THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

THOMAS L. RISE,
Grievant,

v. **Docket No. 2012-1464-MAPS**

DIVISION OF CORRECTIONS/PRUNTYTOWN CORRECTIONAL CENTER and DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Thomas Rise, filed this grievance on June 25, 2012, against his employer, the Division of Corrections, alleging the following:

> I was unfairly worked in a job with additional responsibilities that are not required of me in my current pay grade. This was done with the full knowledge and consent of the appointing authority despite my objections. I was required to supervise a shift for which I had not been adequately trained, was not paid any additional monies, even though the task is required for those of a higher pay grade, and was required to perform this task on a shift which I am not normally assigned.

He seeks for relief, up to a 15% pay increase for the above coverage day. This grievance was denied at level one by letter dated July 18, 2012, which was issued by Commissioner Jim Rubenstein adopting the recommendations of the grievance evaluator. The Division of Personnel was joined as an indispensable party on June 28, 2012. A level two mediation session was conducted on December 12, 2012. Grievant perfected his appeal to level three on December 19, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on April 18, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Jack

Ferrell, Communication Workers of America. The Division of Corrections appeared by its counsel, Cynthia "Shelly" Gardner, Assistant Attorney General. The Division of Personnel appeared by its counsel, Karen Thornton, Assistant Attorney General. The parties indicated to the undersigned after the level three hearing that they would not submit fact/law proposals. This grievance became mature for consideration after the level three hearing.

Synopsis

It is undisputed that Grievant worked as the facility Shift Commander on June 11, 2012. This is a position normally held by a Correctional Officer 5 at Pruntytown Correctional Center. Grievant is classified as a Correctional Officer 3. Grievant amended his statement of grievance at level one removing the request for reallocation. Due to the limited amount of time spent performing the duties, a temporary upgrade to a higher pay grade was unavailable as relief. This grievance is denied.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is employed as a Correctional Officer 3 at Pruntytown Correctional Center, which is operated by the Division of Corrections.

2. Grievant worked on June 11, 2012, as the facility Shift Commander. This position is normally held by a Correctional Officer 5. The facility began using Correctional Officer 3's to fill in as Shift Commanders in December 2011. This is done on the irregular

occasion when the Correctional Officer 5 or 6 is unavailable due to sick leave, annual leave, holiday leave or training.

3. Grievant was trained by the Correctional Officer 6 on day shift in January 2011 to familiarize Grievant on the Shift Commander post.

4. Grievant points out that the Correctional Officer 3 classification specification indicates that the Correctional Officer 3 will work under the direct supervision of a higher classified Correctional Officer. Grievant did not have any direct supervision when acting as Shift Commander on this one date.

5. Grievant is seeking the pay of Correctional Officer 6 while doing the Shift Commander duties on June 11, 2012.

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 Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that he should have been given the salary of a Correctional Officer 6 while doing the duties of that officer as Shift Commander. Under the limited facts of this

grievance, this could only be accomplished by a temporary upgrade with the attending raise in pay grade. However, the record established that the means to obtain the pay of a Correctional Officer 6, a temporary upgrade, was unavailable. Under the West Virginia Division of Personnel's "Temporary Classification Upgrades" policy, a temporary upgrade assignment, "shall be for no less than 30 calendar days and not more than six months."

Grievant was not asked to assume duties and responsibilities for a length of time in excess of 30 days as outlined in the Temporary Upgrade rule, instead he was directed to assume the duties of the post for one day. This was done because the Correctional Officer 6 was on sick leave, the Correctional Officer 5 was activated on a "Correctional Emergency Response Team" and the Correctional Officer 4 was unavailable. Grievant only worked as a Shift Commander for the one day in question, therefore, he was not eligible for a temporary upgrade and the pay grade for a Correctional Officer 6. Finally, the record established that the Administrative Duty Officer was available to be contacted by Grievant on the day in question in the event of emergency situations. The Associate Warden of Security, Deputy Warden and Warden were available during regular business hours on the day in question.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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 Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan*

County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant failed to establish by a preponderance of the evidence that he was eligible for a temporary upgrade and the corresponding pay grade under the Division of Personnel's controlling policy.

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 (2008).

Date: May 20, 2013

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Ronald L. Reece
Administrative Law Judge