

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ASHLEY RENEE HEBB,
Grievant,

v.

Docket No. 2019-0322-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF JUVENILE SERVICES/
KENNETH “HONEY” RUBENSTEIN CENTER,**
Respondent.

DECISION

Grievant, Ashley Hebb, is employed by Respondent, Division of Corrections and Rehabilitation (DCR) at Kenneth “Honey” Rubenstein Center. On September 5, 2018, Grievant filed this grievance against Respondent, stating:

I am filing this grievance because I am owed back pay due to not receiving my Correctional Officer II pay. ...

For relief, Grievant seeks “back pay.”

A level one conference was held on September 28, 2018. On October 19, 2018, Respondent’s hearing examiner issued a decision granting back pay from February 14, 2018, to June 6, 2018. The Division of Personnel disallowed the award. On September 3, 2019, Respondent sent Grievant a letter rescinding the level one decision and denying the grievance based on the Division of Personnel policy.

On September 8, 2019, Grievant appealed to level three of the grievance process. On October 7, 2019, the Grievance Board issued a Transfer Order moving the grievance back to level two. A mediation session was held on December 19, 2019. On January 2, 2020, Grievant again appealed to level three of the grievance process. The parties requested a level three decision on the record and submitted stipulated findings of fact.

Grievant was *pro se*.¹ Respondent was represented by counsel, Briana J. Marino, Assistant Attorney General. This matter became mature for decision on September 17, 2020, upon submission of a Proposed Order submitted by the Respondent. Grievant did not make a separate submission.

Synopsis

Grievant is employed by Respondent as a Correctional Officer II. Grievant became eligible for position reallocation from Correctional Officer I on February 14, 2018, when her duties and responsibilities changed to those of Correctional Officer II. Respondent inadvertently delayed reallocating her position to Correctional Officer II until June 7, 2018. Grievant proved entitlement to back pay with interest. Accordingly, this grievance is GRANTED.

The following findings of fact have either been stipulated to by the parties or gleaned from the record.

Findings of Fact

1. Grievant, Ashley Hebb, is employed by Respondent, Division of Corrections and Rehabilitation (DCR), at Kenneth “Honey” Rubenstein Center.
2. Grievant was reallocated from a Cook to Correctional Officer I on or about February 14, 2017.
3. Throughout her employment as a Correctional Officer I, Grievant either met or exceeded expectations on her employee performance appraisals.
4. Grievant successfully completed and graduated from the Correctional Academy in Glenville, West Virginia on or about June 30, 2017.

¹For one’s own behalf. Black’s Law Dictionary 1221 (6th ed. 1990).

5. Grievant became eligible for reallocation to Correctional Officer II on February 14, 2018, due to a change in her duties and responsibilities.

6. Grievant should have been reallocated to Correctional Officer II on February 14, 2018 based on this change in her duties and responsibilities.

7. Due to clerical error, oversight, or inadvertent omission by Respondent, this reallocation was not timely processed, resulting in a delay of the implementation of the wage increase earned by Grievant Hebb.

8. Grievant was not reallocated to Correctional Officer II until June 7, 2018, whereupon she began receiving pay commensurate with her reallocation.

9. Respondent had attempted to submit for approval by the Division of Personnel (DOP) a settlement agreement granting backpay for the period between February 14, 2018, to June 6, 2018. However, DOP and/or the West Virginia Auditor's Office disallowed this settlement agreement.

10. Due to the change in her duties and responsibilities, and her late reallocation, Respondent owes Grievant backpay for the period of February 14, 2018, to June 6, 2018.

11. Per the Division of Administrative Services, Grievant's backpay for this period is approximately \$517.17.

12. Respondent owes Grievant interest on this backpay calculated per the typical method.

13. This grievance is supported by Respondent.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

The parties agree that Grievant should have been reallocated from Correctional Officer I to Correctional Officer II on February 14, 2018, due to a change in her duties and responsibilities; that due to oversight or error by Respondent the reallocation was not processed until June 7, 2018; and that Grievant is owed backpay of \$517.17 with interest from February 14, 2018, to June 6, 2018.

The Division of Personnel Administrative Rule defines “reallocation” as “Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties.” W. VA. CODE ST. R. § 143-1-3.72 (2016). This is consistent with the practice of Respondent to reallocate officers at the completion of their one year probationary status from a Correctional Officer I to a Correctional Officer II, assuming they have graduated the Correctional Academy and completed any other preliminary requirements. DOP’s Classification Specifications reveal that a Correctional Officer II is no longer considered an officer-in-training, performs job assignments with more autonomy, and can supervise and assist in the training of

employees classified as Correctional Officer I. This reallocation is also consistent with the facts established and stipulated to by the parties.

As Grievant's position was reallocated, she was entitled to a pay increase under Administrative Rule 4.7 and Rule 4.7.a. "Whenever significant changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may seek a reconsideration of the decision by submitting a written request to the Director within fifteen (15) working days of the notification of the decision." W. VA. CODE ST. R. § 143-1-4.7 (2016). "The Director shall not reallocate a position based on temporary changes in the duties and responsibilities assigned to the position." W. VA. CODE ST. R. § 143-1-4.7.a. (2016). Therefore, it is undisputed that Grievant was entitled to a pay increase on February 14, 2018, which is the date Grievant should have been reallocated to a Correctional Officer II classification.

The controversy arises due to Respondent's omission, mistake, and/or clerical error when Respondent's Human Resources employees failed to make the requisite written request to DOP within the time frame required by DOP. This deprived Grievant of wages owed her between February 14, 2018, and June 7, 2018, the date Respondent actually processed and implemented this request. The failure to timely process Grievant's reallocation and associated wage increase was not due to any fault or omission on the part of the Grievant. Respondent attempted to remedy its inadvertent mistake through a settlement agreement pursuant to W. VA. CODE ST. R. § 143-1-21.1 and DOP Settlement Agreement Policy. However, the Settlement Agreement was disallowed by the Division

of Personnel and/or the West Virginia Auditor's Office thereby foreclosing Respondent from paying Grievant lawfully owed wages.

Respondent contends that the undersigned has clear authority to fashion equitable relief under W. Va. Code St. R. § 156-1-1.5 & 6.20 and W. Va. Code § 6C-2-1. "Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. Va. Code §6C-2-1, et seq." W. VA. CODE ST. R. § 156-1-6.20 (2018). "The provisions of these rules will be liberally construed to permit the Board to discharge its statutory functions and to secure just and expeditious determination of all matters before the Board; therefore, for good cause, the Board may, at any time, suspend the requirements of any of these rules." W. VA. CODE ST. R. § 156-1-1.5 (2018).

"'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination..." W. VA. CODE § 6C-2-2(i)(1). Thus, the undersigned has jurisdiction to address Grievant's failure to receive just compensation for the changes she experienced in her duties and responsibilities starting February 14, 2018.

Accordingly, this grievance is GRANTED.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST.

R. § 156-1-3 (2018). “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), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “Whenever significant changes occur in the duties and responsibilities permanently assigned to a position, the Director shall reallocate the position to its proper class. The incumbent or the appointing authority may seek a reconsideration of the decision by submitting a written request to the Director within fifteen (15) working days of the notification of the decision.” W. VA. CODE ST. R. § 143-1-4.7 (2016).

3. The Division of Personnel Administrative Rule defines “reallocation” as “Reassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties.” W. VA. CODE ST. R. § 143-1-3.72 (2016).

4. Grievant proved by a preponderance of the evidence that, due to a change in her duties and responsibilities, her position should have been reallocated on February 14, 2018, but was delayed through Respondent’s inadvertent mistake until June 7, 2018, resulting in the delay of her pay increase.

Accordingly, the grievance is GRANTED. Respondent shall pay Grievant back wages for the period from February 14, 2018, through June 6, 2018, in the amount of \$517.17 plus the usual interest thereon.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 16, 2020

Joshua S. Fraenkel
Administrative Law Judge