ROGER CHANNELL, et al.,

Grievants,

v. **Docket No. 99-CORR-244**

DIVISION OF CORRECTIONS/HUTTONSVILLE CORRECTIONAL CENTER and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants Roger Channell, Robert Edmond, Brian Simmons, Randall Shreve, David Potts, and Matthew Currence, employees of the Division of Corrections ("Corrections") at the Huttonsville Correctional Center ("HCC"), each filed a grievance in early May 1999, complaining of discrimination, arguing they should have received a 5% incentive pay increase in 1996, when they voluntarily moved into "Unit Management," as did employees who transferred into Unit Management with a lateral class change. Grievants sought as relief a 5% increase in pay, retroactive to 1996, interest, and attorney fees. (See footnote 1) The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. On July 25, 1996, Warden William C. Duncil sent a memorandum to all HCC staff, informing them of a change in the way HCC would be managed. The memo stated that this change from the "traditional Security/Treatment Model to the Unit Management Model" would result in the creation of the positions of Unit Manager and Case Manager, and the addition of a number of Correctional Counselor positions. (See footnote 2) The memorandum stated, "[b]ecause this is an internal reorganization and there are no new positions, persons selected will have their present job title `reallocated', if necessary." The entire facility was not reorganized at this time, rather only one section was reorganized into Unit Management. Thirty employees transferred into Unit Management.

2. Grievant Simmons has been employed by Corrections since 1988. On September 15, 1998, he applied for a Corrections Case Manager position, pay grade11, in the new Unit Management section at HCC. His position was reallocated from Correctional Officer II ("CO II"), pay grade 9, to Corrections Case Manager, pay grade 11, and he received a 10% increase in salary.

3. Grievant Channell has been employed by Corrections since 1986. In December 1996, he applied for a Corrections Case Manager position in Unit Management. His position was reallocated from Correctional Officer III ("CO III"), pay grade 10, to Corrections Case Manager, and he received a 5% increase in salary.

4. Grievant Currence has been employed by Corrections since February 1996. In December 1996, he applied for a Correctional Counselor I ("CC I") position, pay grade 9, in Unit Management. His position was reallocated from Correctional Officer I ("CO I"), pay grade 8, to CC I, and he received a pay increase in excess of 5% to bring his salary to the minimum salary for pay grade 9.

5. Grievant Edmond has been employed by Corrections since November 1985. In December 1996, he applied for a Corrections Case Manager position in Unit Management. His position was reallocated from CO III to Corrections Case Manager, and he received a 5% pay increase.

6. Grievant Shreve has been employed by Corrections since September 1985. In October 1996, he applied for a Unit Manager position, pay grade 13, in Unit Management. His position was reallocated from Correctional Officer IV, pay grade 11, to Unit Manager, and he received a 10% increase in pay.

7. The salary increases received by Grievants Shreve, Edmond, Currence, Channell, and Simmons, upon their transfer into Unit Management, were not incentiveincreases. These salary increases were based upon the Division of Personnel's ("Personnel") Administrative Rules governing salary increases upon reallocation, and were a result of the changes in pay grades.

8. Grievant Potts has been employed by Corrections since November 1985. In mid-1997, he applied for a CC I position in Unit Management, and he was selected. Prior to that, he had been classified as a CO III. His salary remained the same upon his placement into the CC I position, although this was a voluntary demotion. He was later promoted to Corrections Case Manager, and received a 5% pay increase, even though he moved up two pay grades.

9. Troy J. McCauley, Jr., Randall Brake, Ben Gobeli, Brian Edmond, Michael Smith, and Mike Clay all transferred to Unit Management in 1996 or 1997, and their positions were reallocated from

CO II to CC I. These were lateral class changes, as they remained in the same pay grade. Each of them received a 5% increase in pay, as Warden Duncil directed that everyone who transferred into Unit Management should receive a pay increase of at least 5%.

10. Mr. Clay and Mr. Smith were both later promoted to Corrections Case Manager to fill vacancies, and both received a 10% increase in pay at that time. Mr. Gobeli later was promoted from CC I to a position in pay grade 10, and received a 5% increase in pay. These pay increases were in accordance with Personnel's Rules governing salary increases upon promotion.

11. When Mr. Brake transferred out of Unit Management, he voluntarily gave up the 5% pay increase he had received upon his transfer into Unit Management. 12. The pay increases received by employees who transferred into Unit Management by lateral class change were not merit increases. They were incentive pay increases given as a reward or bonus to employees for their choice to transfer into Unit Management.

13. No one told Grievant Channell about the 5% increase in pay for a lateral transfer into Unit Management. He did not apply for any positions in a pay grade 10 or lower, because he did not believe a pay increase would accompany a lateral transfer into these positions. (See footnote 3)

14. Grievant Simmons did not know that employees who transferred into Unit Management with a lateral class change received a 5% pay increase, until he saw Mr. McCauley's personnel action form on May 4 or 5, 1999. The personnel action form described Mr. McCauley's salary increase upon his lateral transfer into Unit Management as a merit increase. Grievant Simmons then talked to others who had laterally transferred into Unit Management, and discovered they had also received 5% salary increases when they transferred, and that Mr. Brake had to give up his 5% increase when he left Unit Management. He filed this grievance on May 12, 1999. 15. Grievant Channell filed his grievance the day he learned from Mr. McCauley and Grievant Simmons that individuals had received 5% salary increases when they laterally transferred into Unit Management.

16. Grievant Currence first learned on May 10, 1999, that employees had received 5% pay increases when they laterally transferred into Unit Management. Mr. McCauley told Grievant Currence he had received a 5% incentive increase when he went to Unit Management, and he might want to be aware of it, and even gave him a copy of his personnel action form. Grievant Currence filed his grievance the next day.

17. Grievant Edmond learned in May 1999, from Mr. McCauley, about the 5% increase

received by employees who laterally transferred.

18. Grievant Shreve filed his grievance on May 11, 1999, within a few days of viewing Mr. McCauley's personnel action form, and learning that employees who were lateral transfers into Unit Management received a 5% pay increase.

19. Respondent raised as a defense, at or before Level II, that the grievances were not timely filed.

Discussion

Corrections asserted the grievances should be dismissed as they were not timely filed, and that Grievants were lying when they testified they had only recently become aware that employees whose pay grade did not change had been given a 5% pay increase for choosing to transfer into Unit Management. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove thisaffirmative defense by a preponderance of the evidence. Craig v. Dep't of Health and Human Resources, Docket No. 98-HHR-334 (June 24, 1999); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). In addition, effective July 1, 1998, W. Va. Code § 29-6A-3 requires the respondent to raise the issue of timeliness at or before Level II. The record reflects that the timeliness defense was raised at Level II.

If the respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). Although W. Va. Code § 29-6A-3(a) specifically lists the excuses to timely filing, this Grievance Board has nonetheless determined that equitable theories may be applied to toll the time for filing a grievance. Craig, supra; Rose, et al., v. Raleigh County Bd. of Educ., Docket Nos. 94-41-296/314 (Nov. 29, 1994), aff'd per curiam, 199 W. Va. 220, 483 S.E.2d 566 (1997).

As to when a grievance must be filed, W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> 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 mostrecent 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. . . ..

Only working days are counted in determining when the 10 day time period runs for filing a grievance. Holidays are not counted. W. Va. Code § 29-6A-2(c).

Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "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." The same discovery rule found in the education grievance procedure is also found in the grievance procedure for state employees at Code § 29-6A-4, quoted above. The event triggering the time period for filing this grievance was the discovery by Grievants that employees who transferred into Unit Management and whose pay grade did not change, had received a pay increase upon their transfer into Unit Management. Hammond v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-222 (Nov. 30, 1998); Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (July 27, 1998). Until Grievants knew of this fact, they had no reason to raise a claim of discrimination. See Short v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-038 (Mar. 25, 1999); Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998).

Respondent argues it has met its burden of proving the Grievants knew of the events giving rise to this grievance because "it is simply incredible to believe that no employee knew of the pay increases prior to the filing of the grievances in this case." Respondent presented no witnesses to testify to the fact that any of the Grievants had knowledge of the incentive pay, despite testimony that all the employees talk to each other about their pay. Not a single employee was called to testify that he had talked to any of the Grievants about salaries.

Joyce Gumm, an Accounting Tec III at HCC, has been responsible for payroll at HCC for several years. Her testimony was that all the employees at HCC show their pay stubs to everyone else. She stated she knew the employees had passed around their personnel action forms, because they were showing up in grievance hearings. She stated employees started coming to get copies of their personnel action forms in 1997 when Mr. Brake left Unit Management. She stated everyone in Unit Management knew they were getting a 5% increase in pay, and came to her and asked her for their new salaries; and it was common knowledge all over the prison. She felt certain Warden Duncil had told the employees of the pay increase when he held a meeting to explain Unit Management,

although she did not attend the meeting. Grievants, however, testified that Warden Duncil never mentioned the 5% incentive pay increase at this meeting, and they were not aware of it. Importantly, Ms. Gumm stated she did not know for a fact that any of the Grievants had seen any other employee's personnel action form prior to May 1999, or that they were otherwise aware of the 5% incentive pay given to lateral transfers; although she opined that it was very improbable that they did not know before this.

Respondent asserts that the undersigned must assess the credibility of the Grievants. This would be true had Respondent presented sufficient evidence that itwas more likely than not that the Grievants were aware of the incentive pay. Respondent has not done so. It is clear that Warden Duncil did not tell the employees they would receive a 5% salary increase as an incentive to recruit volunteers, and this information was not posted. The only way Grievants would have known of the incentive pay was if those who laterally transferred into Unit Management had told Grievants, or others, and rumors had then circulated to Grievants, or if Grievants had just decided to ask for salary information on everyone transferring into Unit Management. Despite Ms. Gumm's belief that "everyone" shares salary information, and the incentive pay was common knowledge, she had no information specific to Grievants, and could not even testify as to when Grievants had requested their own personnel action forms.

Were the undersigned to assess the credibility of Grievants, however, they would be found to be credible witnesses. In assessing the credibility of witnesses,

> some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. McCauley testified he thought everyone had gotten a pay increase when they went into Unit Management, although he disagreed with Ms. Gumm's testimonythat it was common knowledge that everyone who went into Unit Management received a pay increase, and stated he had heard no rumors about it. He stated he asked Grievant Simmons if he had gotten a merit increase when he went into Unit Management, and Grievant Simmons asked him if he was sure his personnel action

form said that.

Grievant Simmons stated after he saw Mr. McCauley's personnel action form on May 5, 1999, he began investigating by asking others whether they had received pay increases when they transferred into Unit Management. When he found out Mr. Brake had given up his increase when he left Unit Management, he was really confused, because this was inconsistent with what he thought a merit increase was.

Grievant Channell stated he does not discuss salary with other employees. He stated there are six employees in his unit, and he does not regularly see any other employees or speak to them except in passing to say hello. He testified he first found out about the 5% increase when Mr. McCauley and Grievant Simmons stopped by his office and asked if he was aware of it, and he filed his grievance the same day.

Grievant Currence testified when he found out about the 5% incentive increase on May 10, 1999, from Mr. McCauley, he filed his grievance the next day. He denied it was common knowledge that lateral transfers had received a salary increase for transferring into Unit Management, or that he heard any such rumors, and stated he does not ask others what their salary is.

Grievant Edmond stated he sees only those employees in his unit of six. He stated he was not aware of the 5% incentive increase until Mr. McCauley brought hispersonnel action form to his office. He explained that had he known he could have received a 5% salary increase for a lateral transfer into Unit Management, he would have applied for a position in the same pay grade he was in, as it would have meant less work for the same money.

What became clear from the testimony of Grievants was that they did not transfer into Unit Management simply for career satisfaction. As several of them stated, they were in it for the money, and had no desire to work any harder than they had to. Had they known they would have received a 5% salary increase for doing a job in the same pay grade they were already in, and that they could then later apply for a promotion and receive another salary increase for the change in pay grade upon promotion, it is clear that is the course they would have chosen. Further, Respondent advanced no reason why Grievants would choose to wait more than two years to file a grievance over this. The undersigned finds Grievants' testimony that they were unaware until May 1999 that lateral transfers had received a pay increase upon transfer into Unit Management to be truthful. Respondent has not met its burden of proving the grievances are untimely. Further, as this grievance is found timely under

the discovery exception, should they prevail, Grievants' back pay recovery would not be limited to ten days preceding the filing of the grievance. Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999).

Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievants argued it wasdiscriminatory to give lateral transfers a 5% pay increase simply for moving to Unit Management, and that they should have received this same incentive pay in addition to the raises most of them received when they accepted positions in higher pay grades than they had been in, and which they believed carried with them more responsibility. In addition, they presented evidence further demonstrating the discriminatory effect of this action, that three employees had received a 5% pay increase when they laterally transferred into Unit Management, and then when they later accepted positions in higher pay grades, they got another 5% pay increase per pay grade, in accordance with Personnel's Rules regarding salary upon promotion. Thus, an employee who laterally transferred into Unit Management at a pay grade 9, and then later accepted a position in a pay grade 10, received two 5% pay increases, while an employee at a pay grade 9 before going into Unit Management, who accepted a position in a pay grade 10 in order to transfer into Unit Management, only received one 5% pay increase.

Corrections pointed out that everyone got at least a 5% pay increase, and some of the Grievants received more than 5%. It argued that Grievants are not similarly situated to lateral transfers, because they did not laterally transfer into Unit Management. It also argued that under Grievants' reasoning, those employees who laterally transferred into Unit Management should grieve because they did not receive the same pay increases Grievants received. The facts are, however, that the reason Grievants received pay increases was because of their moves to higher pay grades, and that the lateral transfers who were later promoted into positions in higher paygrades received the very same pay increases Grievants had received, and in addition, they received a 5% incentive pay increase which Grievants did not receive.

Personnel pointed out that when an employee transferred into Unit Management, and then later was promoted, these were two separate transactions. Personnel also argued the pay increases received by the lateral transfers were merit increases.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id. At the Level IV hearing Ms. Gumm testified:

> Mr. Duncil told me that he wanted everyone that went into Unit Management to have 5%. It wasn't mentioned as, uh, merit or anything. He just wanted, if it was by pay grade raise or just for going into Unit Management. . . . Because we didn't have any new positions, these people had to decide to go into, and accept the responsibility of Unit Management, uh, from the jobs they were already in, and he felt that he needed to offer an incentive, or, uh, to fill the positions.

She stated it was her understanding that this was a temporary measure to enable him to staff the new unit; however, this continued until Warden Duncil left HCC. Ms. Gumm's explanation was also supported by Linda Sprouse, who works with Ms. Gumm at HCC, when she testified at Grievant Potts' Level III hearing.

A lateral class change is defined by Personnel's Administrative Rules, § 3.54, as "[t]he movement of any employee from one class to another class in the same pay grade." (See footnote 4) Those same Rules at § 5.7 provide that, "[a]ny employee who receives a lateral class change shall be paid the same salary received prior to the change."

Personnel's Administrative Rules provide at § 5.4, that "[w]hen a position is reallocated to a different class, the salary of the incumbent shall be adjusted in accordance with salary regulations for promotion, demotion and lateral class change." The salary of an employee who is promoted into a

position in a higher pay grade, and whose salary is within the pay range for the new pay grade, is adjusted by either 5% per pay grade, to a maximum of 15%, or to the minimum salary of the new pay grade, whichever is greater. If the salary of the promoted employee is at theminimum rate of the old pay grade, his salary is increased to the minimum level of the new pay grade. Personnel's Administrative Rules at § 5.5.

The undersigned finds that the Grievants received pay increases in accordance with §§ 5.4 and 5.5 of Personnel's Administrative Rules. Mr. McCauley, Mr. Smith, Mr. Clay, and Mr. Gobeli were not entitled to a pay increase based upon these rules, because they experienced lateral class changes. However, they were given pay increases simply because they chose to transfer into Unit Management. (See footnote 5) Grievants did not receive this pay increase. In addition, Mr. Smith, Mr. Clay, and Mr. Gobeli later were promoted, and received the 5% per pay grade increase which Grievants received upon their transfer into Unit Management. Grievants have made a prima facie case of discrimination. Under the facts of this case, they are similarly situated to all the other employees who transferred into Unit Management, and failed to receive a benefit which other employees received which was not related to actual job duties. See Travis v. W. Va. Dep't of Health and Human Resources, Docket No. 96- HHR-518 (Jan. 12, 1998).

Although Grievant Potts' situation is somewhat different from that of the other Grievants, he likewise has proven a prima facie case of discrimination. Although hissalary was not decreased upon demotion, as is allowed by Personnel's Rules, the net effect on his salary was the same as the other Grievants and different from that of those receiving the incentive increase. He moved down one pay grade, then up two pay grades, resulting in a net movement up one pay grade. His pay increased only 5% - the same change experienced by the other Grievants. However, Mr. Gobeli also moved up one pay grade upon promotion after his transfer into Unit Management, yet he received two 5% pay increases.

Personnel argued the increase in pay given to lateral transfers was a merit increase, and accordingly, Grievants had to produce evidence that their performance evaluations and other recorded measures of performance were such that they were more entitled to merit increases than those who received them. Although it is possible Personnel was told by Corrections in 1996 that the pay increases for lateral transfers were merit increases, it is clear from the testimony offered by Ms. Gumm and Ms. Sprouse that these pay increases were not based upon merit, i.e., any recorded

measure of performance, but rather were in the nature of an incentive, or bonus, for transferring into Unit Management. They were not merit increases. If they could be considered merit increases, these employees were no more meritorious in their choice to transfer into Unit Management than Grievants, and Grievants likewise should have received a "merit" increase. The incentive pay was for the transfer into Unit Management. If one employee was entitled to receive incentive pay for this choice, everyone who chose to transfer was entitled to the incentive pay. Respondents failed to demonstrate a "legitimate, nondiscriminatory reason" for the difference in treatment.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Craig v. Dep't of Health and Human Resources, Docket No. 98-HHR-334 (June 24, 1999); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. Grievants filed their grievances in a timely manner, within ten days of the discovery that employees who transferred into Unit Management, and whose pay grade did not change, had received a pay increase upon their transfer into Unit Management. W. Va. Code § 29-6A-4. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Hammond v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-222 (Nov. 30, 1998); Little v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-092 (July 27, 1998). See Short v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-038 (Mar. 25, 1999); Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998).

3. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

4. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievants proved they were similarly situated in a pertinent way to other employees who were treated differently from Grievants, in that the other employees received an incentive pay increase upon transferring into Unit Management, which Grievants did not, and then later received pay increases upon promotion for changing pay grades, all to Grievants' detriment; and that these differences were unrelated to actual job responsibilities and were not agreed to by Grievants.

6. Once a prima facie case of discrimination has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra.

7. Respondents did not demonstrate a legitimate, nondiscriminatory reason for the difference in treatment.

8. As this grievance is found timely under the discovery exception, Grievants' claim for back pay should not be limited to ten days preceding the filingof the grievance. Syl. Pt. 1, Spahr, supra; Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999).

9. The undersigned has no authority to award attorney fees. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998); Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to increase Grievants' salaries by 5% over the amount each was earning at the time each Grievant transferred into Unit Management, and to pay them all back pay to which they are entitled, plus interest, as though the 5% salary increase had been awarded on the date each transferred into Unit Management.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: December 8, 1999

Footnote: 1

These grievances progressed through Level II, with the grievances being denied at that level on the grounds they were not timely filed. Each Grievant appealed to Level III, where individual hearings were held on May 20, May 26, or June 1, 1999. The grievances were all denied at Level III, and Grievants appealed to Level IV in June1999. The grievances were each set for hearing, and were then consolidated at the Level IV hearing, held on July 26, 1999. Grievants were represented by James R. Fox, Esquire, Corrections was represented by Charles Houdyschell, Jr., Esquire, and the Division of Personnel was represented by Lowell D. Basford, its Assistant Director. This matter became mature for decision on November 12, 1999, upon receipt of Grievants' post-hearing written argument. The other parties had submitted their arguments earlier.

Footnote: 2

The "Unit Management" concept involves more counselors and more intense contact with the inmates.

Footnote: 3

In Legg v. West Virginia Department of Health and Human Resources, Docket Number 90-H-461 (January 28, 1991), the Administrative Law Judge found that the failure of the Division of Personnel to inform a new employee that if he began his employment as a Trainee and later advanced to the position in a higher pay grade which he accepted upon employment, he would receive a pay increase upon promotion, was an abuse of discretion.

Footnote: 4

The parties did not dispute that Grievants are in the classified service, and Personnel's rules are applicable to them.

Footnote: 5

As the parties did not address Corrections' authority to give such pay increases to lateral transfers, this issue will not be addressed. However, it is noted that Personnel's Rules do allow for pay differentials for defined groups of employees in

particular circumstances, upon approval by the State Personnel Board, and they also allow for additional increases upon promotion if the employee possesses more than the minimum experience required.