WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOHN ROBINSON,

Grievant,

v. **Docket No. 06-CORR-462**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

John Robinson ("Grievant") initiated this grievance on November 9, 2006, protesting a written reprimand that was issued in a level three grievance decision rendered on March 14, 2006, but which was not actually placed in his personnel file until November 2, 2006. Grievant seeks to have the reprimand removed from his personnel file, along with a promotion to CO V (Correctional Officer V), which promotion was denied because of the disciplinary action against him.

The grievance was denied at level two on November 21, 2006, and, following a hearing held on November 30, 2006, a level three denial was issued in a decision dated December 1, 2006. Grievant appealed to level four on December 12, 2006, and a hearing was held in Beckley, West Virginia, on February 6, 2007. Grievant represented himself, and Respondent appeared by counsel, John H. Boothroyd, Assistant Attorney General. The parties submitted fact/law proposals by March 6, 2007.

Following the resignation of Chief Administrative Law Judge Paul Marteney, this matter was reassigned to the undersigned on August 30, 2007.

Synopsis

Grievant was suspended for misconduct in February of 2006, which he successfully grieved to level three of the grievance process. The level three decision ordered that the suspension be replaced with a written reprimand, but, due to a clerical oversight, a reprimand was not physically placed in the personnel file at that time. In October of 2006, Grievant applied for a promotion, which was denied, due to Corrections' policy prohibiting promotion within one year of receipt of a written reprimand. Once it was discovered that the reprimand had not been placed in the file, on November 2, 2006, Respondent substituted the suspension letter with a duplicate letter, titled as a written reprimand.

Grievant established no legal entitlement to have the reprimand removed from his personnel file or consideration for a promotion. He participated in the proceedings regarding the discipline imposed and was well aware of the parameters and basis of the suspension and reprimand. A clerical error does not entitle Grievant to the relief requested. Grievance DENIED.

Findings of Fact

1. At all times pertinent to this grievance, Grievant was employed at Anthony Correctional Center as a Correctional Officer III.

2. On February 6, 2006, Warden Scott Patterson issued a letter notifying Grievant that he was being suspended for twenty days, due to various incidents involving the improper duplication, issuance and use of keys at Anthony Correctional Center.

3. Grievant filed a grievance objecting to the suspension. A recommended level three decision was issued by Hearing Examiner Paula K. Gardner on March 14, 2006,granting the grievance, in part, by directing “that the suspension be removed and Grievant be issued a written reprimand and reimbursed for wages and benefits[.]”

4. The recommended decision was accepted by Commissioner Jim Rubenstein and issued to all parties, including Grievant, on March 14, 2006.

5. Grievant did not appeal the level three decision.

6. After issuance of the level three decision, a written reprimand was not placed in Grievant's personnel file.

7. In October of 2006, Grievant applied for a vacancy in a Correctional Officer V position. He

reviewed his personnel file and found that the reprimand was not in the file, so he decided to apply for the promotion. An interview was scheduled for October 31, 2006.

8. On October 26, 2006, Grievant was notified by human resources officials that he was not eligible for consideration for the vacant position, in accordance with the provisions of Policy Directive 132.02, which provides that "a written reprimand shall deem the employee ineligible for a Correctional Officer promotion for one (1) year from the date of the disciplinary action."

9. On November 2, 2006, Warden Patterson placed the written reprimand in Grievant's personnel file, which was virtually a duplicate of the previous suspension letter, but entitled "written reprimand." This letter also stated that it was "being issued in compliance with Grievance #06-002 dated 3/13/06."

10. Although not physically placed in Grievant's personnel file until November 2, 2006, the written reprimand was issued on March 14, 2006, and, for purposes ofdetermining Grievant's eligibility for promotions, was in effect from one year after the original suspension was issued.

Discussion

As a preliminary matter, Respondent has raised the issue of timeliness throughout this grievance proceeding. A grievance must be filed with the immediate supervisor of the grievant "[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, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." *W. Va. Code* § 29-6A-4(a). (See footnote 1) Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

In order to determine whether this grievance is timely filed, the issue which gave rise to the grievance must be identified. In this case, Grievant did not grieve the level three decision in which his suspension was replaced with a written reprimand. It is undisputed that Grievant participated in that proceeding, received the level three decision in a timelyfashion, and consciously chose not to appeal it. Therefore, the issuance of the reprimand, in the context of the suspension grievance, is not the issue in the current grievance. Rather, the event which caused Grievant to initiate this proceeding on

November 9, 2006, was the placement of the letter of reprimand in his personnel file on November 2, 2006, which, in turn, prohibited his consideration for promotion. Accordingly, the undersigned finds that this grievance was initiated within ten days of the grievable event.

Although Grievant seeks to have the reprimand removed from his personnel file as relief in this case, this is not a disciplinary matter. The placement of the reprimand in Grievant's file in November of 2006 is at issue because of its timing, not because of the underlying issues which led to the original suspension. 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 (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).

Grievant contends that, because the actual reprimand letter was not placed in his personnel file until November 2, it should be declared void and removed from his file. Unfortunately, the relief requested has no legal basis. Even if the undersigned were to find that it was legally wrong for Respondent to place the reprimand letter in the file inNovember, removal of the discipline from Grievant's record would not be appropriate relief, as he has forfeited the right to grieve the underlying issue by choosing to allow the level three decision to stand. Only if the reasons for the initial discipline were at issue would Grievant be entitled to the relief which he requests.

Grievant was well aware of the discipline against him when it originally occurred in February of 2006. Indeed, he pursued his legal right to grieve that discipline, was successful at level three of the grievance process, and was apparently satisfied with the result. As stated in Respondent's progressive discipline policy (Policy Directive 129.00), the purpose of progressive discipline is to correct behavior, requiring that the employees know what they did wrong, what they should have done, future expectations, and the consequences of future violations. All of these requirements were met when the original suspension and subsequent reprimand were issued. A clerical oversight resulting in a failure to place the physical document in Grievant's file simply does not entitle Grievant to rescission of a properly-issued disciplinary action. Grievant knew of the action against him,

understood its basis, and clearly knew that it would prevent him from being promoted for a specified period of time.

Grievant has cited the Grievance Board's decision in *Martin v. Department of Corrections*, Docket No. 88-CORR-020 (Dec. 30, 1988), in support of his position. However, that case was different from the instant situation in one important aspect, in that there was a seven-month delay between the employer's *initial* disciplinary action and the incident upon which it was based. It was found by the administrative law judge that the delay was “patently unreasonable” and violated Corrections' own policies requiring prompt correction of unsatisfactory behavior. Conversely, in the instant case, Grievant was fullyaware of the discipline against him in February of 2006 and its basis, and there is no evidence that it was not promptly administered.

The failure to physically place the reprimand in Grievant's personnel file may be viewed as a minor procedural error. As has been previously held by this Grievance Board, within the context of procedural errors which occur in disciplinary actions, if the employee is unable to establish that the error influenced the final outcome, the procedural violation will be considered as "harmless error." *Wines v. Jefferson County Bd. of Educ.*, Docket No. 00-19-394 (July 9, 2001); *Bradley v. Cabell County Bd. of Educ*., Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). Grievant has not been harmed by the failure to place the reprimand in his file at an earlier date and is not entitled to the relief requested.

The following conclusions of law are consistent with this decision.

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

2. This grievance was filed within ten days of the grievable event, so it was timely filed.

3. 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. & StateEmployees 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).

4. In a disciplinary matter, if the employee is unable to establish that a procedural error influenced the final outcome, the violation will be considered as "harmless error." *Wines v. Jefferson County Bd. of Educ.*, Docket No. 00-19-394 (July 9, 2001); *Bradley v. Cabell County Bd. of Educ*., Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999).

5. Grievant has established no legal entitlement to the relief requested.

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. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 1, supra)*. 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.

Date: October 24, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education

employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.