ROBERT RHODES,

Grievant,

v.

DOCKET NO. 03-CORR-152

DIVISION OF CORRECTIONS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Robert Rhodes, filed this grievance against his employer, the West Virginia Division of Corrections ("Corrections"), on or about April 12, 2003:

> I am grieving the posting of two COVI positions that occurred when I was a COV in the Quilliams One Unit as Unit Commander. I became aware of my loss of right on 08 April 2003.
>
> Relief sought: Reimbursement/Reinstatement of any benefit, reward, rank or pay that have been lost; right to be instituted and to be made whole.

The grievance was denied at the lower levels, and advanced for a level three hearing on May 16, 2003, where the West Virginia Division of Personnel ("DOP") was joined as a party to the grievance. The grievance was denied by Grievance Evaluator Paula Gardner on May 16, 2003, and Grievant appealed to level four on May 30, 2003. Following several continuances for good cause, the parties agreed to submit the matter on the record, and this grievance became mature for decision on January 8, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Jack Ferrell, Communication Workers of America; Corrections was represented at level three by Kathy Dillon and at level four by Charles Houdyschell, Jr., Esq.; DOP

was represented by Lowell D. Basford.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Division of Personnel ("DOP") Administrative Rule Section 4.6(b) and (c), Reclassification.

Ex. 2 -

DOP Administrative Rule Section 4.3, Incumbents of Reallocated Positions.

Ex. 3 -

Level I and II decisions and responses.

Ex. 4 -

May 5, 2003 memorandum from Lt. Robert Rhodes to Level Three Evaluator.

Ex. 5 -

May 16, 2003 memorandum from Lt. Robert Rhodes to Level Three Evaluator.

Ex. 6 -

DOP Classification and Compensation Plan, Frequently Asked Questions (FAQ).

Ex. 7 -

Channell, et al. v. W. Va. Div. of Corrections, Docket No. 99-CORR-244 (Dec. 8, 1999).

Ex. 8 -

Nabors/Brewer v. W. Va. Dept. of Health and Human Resources, Docket No. 96-DOH-100 (Aug. 4, 1997).

Ex. 9 -

Mancino v. W. Va. Bureau of Empl. Programs, Docket No. 96-BEP-402 (Apr. 30, 1997).

Level Three Corrections' Exhibits

Ex. 1 -

October 18, 2000 posting for Correctional Officer VI.

Testimony

Grievant testified in his own behalf. Corrections presented the testimony of Lowell D. Basford, Wayne Armstrong, William Bess, and Michael Coleman.

Based upon the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is currently employed by Corrections. 2. From February 2000 to March 2001, Grievant supervised the unit known as Quilliams I at the Mt. Olive Correctional Complex, and was classified as a Correctional Officer V.

3. Historically, Quilliams I had a separate programming and classification mission which distinguished it from Quilliams II, which served a security and segregation purpose.

4. For a period of time Unit Management supervised Quilliams I.

5. Over time, the missions of the Quilliams Units both became more security oriented and the administration decided to have the units headed by security.

6. As a result, on October 18, 2000, two Correctional Officer VI positions were posted to head Quilliams I and II. LIII Corrections' Ex. 1.

7. Grievant applied for the Correctional Officer VI positions, but was not a successful applicant.

8. Grievant ceased to supervise Quilliams I in March 2001.

9.

Grievant filed this grievance on or about April 12, 2003.

10. Corrections asserted a timeliness defense beginning at level one of the grievance process.

11. The creation and posting of the Correctional Officer VI positions did not involve a reclassification or reallocation of positions.

12. DOP was never asked by Corrections or Grievant to review the subject positions to examine the kind and level of duties and responsibilities of the position.

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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant contends the Correctional Officer VI positions should have been treated as reclassifications or reallocations of existing positions, in which case he would have remained in the position he held in Quilliams I in March 2001. Respondents deny any reclassification or reallocation took place with respect to the Correctional Officer VI positions, and Corrections further alleges the grievance was untimely filed.

A timeliness argument is an affirmative defense. As the resolution of the timeliness issue could be determinative of the grievance as a whole, it will be addressed first. 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. Dept. 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). 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 became known to the Grievant, or within ten days of the most recent occurrence ofa 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.

Clearly, this grievance was not filed within 10 days of the action Grievant complains of, i.e., his removal from his position in Quilliams I in March 2001. 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. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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).

Grievant argues he only became aware of his “rights” in April 2003, while researching another grievance. A grievant must bring a claim within 10 days of the date he becomes aware of the facts giving rise to the grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). The facts that give rise to a claim are not the discovery of a similarly situated party prevailing on their claim, or a legal theory. Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (1999); Pryor v. W. Va. Dept. of Transp., Docket No. 97-DOH 341(Oct. 29, 1997). Rather, the time begins to run when the grievant learns of the facts. In this case, the facts giving rise to the grievanceoccurred when Grievant knew he would not become a Correctional Officer VI, and was removed from the Quilliams I unit.

The above findings of fact and discussion are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. 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. Dept. 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). 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).

2. The facts that give rise to a claim are not the discovery of a similarly situated party prevailing on their claim, or a legal theory. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (1999); Pryor v. W. Va. Dept. of Transp., Docket No. 97-DOH 341(Oct. 29, 1997). Grievant was aware of the facts giving rise to this grievance in March 2001, but did not file this grievance until April 2003, based upon his discovery of a legal theory, and this grievance was untimely filed.

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 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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MARY JO SWARTZ

Administrative Law Judge

Dated: January 27, 2004