

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**NICHOLAS BURTON,
Grievant,**

v.

Docket No. 2020-1493-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/SOUTHERN REGIONAL JAIL
AND CORRECTIONAL FACILITY,
Respondent.**

DECISION

Grievant, Nicholas Burton, is employed by Respondent, Division of Corrections and Rehabilitation (DCR), at Southern Regional Jail and Correctional Facility. On July 2, 2020, Grievant filed this grievance against Respondent, stating:

I was promoted to Captain and was suppose [sic] to go into effect March 14, 2020. DASHR failed to process my promotion on said date as promised per the letter I signed accepting the position. I notified my HR representative Charlotte Underwood and she inquired to DASHR. The response I received was "It was forgotten, due to the salary adjustments from July 1, 2018. It was processed May 9, 2020.

For relief, Grievant seeks "salary adjustment from March 14, 2020 to May 9, 2020, to be paid immediately."

A level one conference was waived by letter dated July 14, 2020. On September 30, 2020, mediation was held wherein DCR was unable to provide Grievant with relief due to the nature and type of the grievance. Subsequently, Grievant 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*. Respondent was represented by counsel, Briana J. Marino, Assistant Attorney General. This matter became mature for decision on or about February 2, 2021, upon submission of a Proposed Order submitted by Respondent. Grievant did not make a separate submission.

Synopsis

Grievant was employed by Respondent as a Correctional Officer V. Grievant was selected for promotion through a competitive promotional process and should have been promoted to the classification of Correctional Officer VI on March 14, 2020. Respondent inadvertently delayed promoting his position to Correctional Officer VI until May 9, 2020. Respondent admits that a mistake was made causing Grievant to work in the higher classification for a period without the commensurate salary increase. Respondent admits that Grievant is owed the additional compensation he would have received if he had been paid at the proper rate when she began working as a Correctional Officer VI. 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, Nicholas Burton, is employed by Respondent, Division of Corrections and Rehabilitation (DCR), at the Southern Regional Jail and Correctional Facility.
2. Throughout his employment as a Correctional Officer V, Grievant either met or exceeded expectations on his employee performance appraisals thereby making him eligible to apply for competitive promotional opportunities.
3. Grievant applied for and was selected for the classified position of Correctional Officer VI through the promotion process.

4. Grievant began performing the duties of a Correctional Officer VI. Grievant should have been promoted to Correctional Officer VI on March 14, 2020, due to a change in his duties and responsibilities as a result of the promotion.

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

6. Grievant was not promoted within OASIS to Correctional Officer VI until May 9, 2020, whereupon he began receiving pay commensurate with his promotion.

7. Respondent had attempted to submit for approval by the Division of Personnel (DOP) a settlement agreement granting backpay situations such as Grievant's facts before the Board in this case. However, DOP and/or the West Virginia Auditor's Office disallowed similar settlement agreements necessitating the filing of this grievance.

8. Due to the change in his duties and responsibilities as a result of his promotion, and delay in its effective date, Respondent owes Grievant backpay for the period of March 14, 2020, to May 9, 2020.

9. Per the Division of Administrative Services, Grievant's backpay for this period is approximately \$801.65.

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

11. This grievance is supported by Respondent. The parties are in agreement regarding the disposition of the issue in dispute.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 1561-3 (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 promoted from Correctional Officer V to Correctional Officer VI on March 14, 2020, due to a change in his duties and responsibilities by virtue of a competitive promotion; that due to oversight or error by Respondent the promotion was not processed until May 9, 2020; and that Grievant is owed back pay of \$801.65 with interest from March 14, 2020, to May 9, 2020. DOP's Classification Specifications reveal that a Correctional Officer VI is the second highest classification of uniformed officer and performs a wide variety of duties and responsibilities and a higher level of responsibility than a Correctional Officer V. This promotion is also consistent with the facts established and stipulated to by the parties.

West Virginia Code of State Regulations § 143-1-5.5 and § 143-1-5.5.a states: Pay on Promotion. — When an employee is promoted, the employee's pay shall be adjusted as follows:

3 5.5.a. Minimum Increase. — Any employee promoted will be compensated to at least the minimum of the compensation range of the job class to which he or she is promoted. An employee whose salary is within the range shall receive an increase of one (1) increment or a maximum established by the Board, except where an employee accepts a lesser increase within the compensation range to obtain the position. In no case shall

any employee receive an increase which causes the employee's pay to exceed the maximum of the range except as provided in subdivision 5.5.b of this rule.

Grievant Burton accepted a promotion pursuant to W. Va. CSR § 143-1-5.5 and the parties agree that transaction resulted in a pay increase of 12%. Grievant was not paid at the higher rate for the period of March 14, 2020, through May 9, 2020.

The Grievance Board has previously held, "If an employer assigns 'out of class' duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification." *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans.*, Docket No. 94-DOH-095 (Aug. 31, 1994). *Reed v. WV Div. of Corrections*, Docket No. 97-CORR-127 (May 22, 1998). *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-053 (Apr. 28, 2000). *Baker v. Dep't of Health & Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016). In this case the duties in the higher classification of Captain were the permanent, fulltime duties of Grievant's new position. They were not temporary or occasional. 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 him between March 14, 2020, and May 9, 2020, the date Respondent actually processed and implemented this request. The failure to timely process Grievant's promotion and associated wage increase was not due to any fault or omission on the part of the Grievant. Respondent's attempts to remedy these types of situations via settlement agreements have been unsuccessful due to the administrative rules of 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 he experienced in his duties and responsibilities starting March 14, 2020.

Grievant is entitled to be paid the difference between the two classifications during the time in question which the parties agree is approximately \$801.65. Accordingly, the 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 his 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-H HR-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. West Virginia Code of State Regulations § 143-1-5.5 and § 143-1-5.5.a states: Pay on Promotion. — When an employee is promoted, the employee's pay shall be adjusted as follows:

3 5.5.a. Minimum Increase. — Any employee promoted will be compensated to at least the minimum of the compensation range of the job class to which he or she is promoted. An employee whose salary is within the range shall receive an increase of one (1) increment or a maximum established by the Board, except where an employee accepts a lesser increase within the compensation range to obtain the position. In no case shall any employee receive an increase which causes the employee's pay to exceed the maximum of the range except as provided in subdivision 5.5.b of this rule.

3. "If an employer assigns 'out of class' duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification." *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996); *Shremshock v. W. Va. Dept. of Trans.*, Docket No. 94-DOH-095 (Aug. 31, 1994). *Reed v. WV Div. of Corrections*, Docket No. 97-CORR-127 (May 22, 1998). *Hall v. Div. of Natural Res. and Div. of Personnel*, Docket No. 00-DNR-

053 (Apr. 28, 2000). *Baker v. Dep't of Health & Human Res.*, Docket No. 2015-0422-DHHR (Aug. 22, 2016).

4. It is established by a preponderance of the evidence that, due to a change in Grievant's duties and responsibilities by virtue of his promotion, his position should have been promoted on March 14, 2020, but was delayed through Respondent's inadvertent mistake until May 9, 2020, resulting in the delay of his pay increase.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to pay Grievant the sum of \$801.65 plus statutory interest from May 9, 2020, through the date the principle amount is paid.

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 (2018).

Date: February 16, 2021

Landon R. Brown
Administrative Law Judge