**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOHNNY BOWMAN,**

**Grievant,**

**v.** **Docket No. 2012-0449-MAPS**

**REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/WESTERN REGIONAL JAIL and DIVISION OF PERSONNEL,**

**Respondent.**

## DECISION

Grievant Johnny Bowman filed a grievance on October 24, 2011, against his employer, Respondent Regional Jail and Correctional Facility Authority/Western Regional Jail ("RJA"), and the Division of Personnel ("DOP"), stating as follows: "On 24 Oct 2011 it was brought to my attention that I was entitled to longevity credit from my past employment and I have not received such credit and I am entitled to compensation for the past years of service." As relief sought, the Grievant requests the following: "Compensated for lost wages back to 2003 to present."

A Level One conference was conducted on November 3, 2011. The grievance was denied by letter dated November 8, 2011. Grievant perfected his appeal to Level Two on November 9, 2011. A Level Two mediation was conducted on December 15, 2011. Grievant appealed to Level Three on December 20, 2011. A Level Three hearing was held on May 17, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by its Representative, John V. Lopez, Chief of

Operations, along with Meredith Ayers, paralegal. Respondent Division of Personnel appeared by counsel, Karen O'Sullivan Thornton, Esq., Assistant Attorney General.

At the conclusion of the hearing, the parties declined the opportunity to submit proposed Findings of Fact and Conclusions of Law. Therefore, this matter became mature for decision on May 17, 2012.

## Synopsis

Grievant was employed at a county jail for twenty-two years before the jail was closed and he was transferred to a position with Respondent RJA. While employed at the county jail, Grievant contributed to the state's retirement system. Grievant retired in November 2011, and is receiving retirement benefits based upon tenure and contributions made since 1981. However, his increment payments were based only upon years of service starting with the year he became employed by Respondent RJA. Grievant asserts that the years he worked at the county jail should be counted in the calculation of his increment pay. Respondent argues that when Grievant was employed at the county jail, he was a county employee, not a state employee; therefore, years should not be counted in the calculation of his increment pay. Grievant failed to demonstrate that the years he worked at the county jail should be counted in the calculation of his increment pay. This grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

## Findings of Fact

1. Grievant was employed by Respondent RJA from 2003 until his retirement on November 15, 2011.

2. Grievant was employed as a correctional officer at the Cabell County Jail from 1981 until the jail was closed in 2003. When the jail closed, Grievant was transferred to the employ of Respondent RJA at the Western Regional Jail.[1]

3. While Grievant was employed at the Cabell County Jail, his salary was paid by the county; however, he participated in the state's retirement system. The county also paid Grievant an annual payment of $50.00 per year of service.[2]

4. Since Grievant became employed by Respondent RJA, he has received increment payments based upon his years of service beginning with the year 2003.

5. When Grievant began the process of filing for his retirement benefits, a payroll administrator at RJA told Grievant that his increment payment should be calculated using both his years of service with RJA and the Cabell County Jail. The payroll administrator then contacted individuals within her office and/or RJA Human Resources to have Grievant's increment recalculated.[3]

6. RJA employee Melissa Hayes Murphy contacted Teresa Morgan at DOP about the increment calculation. Ms. Morgan advised Ms. Murphy that the time Grievant worked at the county jail would not be counted in the calculation of the increment payments. Ms. Morgan based her determination on existing DOP policy.[4]

7. Based upon the information provided by Ms. Morgan, Respondent RJA made no further attempts to change the calculation of Grievant's increment payment.

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[1] *See*, testimony of Grievant.
[2] *See*, testimony of Grievant.
[3] *See*, testimony of Grievant; Grievant's Exhibit 2.
[4] *See*, testimony of Melissa Hayes Murphy; testimony of Teresa Morgan; and, Respondent RJA's Exhibit 1.

8. Grievant's retirement benefits are based upon his tenure and contributions made from 1981 to 2011. However, his increment payments were based only upon his years of service at the RJA.

9. Grievant presented no evidence that his increment payment was calculated differently than those of other employees.

**Discussion**

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant argues that the twenty-two years he worked at the Cabell County Jail should be counted in the calculation of his increment pay. Respondents argue that during the time Grievant worked at the Cabell County Jail he was a county employee, not a state employee; therefore, the years Grievant worked for the county cannot be counted in the calculation of his increment pay.

Increment pay is addressed in WEST VIRGINIA CODE §§ 5-5-1 and 5-5-2, which state, in pertinent part, as follows:

> § 5-5-1. Definitions.
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> For the purposes of this article: (a) "Eligible employee" means: (1) Any regular full-time employee of the state or any spending unit of the state who is eligible for membership in any state retirement system of the State of West Virginia or other retirement plan authorized by this statute: *Provided*, That the mandatory salary increase required by this article does not apply to any employee of the state whose compensation is fixed by statute or by statutory schedule other than employees described in this section. . . .(b) "Years of service" means full years of totaled service as an employee of the State of West Virginia. . . . (c) "Spending unit" means any state office, department, agency, board, commission, institution, bureau, or other designated body authorized to hire employees.
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> § 5-5-2. Granting incremental salary increases based upon years of service.
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> (a) Every eligible employee with three of more years of service shall receive an annual salary increase equal to sixty dollars[5] times the employee's years of service. In each fiscal year and on the first day of July, each eligible employee shall receive an annual increment increase of sixty dollars for that fiscal year.

*Id. See also,* Division of Personnel Policy, DOP-P5 (2008), Grievant's Exhibit 3.

The question becomes whether Grievant was an "eligible employee" while he was employed by the Cabell County Jail, before he was transferred to the RJA. WEST VIRGINIA CODE §§ 5-5-1 and 5-5-2 are controlling on this issue. Pursuant to these statutes, to be considered an eligible employee, an individual must be an employee of the State or any spending unit thereof who is eligible for membership in any authorized

[5] This statute was amended in 2008 increasing the yearly increment amount from fifty dollars per year of service to sixty dollars.

state retirement plan. *See, Id.* Clearly, Grievant meets the requirement of membership in the state retirement system. Therefore, it must be determined whether he was "an employee of the State or any spending unit thereof."

Grievant was employed as a correctional officer at the Cabell County Jail for twenty-two years beginning in 1981. While employed there, Grievant's salary was paid by the county, not the state. Further, during those years, Grievant received an annual increment payment *from the county* of $50.00 per year of service. This was *not* an increment payment made pursuant to WEST VIRGINIA CODE §§ 5-5-1 and 5-5-2. Nonetheless, during his employment at the Cabell County Jail, Grievant paid into the State of West Virginia retirement system, now known as the Consolidated Public Retirement System. When Grievant retired on November 15, 2011, he received retirement benefits based upon contributions and tenure starting with the year 1981. However, his increment payments were only based upon years of service from 2003 forward because such was the year he became employed by the RJA.

"A county is not a spending unit of the State of West Virginia, as employment by a county is not considered state employment for the purposes of this article." *Childers v. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 01-T&R-142 (July 17, 2002). Further, the Grievance Board has previously concluded that "an employee of a county is not an employee of the State of West Virginia, and employment with a county cannot be counted as 'years of service' for the purpose of determining the amount of an employee's increment pay. *Meskinish v. W. Va. Dep't of Health and Human Resources*, Docket No. 01-HHR-597 (Mar. 11, 2002); *Cook v. Dep't of Health and Human Resources, et al.*, Docket No. 00-HHR-352 (June 29, 2001)." *Id*.

Accordingly, Grievant's years of employment with Cabell County cannot be counted as "years of service" in the calculation of his increment pay.

For the foregoing reasons, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

**Conclusions of Law**

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990).

2. Eligible employees of the State of West Virginia are entitled to an annual incremental salary supplement based upon years of service. *See*, WEST VIRGINIA CODE §§ 5-5-1 and 5-5-2.

3. "[A]n employee of a county is not an employee of the State of West Virginia, and employment with a county cannot be counted as 'years of service' for the purpose of determining the amount of an employee's increment pay. *Meskinish v. W. Va. Dep't of Health and Human Resources*, Docket No. 01-HHR-597 (Mar. 11, 2002); *Cook v. Dep't of Health and Human Resources, et al.*, Docket No. 00-HHR-352 (June 29, 2001)." *Childers v. Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 01-T&R-142 (July 17, 2002).

4. Grievant was not an employee of the State of West Virginia, or any spending unit thereof, when he was employed as a correctional officer at the Cabell County Jail; therefore, his service in that position cannot be counted in the calculation of his increment pay.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See,* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also,* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

**DATE: October 23, 2012.**

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**Carrie H. LeFevre**
**Administrative Law Judge**