SCOTT PARSONS,

Grievant,

v. **Docket No. 99-CORR-056D2** **(See footnote 1)**

DIVISION OF CORRECTIONS/
NORTHERN REGIONAL JAIL
& CORRECTIONAL FACILITY,
and DIVISION OF PERSONNEL,

Respondents.

DECISION ON DEFAULT

On February 11, 1999, Scott Parsons (Grievant) submitted an appeal to level four of the grievance procedure, requesting relief by default, pursuant to the provisions of W. Va. Code § 29-6A-3. On March 26, 1999, a hearing was conducted before the undersigned administrative law judge for the purpose of determining whether a default had occurred, and, pursuant to agreement of the parties, reserving the question of whether the remedy sought by Grievant was contrary to law or clearly wrong. Subsequent to that hearing, on April 26, 1999, the undersigned issued an "Order Granting Default", finding that a default had occurred at level one of the grievance procedure, and ordered that this matter remain on the Grievance Board docket for further proceedings to determine whether the remedy sought by Grievant was contrary to law or clearly wrong. The Order Granting Default is attached hereto as Appendix A. A hearing regarding the default remedy was conducted in this Grievance Board's office in Wheeling, West Virginia, on May 21, 1999. Grievant was represented by David Young, a coworker, and the Division of Corrections (DOC) was represented by counsel, Charles Houdyschell. The Division of Personnel was notified, but did not appear for the hearing. Grievant seeks compensation for supervisory work he was required to perform, which is not part of his present duties as a Correctional Officer I. This matter became mature for consideration on June 1, 1999, upon receipt of the parties' written arguments.

The following findings of fact are made from a preponderance of the evidence submitted at the

May 21 hearing.

Findings of Fact

1. Grievant is employed by DOC at the Northern Regional Jail & Correctional Facility (NRJ) as a Correctional Officer I (CO I).

2. Supervision of other officers is not part of the duties of a CO I.

3. On 49 days between March and September of 1998, Grievant was required to substitute for an absent supervisor, performing duties within the job description for CO III. The dates were March 6; April 3, 4, 10, 11, 12, 18, 19, and 25; May 2, 3, 10, 11, 17, 18, 24, 25, and 31; June 1, 7, 8, 9, 15, 16, 22, 29, and 30; July 8, 14, 15, 28, and 29; August 4, 5, 6, 12, 13, 19, 20, 26 and 27; September 2, 3, 4, 10, 11, 17, 24, and 25.

4. After the initiation of this grievance in October of 1998, Grievant received a level one decision from his immediate supervisor on October 23, 1998.

5. On February 3, 1999, Grievant's supervisor issued an amended level one decision, which was determined by this Grievance Board to be untimely, pursuant to the provisions of W. Va. Code § 29-6A-3. See Appendix A.

Discussion

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 2) This default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

In a default matter, Respondent has the burden of establishing by a preponderance of the

evidence that the remedy requested is contrary to law or clearly wrong. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). In the instant case, Grievant is requesting compensation equivalent to the difference between his salary and the CO III salary for each day he was required to perform duties outside of his own classification.

DOC contends that the only mechanism by which an employee can be compensated for duties performed in a higher classification is the Division of Personnel'spolicy allowing temporary classification upgrades. Because Grievant's work as a substitute supervisor was sporadic, DOC contends that the policy does not apply, and, consequently, Grievant is not entitled to compensation for performing these duties. The policy provides for approval of a pay differential to such employees, upon request by the employing agency, when the duties of the higher classification are performed on a “full-time basis” and for periods of no less than 30 calendar days. DOC contends, and the policy does seem to imply, that the employee must be substituting for someone on an everyday basis for an extended period of at least 30 continuous days, and it does not cover situations where the work is performed on a day-to-day, sporadic basis. However, DOC does not appear to dispute that Grievant did perform out-of-class duties on the 49 days in question.

Shremshock v. W. Va. Dep't of Transp., Docket No. 94-DOH-095 (Aug. 31, 1994), also involved a situation where the temporary upgrade policy did not apply, because the grievant had not performed the duties of the higher classification for 30 continuous days. Nevertheless, 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. An argument similar to DOC's contentions in the instant case was rejected, i.e., that, if the employee's situation does not fit within the temporary upgrade policy, compensation is not required. “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 consistentlyfollowed 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 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).

As noted in Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93- HHR-460 (June 17, 1994), an employer may not be required to compensate employees for work performed outside their classifications on “infrequent short-term assignments.” However, in that case, the employer was required to compensate the grievant, who was performing the duties an average of 25% of her work time. In Shremshock, supra, four weeks over the course of one year was determined not to be de minimis, and compensation was required. Similarly, the undersigned concludes that 49 days within approximately a six-month period cannot be considered infrequent or short-term, and DOC must compensate Grievant for each day he was required to perform supervisory duties.

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

Conclusions of Law

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code§ 29-6A-3(a)(2).

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. 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 a CO III on 49 days in 1998, which duties were not part of his job description as a CO I.

4. Respondent has failed to establish that the remedy requested by Grievant is clearly wrong or contrary to law.

Accordingly, the requested remedy is **GRANTED**, and Respondent is ORDERED to pay Grievant the difference between his salary and the salary of a CO III for the 49 days upon which he performed the out-of-class duties.

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 EmployeesGrievance 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: July 19, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

A "2" has been added to the docket number to distinguish this decision from the "Order Granting Default" previously issued in this matter.

Footnote: 2

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).