JOHN ROBINSON,

Grievant,

v. **Docket No. 04-CORR-242**

WEST VIRGINIA DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

The grievant, Corporal John Robinson ("Robinson"), is an employee of the respondent, West Virginia Division of Corrections ("Corrections"), assigned to work at the Anthony Correctional Center ("the Anthony Center"). Effective May 16, 2004, Robinson was reallocated from Correctional Officer II to Correctional Officer III.

Reallocation refers to a change from one classification to another based on a significant change in the kind or level of duties and responsibilities assigned to the position being reallocated. However, in this case, Robinson claims that his duties remained essentially the same throughout his tenure as Armory Officer and Key Control Officer at the Anthony Center. Therefore, he filed this grievance, which arose out of his misclassification. As relief he sought back pay from July 1, 2000, when he first assumed those duties, to the date of his reallocation.

Procedural Background

Robinson filed a Level I grievance on May 10, 2004, after he was informed of his reallocation to Correctional Officer III. In pertinent part, Robinson stated in his grievance that

> [a]s my duties and responsibilities have not diminished since my initial assignment as Armory/Key Control Officer in July 2000, (See footnote 1) I feel that I have been discriminated against by being held in the pay grade of a Correctional Officer II for the past four (4) years rather than being promoted to Correctional Officer III as the Division of Personnel has determined to be the appropriate classification for the

position I am assigned.

For relief, Robinson asked "[t]o receive back pay in the difference between Correctional Officer II pay and Correctional Officer III pay for the time (01 July 2000 to 16 May 2004) that I was assigned as the Armory/Key Control Officer for Anthony Correctional Center as a Correctional Officer II."

Upon agreement of the parties, the responses for Level I and Level II were combined. The combined response denying Robinson's request for relief was issued on May 14, 2004. A Level III hearing was conducted on June 8, 2004. (See footnote 2) The resulting recommended decision, which was adopted by Corrections, awarded Robinson back pay from ten days preceding the filing of his grievance on May 10, 2004.

Robinson's appeal to Level IV was received by the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on June 18, 2004. A Level IV hearing was held on August 10, 2004, in the Grievance Board's hearing room at Beckley. At the Level IV hearing Robinson represented himself. Corrections was represented by Charles Houdyschell, Jr., Assistant Attorney General. This grievance matured for decision on September 1, 2004, with the final submission by the parties of proposed decisions. After careful review of the entire record, including the Level III transcript and exhibits, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Robinson is employed by Corrections and assigned to work at the Anthony Correctional Center ("the Anthony Center").

2 2. Robinson has been assigned duties as the Armory Officer and the Key Control Officer at the Anthony Center since July 2000. Grievant's Exhibit 1 at Level III. He has also been assigned other, additional responsibilities at various times.

3 3. As early as 2001, Robinson had concerns that his position was misclassified.

4 4. In 2002, after Robinson complained about being misclassified as a Corrections Officer II, Corrections instructed him to prepare four separate Position Description Forms relating to his duties as Support Unit OIC, Armory Officer, Key Control Officer, and Tool Control Officer.

5 5. Neither party is aware of what happened to the four Position Description Forms Robinson

filled out. Both parties allowed the matter to languish and, as a result, Robinson's classification remained the same.

6 6. In March 2004, at the direction of Corrections, Robinson prepared a new Position Description Form (See footnote 3) for the combined duties of Armory Officer and Key Control Officer. This led to Robinson's reallocation from Corrections Officer II to Corrections Officer III. Grievant's Exhibit 5 at Level III.

7 7. The reallocation, which took effect on May 16, 2004, resulted in a pay raise for Robinson. He now seeks to make the pay raise retroactive to July 2000.

8 8. Although not reflected in the style of the case, it appears that the West Virginia Division of Personnel ("DOP") was joined as a party at Level III. Both the hearing transcript (See footnote 4) and the Level III decision reflect that Lowell Basford, of the Classification and Compensation Section of DOP, appeared at the Level III hearing and "presented the evidence for the Institution and the Division of Personnel." (See footnote 5)

9 9. At its first appearance in this grievance, DOP raised a claim that the grievance was untimely.

10 10. At Level III it was determined that Robinson's grievance was untimely. Although Robinson was given a back pay award, it was limited in reach to the ten days preceding the filing of this grievance.

Discussion

This grievance does not involve a disciplinary matter. Therefore, Robinson bears the burden of proving this grievance by a preponderance of the evidence. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

As an initial matter it should be noted that this does not appear to be a discrimination case, despite Robinson's assertion that he felt that he had been "discriminated against by being held in the pay grade of a Correctional Officer II for the past four (4) years[.]" Robinson made no attempt to compare himself to other employees. Nor did he make any reference to the statute that prohibits discriminatory treatment of state employees. Thus, it appears that Robinson's claim that he had been

"discriminated against" was intended to convey his sense that he had been treated unfairly. Resolution of this grievance will proceed on the premise that this was Robinson's intended meaning. To read his statement of grievance otherwise would be inconsistent with the tenor of the evidence and the arguments presented by Robinson at all levels of this grievance.

The parties have correctly noted that there is only one question to be resolved in this grievance. The facts are not in dispute. The question of whether Robinson was misclassified has already been resolved. Robinson's sole purpose in filing a grievance at this point is to address whether he is entitled to relief, in the form of back pay, for the period during which he was misclassified. Thus, the issue to be resolved is whether Robinson is entitled to back pay from July 2000, when he first undertook the duties of Armory/Key Control Officer, through the time his position was reallocated.

The Level III decision authorizing back pay, but limiting its reach to ten days before the grievance was filed, comports with the earlier decision in *Curkendall v. W. Va. Dep't of Health & Human Res.*, Docket No. 03-HHR-078 (Sept. 26, 2003). The grievant, Curkendall, submitted a Position Description Form but DOP determined that he was properly classified. Curkendall did not grieve that determination. Later, another Position Description Form was submitted and, as a result, Curkendall's position was reallocated. As with Robinson, Curkendall's classification was not changed through the grievance process. Rather, Curkendall filed a grievance after his classification had already been changed, claiming entitlement to back pay from the date of his initial hire. At Level III, Curkendall was awarded back pay that extended back to the ten-day period preceding the filing of his grievance. This grievance and *Curkendall* are alike in all of these particulars.

In its *Curkendall* decision, the Grievance Board applied the limitation on back pay that is drawn from *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995). The Grievance Board has previously relied upon *Martin* in holding as follows:

> [A] state employee who suspects she is misclassified has two choices: she may apply to DOP for reclassification, and thereby waive any back pay claim; or she may grieve and possibly recover back pay limited to the ten day period preceding the filing of the grievance, should her employer raise a timeliness defense. See Mullens v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 96-HHR-226 (July 31, 1997). In other words, an employee harboring any doubts regarding her classification should file a grievance at once, and certainly no later than her request for reclassification, or risk waiving any claim for back pay.

Thomas v. Dep't of Health & Human Res., Docket No. 01-HHR-385 (Nov. 20, 2001). *Thomas*

involved a nurse who had been reallocated from a Supervisor 1 to a Supervisor 2 “after three attempts[.]” Thomas had not filed a misclassification grievance. Rather, the reallocation of her position came about through applying to DOP. Once she was reallocated, Thomas filed a grievance seeking back pay, with interest, from the date she had first asked DOP to change her classification. In addressing Thomas's claim, the Grievance Board cited *Dudding v. W. Va. Dep't of Health & Human Res*., Docket No. 91- HHR-440 (Sept. 30, 1992) for the proposition that “no statute, regulation, or rule requiredthe employer to adopt a policy addressing back wage claims other than through the grievance process.” (See footnote 6)

Thomas identified two options for addressing a perceived misclassification. The employee can either apply to DOP or file a grievance. Only by filing a misclassification grievance does the employee have access to back pay. Of course, the two options identified in *Thomas* for challenging classification are not mutually exclusive. Frequently, procedurally savvy employees file a grievance to preserve the right to back pay, then they stay the grievance while applying to DOP for a change in classification.

Like Curkendall, Robinson did not file a grievance until the classification for his position had already been changed by DOP. Although the misclassification issue had already been resolved before Robinson grieved, the question of whether he was entitled to relief in the form of back pay still needed to be addressed.

Timeliness as an affirmative defense was introduced by DOP during its initial appearance at Level III, then adopted by Corrections. Although, pursuant to West Virginia Code section 29-6A-3, there is a requirement that timeliness be raised at or before the Level II hearing, the Grievance Board has previously determined that this requirement, which parallels the statutory provision relating to education employees, is not in harmony with the procedures relating to state employees. There is a conference rather than a hearing at Level II for state employees. W. Va. Code 29-6A-4(b). Therefore, the Grievance Board has previously determined “that, in cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before theLevel III hearing.” *Wade v. Div'n of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001)*(citing Greathouse v. Dep' of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)).

Curkendall and similar cases have treated a grievance wherein the grievant sought back pay for work performed while the grievant was misclassified as the functional equivalent of a misclassification

grievance. It is the timeliness of the grievant's assertion of a misclassification claim that is tested when an employer raises a timeliness defense in such circumstances.

Robinson correctly notes that misclassification is an on-going problem that can be grieved at any time. However, delay in bringing the grievance, coupled with a properly asserted timeliness defense on the part of the employer, limits the reach of any back pay award to the ten-day period preceding the filing of the grievance.

Robinson knew that his position was misclassified in 2001. He complained of misclassification and filled out Position Description Forms to submit to DOP in 2002. For no discernible reason, he did not grieve until 2004. Therefore, the Level III grievance evaluator correctly determined that, although Robinson was entitled to back pay, the amount was limited by the fact that his employer had raised and proven a valid claim that the grievance was not timely. Therefore, the back pay could only reach back to the ten-day period preceding the filing of this grievance.

Robinson wants to take the matter further by arguing that the back award should extend back further than this ten-day period. In support of this argument, Robinson cites the Grievance Board's treatment of the back pay issue in *Osborne v. Bureau of Employment Programs*, Docket No. 02-BEP-391 (Jan. 13, 2004). *Osborne* is distinguishable on the grounds that Osborne's employer did not assert a timelinessdefense. Osborne initially filed a grievance seeking reallocation, plus back pay. He prevailed at Level III on the reallocation claim, receiving a back pay award that included the ten-day period preceding the filing of his grievance. Osborne appealed to Level IV, claiming entitlement to back pay to January 1, 2001, which was the date he first undertook the duties that led to his reallocation. Significantly, Osborne's employer, the Bureau of Employment Programs ("BEP"), supported his request for back pay to January 1, 2001. BEP "mirrored Grievant's language for relief on the back pay issue when it asked the Grievance Evaluator, 'to use [his] best discretion determining what kind of back pay, if any, [Grievant is] entitled to.'" *Osborne* at 4, ¶ 15.

The issue of Osborne's delay in filing his grievance was interjected by the grievance evaluator at Level III. Based on that delay, the grievance evaluator determined that the back pay award was subject to limitation. *Osborne* at 4-5, ¶ 18. The Grievance Board amended the grievance evaluator's decision to allow back pay to be calculated from the date BEP had accepted as appropriate, meaning January 2001. Thus, the result in *Osborne* was predicated upon the fact that BEP chose not to raise timeliness as a defense. By contrast, the lack of timeliness was asserted in response to Robinson's

grievance. *Osborne* is thus distinguishable and does not support Robinson's claim for additional amounts of back pay.

Robinson further argues that the back pay award at Level III should not have been limited to the ten-day reach back period due to the fact that Corrections failed to comply with the provisions of Rule 4.5(e) of DOP. Rule 4.5(e) provides that "[p]osition descriptions shall be kept current by the appointing authority for each position under his or her jurisdiction. When the appointing authority significantly alters the duties and responsibilitiesof a position, the appointing authority shall prepare and forward a revised position description to the Director." However, the only consequence that flows from an employer's failure to fulfill this function is that an employee can take action independently of the employer. DOP's Rule 4.5(f) expressly provides "[i]f an appointing authority fails to notify the Director of significant alterations in the duties and responsibilities of a position, the incumbent in the position may file with the Director a written request for a review of his or her position." Robinson failed to pursue this option.

There is nothing in the cited rules to support Robinson's argument that a violation of Rule 4.5(e) eliminates any limitation on calculating back pay. Similar arguments have been addressed and rejected in earlier Grievance Board decisions. *Thomas v Dep't of Health & Human Res.*, Docket No. 01-HHR-385 (Nov. 20, 2001)(citing *Akers v. Dep't of Health & Human Res.*, Docket No. 99-HHR-302 (Dec. 30, 1999)).

Robinson also argues that "limiting the amount a grievant can claim in back pay in a case of misclassification, gives the employer free reign to work any employee out of their classification for as long as they [sic] wish with minimal consequence to the employer." This argument completely ignores the power vested in an employee to protect his own interests. As noted, Rule 4.5(f) allows an employee to go directly to DOP to ask for a position review. Robinson could have contacted DOP to pursue the question of whether he was misclassified. He failed to do so. Furthermore, the grievance process was always available to Robinson as a mechanism for challenging his classification. Robinson had previously filed a number of grievances. Therefore, he was familiar with the grievance process and cognizant of his right to invoke it. Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. This is not a disciplinary grievance. Therefore, the grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. A grievant must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. "'As a general rule, where a state employee is aware of the facts constituting a grievable matter and delays filing, relief is limited to the ten-day period preceding the filing of the grievance.' *Hatfield v. W. Va. Alcohol Beverage Control Comm'n*, Docket No. 91-ABCC-052, 169 (Sept. 27, 1991)." *Davis v. Dep't of Public Safety*, Docket No. 01-DPS- 609 (Sept. 13, 2002).

4 4. "[A] state employee who suspects she is misclassified has two choices: she may apply to DOP for reclassification, and thereby waive any back pay claim; or she may grieve and possibly recover back pay limited to the ten day period preceding the filing of the grievance, should her employer raise a timeliness defense." *Thomas v. Dep't of Health & Human Res.*, Docket No. 01-HHR-385 (Nov. 20, 2001)(citing *Akers v. Dep't of Health & Human Res.*, Docket No. 99-HHR-302 (Dec. 30, 1999)).

5 5. Misclassification is a continuing practice. As such, misclassification can be contested "at any time (although only once)." Syl pt. 5, *Martin*, 195 W. Va. at 301, 465 S.E.2d at 403. However, "'any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance.'" *Curkendall v. W. Va. Dep't of Health & Human Res.*, Docket No. 03-HHR-078 (Sept. 26, 2003) (quoting Syl pt. 5, *Martin*, 195 W. Va. at 301, 465 S.E.2d at 403) (alteration in original).

6 6. A claim of untimeliness is an affirmative defense. The burden of proof rests upon the party asserting the defense to prove it by a preponderance of the evidence. *Curkendall v. W. Va. Dep't of Health & Human Res.*, Docket No. 03-HHR-078 (Sept. 26, 2003) (citing *Hale v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996)).

7 7. In a grievance involving a state employee, "the timeliness defense must be raised at or before the Level III hearing." *Wade v. Div'n of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001)(citing *Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)).

8 8. The timeliness defense was properly raised at Level III.

9 9. Corrections established a timeliness defense by proving, upon a preponderance of the evidence, that as early as 2001and, in any event, no later than 2002, Robinson was aware that his position was misclassified.

10 10. Robinson's entitlement to back pay is limited to the ten-day period preceding the filing of this grievance, which he was awarded at Level III.

11 11. Robinson has failed to demonstrate entitlement to any additional relief.

Accordingly, this grievance is **DENIED**. Any party 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 West Virginia Code section 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: December 7, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

At Level III Robinson provided divergent testimony as to whether he had held these positions since July 2000 or July 2001. Documentary evidence supports the July 2000 date. Grievant's Exhibit 1 at Level III.

Footnote: 2

References to pages in the transcript of the Level III hearing shall appear as "Level III Tr. __."

Footnote: 3

The undersigned redacted Robinson's social security number from the copies of the Position Description Form

contained in the record.

Footnote: 4

Level III Tr. 1.

Footnote: 5

The Level III decision is not paginated. However, the quoted language appears on the third page.

Footnote: 6

The Thomas decision was appealed to the Circuit Court of McDowell County, Civil Action No. 01-AP-320-S, where it remains pending.