with copies of email communications regarding this matter between himself and Mr. Martin.

19. The DOD project report that Grievant submitted in October of 2002 was very lengthy and detailed, despite his superiors' instructions in the past that Grievant's reportsneeded to be more concise. Therefore, Mr. Martin substituted Grievant's previous project report from July for the October report, because it had bulleted, concise information. Grievant again contacted the DOD, without authorization, and attempted to submit the October report.

20. Grievant reported to Mr. Ellison that he was being "left out of the loop" on issues related to the DOD reporting cycle, and requested intervention. Mr. Ellison reviewed the matter and advised Grievant that he believed that Mr. Martin was handling his demanding job in a satisfactory manner and that Grievant should try to be more cooperative in his approach. He also advised Grievant that it was inappropriate to provide a third party with copies of interoffice communications, and that he

should focus on the business of the agency rather than such relatively minor matters.

21. Grievant filed a written grievance on September 9, 2003, alleging that he had been assaulted with pepper spray on May 14, 2003, and on August 21, 2003.

22. Over the past several years, Grievant has consistently questioned his supervisor's directives, rather than cooperating. A significant amount of Mr. Martin's time has been spent reassuring Grievant that policy was being followed, answering questions which did not concern Grievant's job duties, and directing Grievant to perform the tasks requested of him.

23. Respondent raised timeliness objections to all of Grievant's claims, except for the allegations regarding the Norfolk travel arrangements, at the level two conference, at the level three hearing, and in motions filed after this matter was appealed to level four. (See footnote 2)

Discussion

In a non-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); Howell v. W. Va. Dep't Of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievants' claims can be divided into two major contentions: first, he claims that he was assaulted twice with a “pepper spray” type of substance and seeks to have those assaults cease; second, Grievant believes he has proven that he has been subjected to repeated harassment, discrimination and retaliation by his supervisors.

As a preliminary issue, Respondent contends that portions of this grievance have been untimely filed. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. W. Va. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

W. Va. Code § 29-6A-4(a) provides:

> 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 becameknown 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. At the request of the Grievant or the immediate supervisor, an informal conference shall beheld to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Respondent is quite correct in its assertion that much of this grievance has been untimely filed. Grievant's first grievance was filed on May 16, 2003, alleging discrimination, retaliation, withholding of information, and unreasonable travel arrangements. Clearly, the only portion of this grievance which was filed within ten days of the grievable event is the claim regarding the travel arrangements to the conference which was held on May 13 and 14, 2003. Grievant has made allegations that the various incidents set forth above have constituted a pattern of harassment, retaliation, and discrimination, but all of these events occurred well before the filing on May 16, 2003. All of Grievant's allegations regarding the Pantasote site occurred on or around April 6, 2001, when the property was sold to a privateindividual, which is over two years prior to the filing of this grievance. Likewise, Grievant's claims that information was withheld from him regarding the change in the DOD reporting cycle in mid-2002, are also extremely untimely. (See footnote 3)

As to the second grievance, alleging assaults with pepper spray on May 14, 2003, and August 21, 2003, these claims are also untimely. That grievance was filed on September 9, 2003, which was the twelfth working day after the most recent alleged occurrence on August 21, 2003. Therefore, Grievant's claims of assault with pepper spray are also untimely. (See footnote 4) Grievant knew of all of these events at the times they occurred, as he was intimately involved in them, and he has provided no justification for waiting so long to file his grievances. Accordingly, the only claim which

remains to be addressed on the merits is Grievant's allegation that he was subjected to unreasonable travel arrangements regarding the Norfolk conference last May.

Grievant has characterized Mr. Martin's decision to require him to submit to uncomfortable conditions in a Jeep Cherokee, along with being required to travel back to Charleston at the end of a day of training, as “reckless, dangerous and irresponsible” and characteristic of his “domineering management style.” He believes he is entitled to reimbursement for meal and lodging expenses incurred as a result of spending an extra night in Norfolk. This Grievance Board addressed a somewhat similar situation, regarding employees' refusal to carpool, and concluded that employers have the authority to place such restrictions on travel as a cost-saving measure. The following excerpt from Gary/Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999), is quite pertinent to the instant grievance:

> When several employees are traveling from the same office to another location, it is not a reasonable use of taxpayer money, or a valid business expense, to pay each of them travel expenses. If an employee does not wish to travel in the same vehicle with other employees, . . . that is a personal matter, not a business matter. That employee may certainly choose to travel alone, based upon her personal preferences, or her desire to take care of personal business on the same trip, but it is not reasonable to expect to be paid travel expenses so she can indulge her personal preferences.

In addition, the administrative law judge noted that W. Va. Code § 5F-2-2 provides the secretary of each state department the authority to “[c]ause the various agencies and boards to be operated effectively, efficiently and economically,” along with the authority to make cost reductions through the “elimination, reduction and restrictions in the use of the state's vehicle or other transportation fleet.” Id.

In view of state agencies' authority to reduce expenses, along with the reasoning set forth in the Gary decision, the undersigned finds that Grievant is not entitled to reimbursement for additional expenses he incurred in direct contravention of his supervisor's directives. Grievant clearly drove his personal vehicle by his own choosing, and he did not have the authority to determine that an additional night's stay in a hotel was necessary. Mr. Martin had the authority to make that decision, and it was one which was reasonable under the circumstances.

As to Grievant's claim that he has been discriminated against, it is unclear howGrievant believes the travel arrangements, as determined by Mr. Martin, were discriminatory. Nevertheless, W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless

such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Grievant has not compared himself to any other employee in this regard, and, in fact, Grievant was subjected to the same travel arrangements as Mr. Bass and Mr. Martin himself. Accordingly, it is not possible for Grievant to establish discrimination under the facts as presented.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A- 6.

2. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't of Health and Human Res., Docket No. 98-HHR-010 (July 7, 1998); Harvey v. W. Va. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

3. Grievant's claims of being assaulted with pepper spray, irregularities in management of the Pantasote Superfund site, and changes in the DOD reporting cycle in mid-2002, were not filed within ten days of their occurrence, as required by W. Va. Code§ 29-6A-4(a), so they are untimely.

4. State agencies have the authority to determine when cost-saving measures, such as carpooling, are necessary, and any employee who chooses not to abide by such arrangements may properly be required to pay for his own expenses. See Gary/Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999).

5. The requirement that three employees attending a conference should ride together in one vehicle, and that they would return home at the end of the second day of training, was reasonable and within the discretion of Grievant's supervisor.

6. Grievant is not entitled to reimbursement for a third day of expenses while attending training in Norfolk, Virginia, contrary to his supervisor's directions, when he elected to use his own personal vehicle.

7. W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees." Grievant has not compared himself to any other employees, so he has not proven any discrimination in this grievance.

Accordingly, this 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 EmployeesGrievance 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.

Date: March 10, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

To the extent that Grievant's submission contains some allegations and purported facts which were not previously introduced into evidence at the hearings in this matter, this new evidence will not be considered.

Footnote: 2

In a prehearing telephone conference, Respondent requested rulings on its motions to dismiss these claims as untimely, and rulings on those motions were deferred until afterthe level four hearing was held.

Footnote: 3

Also, since it is undisputed that Grievant has suffered no personal consequences as a result of these events, and he has provided no evidence that he was unable to fulfill his responsibilities, it is clear that these claims would also fail on the merits.

Footnote: 4

Likewise, since Grievant has provided absolutely no evidence whatsoever to support the allegations that he was assaulted by anyone with pepper spray, much less by his supervisors or coworkers, these claims would clearly fail on the

merits as well.