

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOSHUA PAUL LOTT,
Grievant,**

v.

Docket No. 2017-1690-MAPS

**DIVISION OF CORRECTIONS/
PAROLE SERVICES,
Respondent.**

DECISION

Grievant, Joshua Lott, is employed by Respondent, West Virginia Division of Corrections (“DOC”). He filed an expedited grievance form¹ dated February 16, 2017, stating:

I was placed on non-disciplinary suspension on 09 September 2016 without pay. I was reinstated on 14 December 2016 and signed a Reinstatement Agreement between myself and Parole Services Director Robert Arnold, citing Administrative Rule W.Va. Code. R 143-1-1, that I would receive all exhausted Annual Leave used during the non-discretionary suspension and back wages in the amount of \$3,239.10. I have not received back wages.

As relief, Grievant sought, “Back wages in the amount of \$3,239.10 plus interest starting 09 September 2016 . . .”

An Order was entered transferring the grievance to level one on March 3, 2017, but a second Order vacating the March 3 Order was entered on March 14, 2017. A telephonic status conference was held with the parties on May 4, 2017. Grievant participated in person and Respondent was represented by John H. Boothroyd, Assistant Attorney General. At that conference, the parties agreed to submit this matter for decision based on agreed stipulations of fact and Proposed

¹ See W. VA. CODE § 6C-2-4(a)(4).

Conclusions of Law. This matter became mature for decision on May 9, 2017, upon receipt of the stipulations and proposals.

Synopsis

Mr. Lott was suspended without pay pending an investigation. The investigation was conducted over the course of two thirty-day periods. The investigation did not produce sufficient evidence to support discipline and Grievant was reinstated. Grievant's annual leave and other benefits were restored, but he has not received pay for the period he was suspended. Grievant is entitled to back pay for the period of suspension pursuant to the Division of Personnel ("DOP") Administrative Rule.

The parties have stipulated to the following facts, which are now found to be proven by a preponderance of the evidence.

Finding of Facts

1. Grievant works for the West Virginia Division of Corrections.
2. On September 9, 2016,² Grievant was informed verbally and later in writing (September 15, 2016) that he was being suspended pending investigation. The non-disciplinary suspension was for thirty days.
3. On or about October 4, 2016, Grievant was informed verbally and in writing that the investigation had not been completed and that the suspension was being extended for another thirty days.

² The suspension occurred during the working hours of September 9, 2016. Any regularly scheduled work hours on September 9, 2016, which were not worked by Grievant and not paid, would be part of Grievant's suspension period.

4. The West Virginia Division of Corrections subsequently determined that the completed investigation did not provide sufficient information to support employee discipline pursuant to West Virginia Division of Corrections' Policy Directive 129.00. (Progressive Discipline).

5. Grievant's suspension was ended and he was returned to work. Grievant's first day of work back from the non-disciplinary suspension was December 14, 2016.

6. Grievant used annual leave to cover part of the unpaid suspension.

7. The West Virginia Division of Personnel's Administrative Rule, 143 C.S.R. 1, provides that for non-disciplinary suspensions for an investigation:

12.3.b. Non-disciplinary Suspension. -- An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

Upon completion of the investigation or criminal proceeding, the appointing authority shall:

12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and,

12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. Further, the appointing authority and employee may agree to consider all or part of the period of unpaid suspension pending investigation or criminal indictment or proceeding as fulfilling the period of any disciplinary suspension without pay.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The West Virginia Division of Personnel's Administrative Rules provide that upon completion of an investigation, which did not result in dismissal or disciplinary suspension, the employee shall receive retroactive wages or restored annual leave for the period of suspension. 143 C.S.R. 1, § 12.3.b.2. Based upon the stipulated facts in this matter, the Grievant has shown that he was subject to a non-disciplinary investigatory suspension and that the investigation did not result in employee disciplinary action against the Grievant. Grievant is entitled to restoration of any annual leave he used to cover the period of

suspension. Grievant is also entitled to back wages for any scheduled work days during the suspension period, which were not covered by annual leave. Such back wages are subject to statutory interest. The period of suspension is from the last regularly scheduled work considered performed by the Grievant on September 9, 2016, up to December 14, 2016.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The West Virginia Division of Personnel's Administrative Rules provide that upon completion of an investigation, which did not result in dismissal or disciplinary suspension, the employee shall receive retroactive wages or restored annual leave for the period of suspension. 143 C.S.R. 1, § 12.3.b.2

3. The Grievant has shown by a preponderance of the evidence that he was subject to a non-disciplinary suspension for purposes of investigation, and that the investigation did not result in either dismissal or disciplinary suspension.

4. The Grievant is entitled to receive either retroactive wages or restored annual leave for the period of suspension.

Accordingly, the grievance is **GRANTED**.

Respondent is Ordered to restore all annual leave used by Grievant to cover the period of suspension and to pay Grievant back pay for any wages he was not payed pursuant to annual leave during the suspension, plus statutory interest. Respondent is further Ordered to restore Grievant's right to consider the suspension period as days of employment for retirement purposes.

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 10, 2017.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE