MARGARET GRAY,

Grievant,

v. **Docket No. 02-CORR-029**

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Margaret Gray (Grievant), employed by the Division of Corrections (Respondent) as an Institutional Training Officer at the West Virginia Corrections Academy, filed a level one grievance on January 2, 2002, in which she requested compensation for thirty-two hours of annual leave which she had attempted to donate to other employees, but was returned to her on December 29, 2001, too late to be used. The hearing evaluators at levels one and two lacked authority to grant the requested relief, and the grievance was denied at level three. Appeal was made to level four on January 14, 2002, and an evidentiary hearing was conducted in the Grievance Board's Wheeling office on March 22, 2002. Grievant was represented by Barry Milbert, and Respondent was represented by Leslie Tyree, Esq. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing.

The facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent as an Institutional Training Officer assigned to the Northern Correctional Facility (NCF) at all times pertinent to this grievance. 2. On September 14, 2001, Grievant completed two “APPLICATION TO DONATE ANNUAL LEAVE” forms on which she donated sixteen hours of annual leave each to Becky Lohr and Susan Toland.

3. Part two of the form is to be completed by the applicant's appointing authority or designee. This section verifies that the applicant is eligible to make the donation, the remaining balance of the applicant's leave time, her hourly rate of pay, and the dollar value of the leave donated.

4. Respondent did not complete part two of either form completed by Grievant.

5. On December 29, 2001, the leave donation slips were returned to Grievant with a note

dated December 20, 2001, advising her that “Per NCF they had enough donations and didn't need yours.”

6. NCF Warden Evelyn Seifert donated twenty-four hours to Ms. Lohr on November 29, 2001.

7. Upon her return to work, Ms. Lohr advised Grievant that she had not received her offer of donated leave, and could have used it.

8. Grievant is permitted to carry over two hundred-eighty hours of annual leave at the end of the calendar year.

9. Because the thirty-two hours of leave time was in excess of the two hundred eighty maximum hours which Grievant could carry over into the next year, the delay in returning the donation forms denied her the opportunity to use the leave time herself.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A- 6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

Grievant asserts that Respondent failed to provide her timely notice that the donated leave was not needed, and deprived her of the opportunity to use the time herself. Respondent offered no reason for the delay in processing, but relies upon Division of Personnel Administrative Rule, Section 14.3, which provides that a limited amount of annual leave may be carried over to the next year, and makes no provisions for payment to employees for time lost.

In general, as a classified State employee, the terms and conditions of Grievant's employment are largely, if not exclusively, determined by State law and the Administrative Rules and Regulations of the West Virginia Division of Personnel (DOP). See Baker v. Civil Serv. Comm'n, 161 W. Va. 666, 245 S.E.2d 908, 912 (W.Va. 1978). Technically, Respondent has correctly applied the appropriate DOP Rule in this matter. Grievant accrued more hours of annual leave than she was allowed to carry over, and therefore lost the excess time.

However, W. Va. Code § 29-6A-5(b) provides that a hearing examiner at level four may “provide relief as is determined fair and equitable . . . and has the authority to provide appropriate remedies including, but not limited to, making the employee whole.” See Wyant v. Div. of Highways, Docket No. 00-DOH-219 (Nov. 29, 2000); Herland v. Health & Human Resources, Docket No. 92-HHR-416

(Aug. 9, 1993). The evidence in this matter establishes that the donation slips submitted by Grievant were never processed by Respondent. Even more importantly, Respondent held the slips in excess of ninety daysat the end of the calendar year. Because Grievant believed she had donated the time, she was denied the opportunity to use it herself. Based upon Respondent's role, and limited to this set of facts only, Grievant is entitled to equitable relief, i.e., restoration to the situation she would have been in had she been promptly advised the donation was not processed.

In addition to the foregoing facts and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. W. Va. Code § 29-6A-5(b) provides that a hearing examiner at level four may “provide relief as is determined fair and equitable . . . and has the authority to provide appropriate remedies including, but not limited to, making the employee whole.” See Wyant v. Div. of Highways, Docket No. 00-DOH-219 (Nov. 29, 2000); Herland v. Health & Human Resources, Docket No. 92-HHR-416 (Aug. 9, 1993).

3. The fair and equitable relief due Grievant in this matter is reinstatement of the thirty-two hours of annual leave.

Accordingly, the grievance is **GRANTED**, and Respondent ORDERED to reinstate thirty-two hours of annual leave to Grievant's account. 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 §29- 5A-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.

Date: March 28, 2002 _____

Sue Keller

Senior Administrative Law Judge