CALVIN COX,

Grievant,

v.

DOCKET NO. 05-CORR-141

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 March 23, 2005. His Statement of Grievance reads:

> On Jan. 13, 2003, I received a letter of suspension for 10 days without pay. Effective Jan. 22, 2003 and [to] conclude on Feb. 8, 2003. With Jan. 22, 2003 being the first day of the suspension. I was not allowed to return to work until Feb. 12, 2003. This being a total of 21 days away from work for a 10 day suspension. Also on Feb. 27, 2003, I received a letter of suspension for a 15 day suspension without pay, effective Friday March 7, 2003 and [to] conclude on April 4, 2003. With March 7, 2003 being the first day of my suspension, March 21, 2003 would be the 15th day of the suspension. I was not allowed to return to work until April 5, 2003. This being a total of 26 days away from work for a 15 day suspension. Between a 10 and 15 day suspension there should have been a total of 25 days that I was not allowed to work, instead of a total of the 47 days that I was not allowed to work.
>
> Relief sought: To be reimbursed with interest for any hours that I could have been allowed to work including overtime, for any/every day I was not allowed to work that exceeded the total number of days specified by the letters of suspension. (All days between and including Feb 1, 2003 thru Feb. 11, 2003 and all days between and including Mar. 22, 2003 and Apr. 4, 2003.[)]

This grievance was denied at all lower levels, and Grievant filed to Level IV on April 25, 2005. Respondent filed a Motion to Dismiss based on the grounds of res judicata and timeliness. A pre-

hearing phone conference was conducted on May 23, 2005, to discuss the Motion. Grievant stated he had no further evidence to present at a Level IV hearing. This being the case, and to allow Grievant the option of presenting any additional argument he wished and time to respond in writing to Respondent's Motion, the case was submitted on the record developed below. Grievant represented himself, and Corrections was represented by John Boothroyd, Assistant Attorney General. This case became mature for decision on June 23, 2005, the date for the receipt of the parties' proposed findings of fact and conclusions of law. Grievant elected not to submit these proposals.

Issues and Arguments

Grievant asserts his suspensions should be based on calendar days, meaning that his ten-day suspension should have lasted only ten calendar days. For example, Grievant believes his 15-day suspension which began on March 7, 2003, and lasted until April 4, 2003, and included 15 working days, should have only lasted until March 21, 2003, as this would be 15 calendar days. Additionally, Grievant contends he should be compensated for overtime he could have worked if Respondent had called him in on his regular days off during the suspension.

Corrections argues this grievance should be dismissed for two reasons. One, that it is untimely filed and two, the matter is res judicata. (See footnote 1) Respondent also notes Grievant cites no statute, policy, rule, or regulation to support his contentions.

In response to Respondent's timeliness argument, Grievant notes he was told at a prior Level IV hearing, by the undersigned Administrative Law Judge, that his suspension was longer than ten and/or fifteen calendar days, and this statement was the grievableevent that caused him to file this current grievance. He offered no other explanation for his delay in filing.

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. The days of the week that are worked are consistent for each correctional officer, although

they may be called in to work overtime. For example, a Correctional Officer would work Thursday, Friday, and Saturday one week, Wednesday, Thursday, Friday, and Saturday the second week, and Thursday, Friday, and Saturday the third week.

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. Grievant was aware of the length of each suspension at the time it occurred, and was aware that the number of days suspended was based on working days.

4. At the time of these suspensions, Warden Patterson was aware Grievant worked 12-hour days, and he worked three days one week and four days the next.

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. Grievant also grieved the length of these suspensions with another grievance filed October 26, 2004. This Level IV grievance was denied by Decision dated May 3, 2005. See Cox v. Div. of Corrections, Docket No. 04-CORR-436.

7. Grievant filed this grievance on March 23, 2005.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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 of demonstrating 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 March of 2005. 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." Syl. Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). 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. In this instance it is unclear what Grievant is actuallyasserting. He knew of the events, his suspensions and their length in working days, 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 grievable event from which his filing date should be counted is when he was told by the undersigned Administrative Law Judge in a prior hearing that his suspensions were longer than ten or fifteen calendar days. Even if it is accepted as true that the undersigned Administrative Law Judge made that statement at another hearing, it is clear this information would not be new data to Grievant, and cannot be seen as a grievable event. Grievant knew at the time his suspensions occurred how long they were, and that they were based on working days. He has not obtained any new information that would support the filing of a grievance on this issue. Accordingly, Grievant has not provided a proper excuse to explain his untimely filing, as what he "discovered" was at best a legal theory, and at worst already known facts, not a grievable event.

II. Length

Grievant's argument that the length of his suspension must be based on calendar days, and that he is entitled to overtime he could have earned while he was suspended is just odd. There is no support or authority for either of Grievant's contentions. Additionally, if Grievant believed his suspensions were too long or unjustly meted out, this would havebeen appropriate issues to address in his initial suspension grievance. Accordingly, Grievant's argument is without merit.

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

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. W. Va. Code § 29-6A-4(a) states a grievance must be filed "[w]ithin 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. . . ."

3. 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).

4. 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, 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: July 21, 2005

Footnote: 1

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