

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**GREGORY TIGNOR,  
Grievant,**

**v.**

**Docket No. 2016-1705-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

## **DECISION**

Grievant, Gregory Tignor, is employed by Respondent, Division of Highways ("DOH"), as a Transportation Worker 2 – Mechanic ("TW2-Mech"). He has worked for the DOH for five years at the Elkview Headquarters in District One. By form dated May 28, 2016, Mr. Tignor filed a grievance alleging, "Running inmate detail not posted despite the fact it earns an upgrade." As relief, Grievant seeks "to be made whole in every way including the opportunity to run inmate detail and receive upgrade." A level one conference was held on June 14, 2016, and a decision was issued denying the grievance on November 21, 2016.<sup>1</sup>

Grievant appealed to level two and a mediation was conducted on February 22, 2017. Pursuant to an appeal dated February 23, 2017, a level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on May 3, 2017. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170, WVPWU. Respondent was represented by Jesseca R. Church, Esquire, DOH Legal

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<sup>1</sup> After the conference, the grievance was placed in abeyance while the parties unsuccessfully pursued settlement discussions.

Division. This matter became mature for decision on June 16, 2017, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

### **Synopsis**

Grievant alleges that he should receive an upgrade to supervisor pay anytime prison inmates are assigned to work inside the Elkview garage because he supervises their activities. Grievant only receives such an upgrade if the inmates are assigned work inside the garage and the employee assigned to the inmates as well as Grievant's supervisor is absent. Grievant did not prove that DOH is required to give him an upgrade in pay when the inmates are assigned to work in the garage if another employee with supervisory authority is present.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, Gregory Tignor, is a Transportation Worker 2 – Mechanic (“TW2-Mech”), employed by Respondent, Division of Highways (“DOH”), at the DOH Elkview Headquarters. He has been employed by the DOH for five years.
2. Grievant works on DOH vehicles and equipment in the Elkview garage. Jeremy Melton is a Transportation Worker 3 – Mechanic (“TW3-Mech”) and the foreman for mechanics in the Elkview garage.
3. On one occasion, Grievant was upgraded to mechanic foreman for roughly seven months while Mr. Melton was on leave.
4. Inmates from the institutions operated by the West Virginia Division of Corrections are given work-release time to perform work for the DOH with a Division of

Corrections guard present for security. The inmates are from a minimal security risk population.

5. The group of inmates is assigned to the Elkview Headquarters every day.<sup>2</sup> Inmates spend about ten percent of their time working in the garage assisting the mechanics or straightening up the work area. The remainder of their time is spent performing various tasks with the road work crews.

6. A Transportation Worker is assigned by management to supervise the work of the inmates and receives a temporary upgrade in pay each day he acts in that supervisory capacity. This supervisory work is also beneficial experience if the employee applies for a permanent supervisory position in the DOH.

7. Greg Young, Transportation Worker 2 – Equipment Operator, has regularly been assigned to supervise the inmate crews. He stays with the crews whether they are on the road or in the garage and he receives a temporary upgrade in pay for each day he supervises the inmates' work. When Mr. Young is not present, another employee is assigned that task and receives the temporary upgrade. Mr. Young has been regularly assigned to supervise the inmates since before October 6, 2014, when Brodis "Bobbie" Brown was assigned to be the Highway Administrator at the Elkview Headquarters.<sup>3</sup>

8. Grievant has received the temporary upgrade for supervising the inmates when they were assigned to the garage, and neither Mr. Young nor the mechanic foreman were present.

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<sup>2</sup> There are days when the inmates are not assigned to DOH due to matters related to the correctional facility. Those occasions are rare.

<sup>3</sup> Mr. Young had been performing that assignment when Mr. Brown was assigned to be the administrator and Mr. Brown did not feel a need to change that role.

9. Even when Mr. Young was with the inmates in the garage, and Mr. Melton was present, there have been times when Grievant assigned the work for the inmates, checked their work and provided any necessary directions. Grievant did not identify any specific times or dates when this occurred.

10. The WVDOH *Administrative Operating Procedures* Section II, Chapter 12 deal with temporary upgrades is titled *Temporary Upgrade Policy*. The policy contains the following provisions:

**Conditions of Temporary Assignment**

Employees may be assigned by the District Engineer or Division Director to perform duties normally contained in certain classifications when it is not feasible or practical to make a permanent assignment to the position. Such occurrences may be the result of vacation schedules, the absence of employees due to illness, the temporary need for additional work crews or other unforeseen circumstances. Changes in assignments may be made only according to those classifications listed in Appendix A. Employees temporarily upgraded must meet the minimum requirements for the higher classification. . .

**Assignment to Higher Classification**

An employee who is temporarily required to perform, and in fact does fully perform the essential job functions of a higher level classification, as provided in Appendix A, will be paid the minimum rate for the higher class, or five percent above their normal rate of pay, whichever is greater. The higher rate will not apply to assignments of less than one hour. *Assignments to a higher classification may not exceed 720 hours in a calendar year. The Commissioner of Highways or his designee may grant extensions to the 720 hours here legitimate justification is presented.* (Emphasis Added).

11. No evidence was presented demonstrating that an extension was granted to extend the temporary upgrade of Mr. Young to supervise inmates working with road crews and at the Elkview facility.

12. The Division of Personnel *Administrative Rule* applies to the Division of Highways. Regarding filling permanent assignments, the rule states in part:

9.5. Posting of Job Openings. -- Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. . .

9.5.a. The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer, except any vacancy filled as a result of an employee exercising his or her bumping rights as provided in subdivision 12.4.g. of this rule.

W. VA. CODE ST. R. § 143.1.9.5.

13. The duties of supervising the inmates at the Elkview facility, with the accompanying increase of pay, were never posted to give all eligible employees an opportunity to apply for them.<sup>4</sup>

### **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.*

Grievant argues that he supervised inmates from time to time in the garage and should receive a temporary upgrade in pay when he is acting in that supervisory capacity.

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<sup>4</sup> Administrator Brown testified that management makes that assignment.

The remedy he seeks is “. . . the opportunity to run inmate detail and receive upgrade.” Respondent contends that Transportation Worker 2 Young has been picked by management to supervise the inmate crew every day, and he receives the temporary upgrade for that supervisor duty. Respondent argues that the only time a different employee is entitled to the upgrade is when Mr. Young is away from work due to illness, vacation, training, or some unforeseen circumstance. Additionally, another employee will receive the upgrade if the inmates are divided and some work at a location where TW2 Young is not present for all or part of the day. See *Melton v. Div. of Highways*, Docket No. 2016-1405-DOT (June 7, 2017). In fact, both Grievant and TW3-Mechanic Melton have separately received an occasional upgrade for supervising the inmates in the garage when Mr. Young was not there. *Id.*

Respondent asserts that management has the right to appoint an employee to supervise the inmates and receive the salary upgrade without posting the supervisory position. However, no statute, rule, policy, or regulation was offered to support that proposition. Respondent’s witnesses and representatives consistently refer to TW2 Young as receiving a temporary upgrade for supervising the inmates.

The DOH *Temporary Upgrade Policy* is the only authority cited by the parties which sets out how these assignments are made. The policy provides that its purpose is “to provide for the payment of increased wages to employees in specific classification series who are temporarily assigned to perform all the essential job duties of a higher level classification than they presently hold.” The circumstances where the policy is implemented are described as occurring when the regular supervisor is absent due to

annual leave or illness, “the temporary need for additional work crews or other unforeseen circumstances” such a training obligations for a supervisor. *Id.*<sup>5</sup>

In the present case, the reason for the temporary upgrade is the use of inmates as an additional work crew or to supplement existing work crews. That assignment goes to TW2 Young. The difference in this circumstance as compared to typical circumstances for temporary upgrades described in case *Groves, et al., v. Div. of Highways*, Docket No. 2015-1077-CONS (Aug. 17, 2016); *Cobb, et al., v. Div. of Highways*, Docket No. 2014-0753-CONS (Dec. 22, 2014), is that there is nothing truly temporary about Mr. Young’s assignment. He is charged with supervising the inmates every day, and other employees receive a temporary assignment to cover those duties when he is absent. This practice runs counter to the DOH *Temporary Upgrade Policy* specific mandate that, “Assignments to a higher classification may not exceed 720 hours in a calendar year.” *Id.*<sup>6</sup> The Division of Personnel Administrative rule related to temporary assignments contains the same restriction:

9.4. Temporary Employment. -- Appointing authorities may employ individuals for a limited period of time not to exceed 720 hours in any twelve-month period in accordance with the provisions of this rule and W. Va. Code §29-6-1 et seq.

W. VA. CODE ST. R. § 143.1.9.4.

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<sup>5</sup> See *Groves, et al., v. Div. of Highways*, Docket No. 2015-1077-CONS (Aug. 17, 2016); *Cobb, et al., v. Div. of Highways*, Docket No. 2014-0753-CONS (Dec. 22, 2014) for explanations and examples of the usual circumstances in which temporary upgrades arise.

<sup>6</sup> The policy further states: “The Commissioner of Highways or his designee may grant extensions to the 720 hours where legitimate justification is presented.” However, no evidence was presented indicating that such an extension was granted, or even requested for Mr. Young’s supervisory upgrade.

No one advances the proposition that the position of supervising the work crew was a permanent position to which Mr. Yong had been promoted. The position was regularly referred to as an assignment with a temporary upgrade. Taking this assignment gives the employee a salary upgrade and supervisory responsibilities and meets the Division of Personnel definition of promotion.<sup>7</sup> Had this been a permanent assignment it would have been necessary for the DOH to get the position approved by the Division of Personnel and post it to give all qualified employees an opportunity to apply for it.<sup>8</sup> Respondent's witnesses indicated that Mr. Young was simply given the assignment to supervise the inmates. The assignment was not posted and other employees were not given an opportunity to apply for it.

It is axiomatic that "administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994).<sup>9</sup> The DOH policy is clear and unambiguous. Temporary assignments may not extend beyond 720 hours in any calendar year. Since this assignment is treated as temporary resulting in a temporary upgrade in salary a single

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<sup>7</sup> 3.70. Promotion. -- A change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities.

W. VA. CODE ST. R. § 143.1.3.70.

<sup>8</sup> 9.5. Posting of Job Openings. -- Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. . .

9.5.a. The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer. . .

W. VA. CODE ST. R. § 143.1.9.5.

<sup>9</sup> This legal principal has been frequently applied by the West Virginia Supreme Court of Appeals, and authoritatively cited in nearly fifty Grievance Board decisions.

employee may only hold it for 720 hours each calendar year. If the position is available after one employee has served for 720 hours, another eligible employee, such as Grievant must be considered for the upgrade. Accordingly, the grievance is GRANTED to the extent that Mr. Young may only receive the temporary upgrade for supervising inmates for 720 hours each calendar year. If there is a need for the upgrade beyond 720 hours in that year, eligible employees, such as Grievant, must be considered for the upgrade.

### **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*.

2. The policy provides that its purpose is “to provide for the payment of increased wages to employees in specific classification series who are temporarily assigned to perform all the essential job duties of a higher-level classification than they presently hold.” The circumstances where the policy is implemented are described as occurring when the regular supervisor is absent due to annual leave or illness, “the temporary need for additional work crews or other unforeseen circumstances” such a training obligations for a supervisor. *Id.*, See *Groves, et al., v. Div. of Highways*, Docket No. 2015-1077-CONS (Aug. 17, 2016); *Cobb, et al., v. Div. of Highways*, Docket No. 2014-0753-CONS (Dec. 22, 2014).

3. The DOH *Temporary Upgrade Policy* specific mandate that, “Assignments to a higher classification may not exceed 720 hours in a calendar year.” *Id.*

4. Grievant proved by a preponderance of the evidence that supervision of the inmate crew is being treated as a temporary assignment and one employee has been regularly holding that assignment for more than 720 hours in one or more calendar years.

5. "Administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994).

6. The DOH practice of allowing a single employee to hold the temporary assignment of supervising inmates at the Elkview Headquarters for more than 720 hours in a calendar year violates the DOH *Temporary Assignment Policy*, which deprives other eligible employees the opportunity to receive the pay and experience gained by receiving the temporary assignment.

Accordingly, the grievance is GRANTED.

Respondent is Ordered to limit the time any employee may serve in the temporary assignment of supervising inmates to 720 hours in any calendar year. If the assignment exists for more than 720 hours in a calendar year, another eligible employee must be temporarily assigned to the position with the same time limitations.

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: August 22, 2017.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**