

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRANDON T. DAVIS,

Grievant,

v.

Docket No. 2020-0780-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF JUVENILE SERVICES/GENE SPADARO
JUVENILE CENTER,**

Respondent.

DECISION

Grievant, Brandon T. Davis, filed a level one grievance on January 14, 2020, against his employer, Respondent, Division of Corrections and Rehabilitation, Bureau of Juvenile Services, Gene Spadaro Juvenile Center, stating as follows: “[n]ot receiving correct rank or pay within DOC rules & policies from Aug 21st-18 up to the present date and counting.” As relief sought, the Grievant requests, “Back pay from Aug 21-18 - Aug 21-19 for the rank of CO II. Back pay from Aug-21-19 / present for rank of CO III. Back pay for all hours worked, including interest.”

A level one conference was conducted on February 6, 2020. The grievance was denied by a level one decision issued on or about February 26, 2020. Grievant appealed to level two on March 16, 2020. A level two mediation was conducted on September 2, 2020. Grievant perfected his appeal to level three on September 9, 2020.¹ In lieu of a level three hearing, the parties requested that this matter be decided upon their agreed stipulations of fact because the facts are not in dispute and this grievance concerns only

¹ The level three appeal bears the signature date of September 8, 2020. However, the postmark on the envelope received at the Grievance Board on September 10, 2020, was September 9, 2020.

a question of law. This administrative law judge granted the parties request and set the submission date for the parties' joint stipulations of fact as December 18, 2020. However, the parties missed their submission date, and did not seek an extension of the same.

As this grievance had not been heard at level three and there had been no submissions from the parties, on January 21, 2021, the Grievance Board emailed Respondent's counsel and Grievant's representatives inquiring as to status and informing them that the matter will be scheduled for a level three hearing if they failed to respond by close of business that day. Respondent's counsel responded, copying Grievant's representatives, "[w]e are awaiting calculations from DAS in order to complete the stipulated facts for submission. I will follow up with them and get an anticipated date of submission. . . ." Later on that same date, the Grievance Board replied to the parties, stating as follows:

Judge LeFevre has reviewed the grievances, correspondence, and Ms. Marino's email response received today. The deadlines for the submission of joint stipulations, as the parties by counsel/representatives specifically requested in October 2020, have passed. They were due on December 18th, December 23rd, and December 31st, respectively. No submissions have been received. Further, counsel/representatives did not object to the dates set and noticed by letters dated October 30, 2020, in each grievance. Counsel/representatives did not request any extensions of time for their submissions. Counsel/representatives have failed to communicate with the Grievance Board regarding these grievances and the submission of joint stipulations until now, nearly three months after the deadlines were set by letters dated October 30, 2020, and well after the deadlines passed.

Given such, if the parties would like the opportunity to submit joint stipulations, they may

request such opportunity. However, at this time, the three grievances will be rescheduled for level three hearings. Should counsel/representatives fail to provide dates for the scheduling of such grievances for hearing when they are requested, these three grievances will be set for hearing at the Judge's discretion. (Emphasis added.)

Neither Respondent's counsel nor Grievant's representatives requested an opportunity to submit joint stipulations following the Grievance Board's January 21, 2021, email. As it appeared the parties no longer wished to submit the matter for decision based upon joint stipulations of fact, the Grievance Board proceeded to take action to schedule the matter for a level three hearing.

On February 3, 2021, the Grievance Board contacted the parties' representatives/counsel seeking dates for the scheduling of the level three hearing. The parties' representatives/counsel provided the same, and on February 22, 2021, the Grievance Board scheduled this grievance for a level three hearing to be held on July 13, 2021. On that same date, the Grievance Board emailed the parties the Zoom hearing information for the level three hearing, including the date and time of the hearing. Also, on February 22, 2021, the Grievance Board mailed a Notice of Hearing to the parties.

Despite these communications between the Grievance Board and the parties' counsel/representatives, later on that same day, counsel for Respondent submitted a document entitled, "*Stipulated Facts Submitted by the Parties.*" This document lacked original, copied, or digital signatures, bore no certificate of service, and listed Grievant as *pro se*. Grievant's representatives were not listed anywhere on the document and there was no way to discern whether they had reviewed the document prior to its submission.

This ALJ entered an “Order Regarding Joint Stipulations of Fact” on March 5, 2021, informing the parties that their submitted stipulations were insufficient and that this ALJ would not consider the same. This Order further informed the parties of the process by which stipulations could be submitted if they were to ask to have the matter decided in that fashion rather than having a level three hearing. Given these issues, this matter was scheduled for a status hearing via Zoom video conferencing on March 16, 2021, at which Respondent’s counsel and Grievant’s representatives appeared. At that hearing, the parties expressed that they still wished for this grievance to be decided based upon their stipulated facts in lieu of a level three hearing. This ALJ set the date for submission of the joint stipulations as April 1, 2021. This matter became mature for decision on March 31, 2021, upon the receipt of the parties’ “*Stipulated Facts Submitted by the Parties.*”

Grievant appears by his representatives, Elaine Harris and Jack Ferrell, Communication Workers of America. Respondent appears by counsel, Briana Marino, Esquire, Assistant Attorney General.

Synopsis

Grievant is employed by Respondent as a Correctional Officer. Grievant became eligible for a reallocation from the Correctional Officer I classification to the Correctional Officer II classification on August 21, 2018, and again on August 21, 2019, when he became eligible for reallocation to the Correctional Officer III classification, because his duties and responsibilities changed to those of the two higher classifications. Respondent failed to timely submit the requisite paperwork to DOP to officially reallocate Grievant’s positions to those higher classifications. Such resulted in Grievant being denied two pay increases to which he was entitled. It is undisputed that Grievant is entitled to back pay,

with statutory interest, for the period of August 21, 2018, to January 1, 2021, due to the late reallocations. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a review of the record created in this grievance:

Stipulated Findings of Fact²

1. Grievant Davis was reallocated from a Correctional Officer I to a Correctional Officer II on or about August 21, 2018.

2. Grievant Davis was reallocated from a Correctional Officer II to a Correctional Officer III on or about August 21, 2019.

3. Grievant Davis successfully completed and graduated from the Correctional Academy in Glenville, West Virginia[,] on or about November 2, 2018.

4. Grievant Davis became eligible for reallocation to Correctional Officer II on August 21, 2018.

5. Grievant Davis became eligible for reallocation to Correctional Officer III on August 21, 2019.

6. Grievant Davis should have been reallocated to Correctional Officer II on August 21, 2018. Due to clerical error, oversight, or inadvertent omission this reallocation was not timely processed resulting in a delay of the implementation of the wage increase earned by Grievant Davis.

7. Grievant Davis should have been reallocated to Correctional Officer III on August 21, 2019. Due to clerical error, oversight, or inadvertent omission this reallocation

² The facts listed herein are taken verbatim from the parties' written submission.

was not timely processed resulting in a delay of the implementation of the wage increase earned by Grievant Davis.

8. Grievant Davis was not reallocated to Correctional Officer II or Correctional Officer III.

9. Grievant Davis is owed backpay as Correctional Officer II for the period of time of August 21, 2018, to August 21, 2019, due to the late reallocation. Grievant Davis is owed backpay as Correctional Officer III for the period of time of August 21, 2019, to the present³, due to the late allocation. Per the Division of Administrative Services this amount of backpay is believed to be \$4,385.76. See the attached wage calculations attached hereto as Exhibit 1.

10. Grievant Davis is owed interest to be calculated by the typical method on any award of backpay that may be awarded by virtue of this grievance.

11. DCR previously attempted to submit to the Division of Personnel for pre-approval a Settlement Agreement to allow for the payment of the back wages owed. However, this Settlement Agreement was disallowed by the Division of Personnel and/or the West Virginia State Auditor's Office.

[12.] Accordingly, the above-styled grievance was filed by Grievant Davis and supported by DCR.

³ According to the calculation documents attached to the parties' joint stipulations, the date of this calculation was as of January 1, 2021.

Findings of Fact⁴

1. Grievant was assigned the duties of a Correctional Officer II on or about August 21, 2018. However, his title and his pay were not changed to reflect his change of duties as a result of Respondent's failure to process the necessary paperwork.

2. Grievant was assigned the duties of a Correctional Officer III on or about August 21, 2019. However, his title and his pay were, again, not changed to reflect his change of duties as a result of Respondent's failure to process the necessary paperwork.

3. Despite the parties' stipulated fact number eight (8), Respondent eventually processed Grievant's paperwork to officially change his titles and his pay to reflect his actual duties. However, as these reallocations were processed late, Grievant is owed money for the work he performed in the higher classifications before the paperwork was processed.

4. Respondent has stipulated that it owes back pay to Grievant for the difference in what he was paid during the specified time periods and what he should have been paid had Respondent reallocated Grievant to the proper classification title at the time his duties were changed. The exhibit Respondent attached to its "*Stipulated Facts Submitted by the Parties*," is a calculation its Division of Administrative Services prepared

⁴ On May 7, 2021, Grievance Board staff, at this ALJ's request, emailed counsel/representatives for the parties asking whether Grievant's position was ultimately reallocated to Correctional Officer III, and if so, when such occurred. Such information was required to decide this grievance, but it had not been included in the parties' stipulations. In response to the inquiry, Stacy L. Nowicki, Deputy General Counsel, Department of Homeland Security, provided information from its Division of Administrative Services stating that Grievant was reallocated to the Correctional Officer III classification on August 15, 2020. Ms. Nowicki properly copied Grievant's representatives on this communication.

showing what it owes Grievant in back pay from August 21, 2018 to January 1, 2021, taking into consideration the pay increases he should have received during that time.

5. Grievant was reallocated to the Correctional Officer III classification on August 15, 2020, and his pay was increased to reflect the duties he was already performing.

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. § 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 have stipulated that Grievant's classification should have been reallocated from Correctional Officer I to Correctional Officer II on August 21, 2018, and from Correctional Officer II to Correctional Officer III on or about August 21, 2019, and that due to Respondent's error or oversight, the reallocation paperwork was not processed. Had the reallocation paperwork been processed correctly, Grievant would have received pay increases each time he moved up a tier in the Correctional Officer classification series. The parties have further stipulated, based upon Respondent's calculations, that Respondent owes Grievant back pay in the amount of \$4,385.76, plus interest, from August 21, 2018, to January 1, 2021, that being the difference between what he was paid and what he should have been paid during that time. Grievant's

classification was ultimately reallocated to Correctional Officer III on August 15, 2020. It appears that Grievant has been receiving the Correctional Officer III rate of pay since that time. Therefore, this grievance only deals with the issue of back pay owed Grievant.

The parties appear to assert that this ALJ 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). Accordingly, this ALJ has the authority to address Respondent’s failure to pay just compensation to Grievant for the changes he experienced in his duties and responsibilities beginning August 21, 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). The parties appear to agree that Grievant performed the duties of the two higher classifications, but his pay and classification titles were not changed when he began performing those duties. As Grievant's duties were reallocated from Correctional Officer I to Correctional Officer II, and from Correctional Officer II to Correctional Officer III, Grievant was entitled to pay increases 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). Grievant has proved his claims by a preponderance of the evidence. Therefore, this grievance is GRANTED.

Lastly, it is noted that Respondent attempted to remedy its mistake through a settlement agreement pursuant to W. VA. CODE ST. R. § 143-1-21.1 and the Division of Personnel's Settlement Agreement Policy. However, the Settlement Agreement was reportedly "disallowed" by the Division of Personnel and/or the West Virginia State Auditor's Office, thereby foreclosing Respondent from paying Grievant lawfully owed wages without the involvement of the Grievance Board.

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-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 his duties and responsibilities, his position should have been reallocated to the Correctional Officer II classification on August 21, 2018, and to the Correctional Officer III classification on or about August 21, 2019, but that Respondent failed to submit the required paperwork to DOP during the appropriate time frames. As a result, Grievant was denied pay increases to which he was entitled.

5. Grievant has proved by a preponderance of the evidence that he is owed back pay from Respondent as a result of its failure to timely submit the requisite paperwork to DOP.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant back wages for the period of time from August 21, 2018, through January 1, 2021, in the amount of \$4,385.76, 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: May 11, 2021.

Carrie H. LeFevre
Administrative Law Judge