JAMES VAUGHT,

Grievant,

v. Docket No. 99-CORR-070

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,
and DIVISION OF PERSONNEL,
Respondents.

DECISION

James Vaught (Grievant) is employed by the West Virginia Division of Corrections (CORR), as a Correctional Officer IV/Sergeant at the Mount Olive Correctional Complex (MOCC). He filed this grievance on September 30, 1998, alleging that he was not paid the correct salary for periods when he worked as MOCC's Operations Officer.

This grievance was denied at Level I, on October 3, 1998, by immediate supervisor Captain William J. Vest; at Level II, on October 21, 1998, by Warden's Designee Linda Coleman; and at Level III, on November 23, 1998, by Commissioner William K. Davis.

A Level IV hearing was held on June 1, 1999, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant was represented at this hearing by Captain Steve Berryman, and CORR was represented by Assistant Attorney General Leslie K. Tyree. The parties were given until August 16, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by CORR as a Correctional Officer IV/Sergeant at MOCC.

2. Grievant worked as MOCC's Operations Officer from late in 1995 until late in 1996 or early in 1997.

3. Grievant worked as MOCC's Operations Officer from March, 1997, until at least September 30, 1998, when this grievance was filed.

4. MOCC's policy requires that the Operations Officer will be the rank of Captain, or will be temporarily upgraded to the rank of Captain.

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 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

CORR has raised a timeliness defense to this grievance. W. Va. Code § 29-6A- 4(a) provides as follows:

> 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 grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

"Days" is defined as "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c). A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Pryor et al. v. W. Va. Dep't of Transp., Div. of Highways, Docket No. 97-DOH-341 (Oct. 29, 1997); West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan.

25, 1996).

Grievant alleges that he has been working as Operations Officer, without proper pay for that position, from March, 1997, to the present. Misclassification is a continuing practice and, as such, a grievance may be filed at any time the misclassification continues. However, "[a]s with a salary dispute, any relief is limited to prospective relief from and after [ten] days preceding the filing of the grievance." Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); W. Va. Code § 29-6A-2; Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998). Accordingly, this grievance was timely filed with respect to Grievant's claim of working out of classification through September 30, 1998, although any relief granted must be limited to ten days preceding the filing of that date.

Grievant submitted MOCC Operational Procedure #XXXX, dated January 25, 1995,and entitled "Operations Officer," which defines the position and duties of the Operations Officer, and states:

> It is the policy of the Mount Olive Correctional Complex that command level personnel be present and available to supervise any situation within the Complex, 24 hours per day, seven days a week. Hence, through this policy and procedure, the position of Operations Officer is established. The Operations Officer will be the rank of Captain (or temporary upgrade to Captain). (emphasis added)

CORR presented no evidence to show that this was not an official policy of MOCC. An administrative body must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). This Grievance Board has held that the professional employees of university and county boards of education are entitled to rely on the policies properly established by their employers. Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-BOD-242 (Nov. 30, 1998), Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997), Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997), Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995). The reasoning behind this principle has also been applied to CORR. White v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-423 (Feb. 3, 1999).

Grievant also presented evidence which established that CORR entered into a settlement agreement with another CO IV/Sergeant, Robert Rhodes, in which CO Rhodes, requested and

received a Captain's pay for the period of time during which he served as Operations Officer. CORR conceded at Level IV that this settlement agreement took place. This settlement agreement was also approved by the Division of Personnel.

In Shremshock v. W. Va. Dep't of Transp., Docket No. 94-DOH-095 (Aug. 31, 1994), the administrative law judge concluded that, in accordance with rulings of the West Virginia Supreme Court of Appeals and of this Grievance Board, when employees are required to perform work in another classification that is in a higher pay grade, they must be compensated for the difference between their assigned salary and that of the higher classification. "If current policy does not permit short-term, ad hoc assignments . . . to higher-graded classifications, then the employer must simply refrain from making assignments to such duties[.]" Id. This Grievance Board has consistently followed the holding in Shremshock, supra, and its progeny, finding that an employer must compensate employees for the difference in salary when performing such duties and should refrain from making such assignments in order to avoid having to pay the extra compensation. See Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999); Reed v. W. Va. Div. of Corrections, Docket No. 97-CORR-127 (May 22, 1998); Beer v. Div. of Highways, Docket No. 95-DOH-161 (Feb. 27, 1996).

Because both MOCC policy and Grievance Board precedent require it, CORR must properly compensate Grievant, as a CO VI/Captain, for each day it required him to perform the duties of an Operations Officer during the ten day period preceding the filing of this grievance.

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

CONCLUSIONS OF LAW

1. 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 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. When an employee in the classified service has been required by his employer to perform duties in a higher classification on a regular basis, such employee is entitled to back wages in the form of the difference between his salary and that of the higher classification for each day on which the duties were performed. Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999); Reed v. W. Va. Div. of Corrections, Docket No. 97-CORR-127 (May 22, 1998); Beer v. Div. of

Highways, Docket No. 95-DOH-161 (Feb. 27, 1996); Shremshock v. W. Va. Dep't of Transp., Docket No. 94-DOH-095 (Aug. 31, 1994).

3. Grievant was required to perform the duties of an Operations Officer from March, 1997, until at least September 30, 1998, when this grievance was filed.

4. MOCC policy requires that the Operations Officer will be the rank of Captain, or will be temporarily upgraded to Captain.

5. This grievance was timely filed with respect to Grievant's claim of working out of classification, although the relief granted is limited to ten days preceding the filing of this grievance.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to pay Grievant the difference between his salary and the salary of a CO VI/Captain for each day that it required him to perform the duties of an Operations Officer during the ten day periodpreceding the filing of this grievance, plus interest.

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.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated September 7, 1999