CALVIN COX,

Grievant,

v.

DOCKET NO. 04-CORR-436

WEST VIRGINIA DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Calvin Cox, filed this grievance against his employer, the West Virginia Division of Corrections/Anthony Correctional Facility ("Corrections") on October 26, 2004. His Statement of Grievance reads:

> On 13 Oct 04, I became aware that Anthony Correctional Center, and the Department [sic] of Corrections have defined a working day to be 8 hours. Annual Leave and Sick Leave is acquired at a rate based on an 8 Hours [sic] day. I was suspended from 23 Jan. 03 thru 08 Feb., and again from 07 Mar. 03 thru 04 Apr. 03 at a rate of 12 Hrs [sic] a day. If the facility considered a day to be 8 hours, and we earn leave based on an 8 hour day, my suspension should have been based on an 8 hour day also.
>
> Relief sought: To have my Annual Leave and Sick Leave acquired at rates based on 12 hours a day, and be reimbursed for the time I worked 12 hour days, or reimburse me with interest for the hours that I was suspended for over the 8 hour per day rate. My total 10 day suspension was for 120 hours, and my 15 day suspension was for a total of 300 hours. This should have been 10 days X 8 hours per day = 80 hours and 15 days X 8 hours per day = 120 hours, for a total of 200 hours.

This grievance was denied at all lower levels, and Grievant filed to Level IV on December 16, 2004. A Level IV hearing was held in the Grievance Board's Beckley, West Virginia, office on February 18, 2005. Grievant represented himself, and Corrections was represented by John Boothroyd, Assistant Attorney General. This case became mature for decision on March 21, 2005,

after receipt of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant repeatedly asserted that his "rewards and punishment should be the same," and either he should receive more annual leave and sick leave because he works 12 hours a day or his suspensions should be based on an eight hour day. He maintains Sheppard v. Department of Health and Human Resources, Docket No. 01-HHR-598D (May 9, 2002). supports his assertions.

Corrections argues this grievance should be dismissed for two reasons. One, that it is untimely and two, the matter is res judicata. (See footnote 1) Additionally, Respondent notes Grievant's assertions have already been decided in the negative by this Grievance Board in Brackman v. Division of Corrections, Docket No. 03-CORR-166 (October 8, 2003).

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Correctional Officer, with the rank of Corporal, at the Anthony Correctional Facility.

2. Grievant's work schedule is three 12-hour days one week and four 12-hour days the next week. This averages out to 42 hours a week during a two-week period. Grievant is paid overtime for his hours greater than forty.

3. Warden Scott Patterson suspended Grievant two times in 2003. The first suspension was for ten working days and the second was for 15 working days. 4. At the time of these suspensions, Warden Patterson was aware Grievant worked 12-hour days.

5. Grievant grieved both suspensions. These suspensions were consolidated and denied by Decision dated January 13, 2004. See Cox v. Div. of Corrections, Docket No. 03-CORR-144 (Jan. 13, 2004).

6. Contrary to Grievant's assertion, Division of Corrections Policy 129.08 does not define a work day as eight hours. Contrary to Grievant's assertion, no Division of Personnel Rule defines a work day as eight hours.

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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Timeliness

Corrections contends this grievance was untimely filed as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden ofdemonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated 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. Higginbotham v. W. Va. Dep't of Pub. 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).

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> 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 relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

In this case, Respondent demonstrated Grievant did not file within the required ten- day time period. Grievant was suspended twice in 2003. He did not file this grievance until December of 2004. Thus, Grievant has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. W. Va. Code § 29-6A-4(a) provides for a "discovery rule," in that "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." Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), Syl. Pt. 1. However, "it is not the discovery of a legal theory which triggers the statute, but the event." Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH- 060 (July 16, 1997) at 8. What Grievant is actually asserting is a legal theory. He knew of the events, his suspensions, at the time they occurred. See Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996) at 7. See also Gragg v. W. Va. Div. of Corrections, Docket No. 98-CORR-330 (Mar. 26, 1999); Pryor v. W. Va. Dep't of Transp., Docket No. 97-DOH-341 (Oct. 29, 1997); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991); Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

Grievant argues the event from which his filing date should be counted is when he found out the Division of Personnel defined a work day as eight hours. Grievant says this assertion is proven by his next assertion that benefits are accrued at a rate based on an eight hour day. Grievant maintains he discovered this "fact" when he heard two employees discussing the Sheppard Decision. This Decision was issued on May 9, 2002, before Grievant was even suspended. The Sheppard default grievance held a suspension did not toll the time limits for responding to a grievance, and there was no discussion of the length of work days. Accordingly, Grievant has not provided a proper excuse to explain his untimely filing, as what he "discovered" was a legal theory not a fact.

II. Work Day Grievant's other assertions are a combination of "fuzzy math" and wishful thinking. A very similar issue was addressed by this Grievance Board in Brackman. In Brackman the administrative law judge found, "[Division of Personnel] Rule 14.3 contains no 'formula' for calculating annual leave; it merely awards, in increasing increment[s], days off for employees of the state, depending upon their length of service. There is no support or authority for [the] grievant's contention that annual leave is based upon hours worked per day."

Additionally, the administrative law judge held the grievant's argument regarding the Division of

Personnel Rule 14.4 was similarly without merit, and that Rule simply provided that full-time employees accrue 1.5 days per month of sick leave. Accordingly, Grievant's arguments are without merit.

The above-discussion will be supplemented by the following Conclusions of Law.

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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. This grievance was untimely filed.

3. Grievant was unable to provide an excuse for his untimely filing as the evidence he presented was a legal theory not a triggering event.

4. Annual leave and sick leave are not "based upon hours worked per day." Brackman v. Div. of Corrections, Docket No. 03-CORR-166 (Oct. 8, 2003).

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, and 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 are 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Date: May 3, 2005

Footnote: 1

This issue will not be addressed further because of the other rulings in this case.