

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ZACHARY MICHAEL ROBINSON,
Grievant,

v.

Docket No. 2018-0887-MAPS

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

Decision

Grievant, Zachary Robinson, is employed by Respondent at the Southwestern Regional Jail and Correctional Facility. Grievant filed this action on or about January 19, 2018, seeking back pay after his promotion to the position of Correctional Officer II. This grievance was granted at level one by decision dated February 14, 2018. On September 17, 2019, Respondent filed an amended level one decision denying the grievance. Grievant filed an appeal on September 24, 2019 to level three of the grievance process. The case was transferred to level two for mediation by Transfer Order dated October 15, 2019. Following a level two mediation on February 3, 2020, Grievant appealed to level three. The parties communicated to the undersigned that in lieu of a level three hearing, the parties would submit the case for decision on stipulated facts and proposals. This case became mature for decision following receipt of the parties' stipulations on January 4, 2021. Grievant appeared *pro se*. Respondent appeared by its counsel, Briana J. Marino, Assistant Attorney General.

Synopsis

Grievant is employed by Respondent as a Correctional Officer II. Grievant became eligible for reallocation to Correctional Officer II on April 1, 2016, when his duties and responsibilities changed to those of that position. Respondent neglected to reallocate Grievant's position to Correctional Officer II until June 10, 2017. It is undisputed that Grievant is entitled to back pay, with statutory interest, for the period of April 1, 2016, to June 9, 2017, due to the late reallocation. Accordingly, the grievance is granted.

The following Findings of Fact have been stipulated to by the parties.

Findings of Fact

1. Grievant was hired as a Correctional Officer I on or about April 1, 2015, with the West Virginia Regional Jail and Correctional Facility Authority.
2. Grievant successfully completed and graduated from the Correctional Academy and completed all other requirements necessary for reallocation to the position of Correctional Officer II on or before April 1, 2016.
3. Grievant became eligible for reallocation to Correctional Officer II on April 1, 2016.
4. Grievant was entitled to reallocation to Correctional Officer II on April 1, 2016. Due to neglect and oversight this reallocation was not timely processed, resulting in a delay of the implementation of the wage increase earned by Grievant.
5. Grievant is owed back pay for the period of April 1, 2016, to June 9, 2017, due to the late reallocation.
6. Per the Division of Administrative Services this amount of back pay is \$2,682.44.

7. Respondent owes Grievant interest on this back pay calculated by the typical method on any award of back pay.

8. Respondent had attempted to submit for approval by the Division of Personnel a settlement agreement to allow for the payment of the back pay in this case. However, the Division of Personnel and the West Virginia Auditor's Office disallowed back wages due to late reallocation.

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 agree that Grievant should have been reallocated from Correctional Officer I to Correctional Officer II on April 1, 2016, due to a change in his duties and responsibilities; that due to oversight or error by Respondent the reallocation was not processed until June 10, 2017; and that Grievant is owed back pay of \$2,682.44 with interest from April 1, 2016, to June 9, 2017.

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. The Division of Personnel'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, he 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 April 1, 2016, which is the date Grievant should have been reallocated to a Correctional Officer II classification.

The case came about due to Respondent's omission, mistake, and/or clerical error when Respondent's Human Resources employees failed to make the requisite written request to the Division of Personnel for reallocation within the time frame required by that agency. This deprived Grievant of wages owed him between April 1, 2016, and June 10,

2017, 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 the Division of Personnel's 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 he experienced in his duties and responsibilities starting April 1, 2016.

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 on April 1,

2016, but was delayed through Respondent's inadvertent mistake until June 10, 2017, resulting in the delay of his pay increase.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant back wages for the period from April 1, 2016, through June 9, 2017, in the amount of \$2,682.44, 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: February 8, 2021

Ronald L. Reece
Administrative Law Judge