PHILLIP CAMERON,

Grievant,

v. **DOCKET NO. 97-CORR-141**

WEST VIRGINIA DIVISION

OF CORRECTIONS,

Respondent.

DECISION

Grievant, Phillip Cameron, initiated this proceeding pursuant to the provisions of W. Va. Code § 29-6A-1, et seq. He seeks to be awarded annual and sick leave during the time period when he was temporarily employed by Respondent at the Northern Regional Jail and Correctional Facility ("NRJ"). The grievance was denied at level one on December 16, 1996, and at level two on January 9, 1997. A level three hearing was conducted on February 11, 1997, followed by a written decision denying the grievance dated February 27, 1997. Appeal was made to level four on March 17, 1997, where a hearing was conducted in the Grievance Board's Wheeling, West Virginia, office on April 28, 1997. (See footnote 1) This matter was reassigned for final decision to the undersigned administrative law judge on September 30, 1997.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant was initially employed by Respondent as a correctional officer on November 1, 1993, at the West Virginia Penitentiary ("penitentiary") in Moundsville, West Virginia. 2. Closure of the penitentiary was ordered by the West Virginia Supreme Court of Appeals in its decision entitled Crain v. Bordenkircher, 342 S.E.2d 422 (W. Va. 1986). Two replacement institutions were built by the Regional Jail Authority, the NRJ and the Mount Olive Correctional Complex ("Mt. Olive").

3. Prior to the implementation of any layoff, Grievant was given the option of transferring

employment to Mt. Olive, which he refused because of its location.

4. Effective June 15, 1995, employees who had not transferred to the two new facilities or to the prison at Huttonsville, including Grievant, were laid off and placed upon a preferential hiring list. (See footnote 2)

5. On October 2, 1995, Grievant was hired for employment at the NRJ under a "90-day appointment." The appointment, which Grievant signed, stated that no annual or sick leave would be earned during the temporary appointment.

6. Grievant's employment under the ninety-day appointment continued for approximately five months, until March 9, 1996, when he was laid off again.

7. Grievant was hired as a permanent, full-time employee at the NRJ on April 16, 1996.

Discussion

Grievant contends that, because there was a shortage of correctional officers at NRJ during his ninety-day appointment, he should have been hired as a full-time, permanent employee. He also asserts that his temporary appointment should not have been allowed to continue beyond ninety days. Grievant seeks to be credited with full-time employment, including annual and sick leave, fromOctober 2, 1995, through April 16, 1996, when he again became a permanent employee.

It is somewhat difficult in this case to ascertain upon what authority Grievant relies to support his position. His "Statement of Grievance" states that he believes Respondent's actions to be contrary to Senate Bill 290, otherwise known as W. Va. Code §25-1-21, which provides, in pertinent part, as follows:

> (a) Notwithstanding any provisions of this code to the contrary, any person not a temporary or probationary employee employed at the West Virginia penitentiary at Moundsville at the time of its closing shall be afforded the opportunity to transfer duty stations to [Mt. Olive, Huttonsville, or NRJ] if he or she is an employee in good standing at the time the facility is closed. . . .
>
> (b) The commissioner shall, within thirty days of the closing of the West Virginia penitentiary at Moundsville, establish and maintain, for a period of two years, a list of all correctional officers who are eligible for transfer pursuant to subsection (a) of this section and who wish to remain eligible for a two-year period for transfer . . . . The commissioner shall give priority to any person on the list for employment in an available position equivalent to the position that person held at the penitentiary unless the commissioner determines that that person is physically or mentally unfit for the employment.

Pursuant to the above provision, Grievant was placed upon the priority list for reemployment after the penitentiary closed. Testimony was given at level three by Paul Kirby, Warden of NRJ, to the effect that, while there was a shortage of correctional officers at the time Grievant and others were hired temporarily, there were no permanent positions available. Accordingly, in order to ensure that security could be maintained at the facility until more positions were allocated by the Division of Personnel, NRJ officials elected to hire officers on a temporary basis. However, once permanent positions became available, (See footnote 3) Grievant and others on the priority list were reinstated to permanent employment. Grievant's position as a correctional officer is a classified service position, which is covered by the provisions of W. Va. Code § 29-6-1, et seq., and the Administrative Rule adopted pursuant to that Code section. As to ninety-day positions, the Administrative Rule provides as follows:

SECTION 3. DEFINITIONS

60.

> Ninety-Day Exempt Appointment. Employment for no more than ninety (90) working days in a year.

* * *

SECTION 9. APPOINTMENTS

9.06

> Limited Term Employment--Appointing authorities may employ individuals for a limited period of time . . . . Limited term employment includes, but is not limited to, 30-day emergency, 90-day exempt, temporary, intermittent, and student appointments and seasonal employment with a state forest, park or recreational area.

There is no other discussion in the rule regarding ninety-day appointments, except for the provisions regarding attendance and leave for classified employees, Section 15, which provides that ninety-day exempt employees do not accrue either annual or sick leave.

Grievant has not proven any statute or rule was violated by his temporary hiring as a ninety- day exempt employee. The Administrative Rule discussed above does not restrict the use of ninety- day

appointments to any particular type of employees, nor does it specify under what circumstances such employees may be hired. Nevertheless, it is quite clear that such employees do not earn sick or annual leave. In contrast, the rule's provisions regarding “temporary” appointments specify that such hirings are made from a register, implying that only new employees are eligible for such appointments. Temporary employees, unlike ninety-day exempt employees, earn sick and annual leave. Accordingly, since the provisions for ninety-day appointments do not restrict them to hiringsfrom a register, it appears that the rule contemplates the use of permanent employees in that capacity.

As to Grievant's contention that his ninety-day appointment improperly continued for approximately 160 days, Respondent's counsel stated at level four that there is no prohibition against renewal of ninety-day appointments in the rule. However, the rule does state that such appointments are to be made for ninety days “in a year,” implying that renewals are not allowed. Nonetheless, Grievant has suffered no harm by having his appointment extended beyond ninety days. In fact, he benefitted from Respondent's failure to strictly adhere to its rules. Since no permanent position was available for him prior to April 16, 1996, Grievant would simply have been unemployed after the expiration of ninety days from his hiring on October 2, 1995. As Mr. Kirby testified, at least Grievant received compensation during the time he was an exempt employee, even if he did not earn leave time, when he would otherwise have been unemployed. At worst, Respondent committed harmless error in extending Grievant's appointment beyond ninety days, and, in fact, Grievant benefitted from this error.

As to W. Va. Code §25-1-21, Respondent complied with its provisions by placing Grievant on a preferred hiring list and offering him employment when a position became available. Until a “position equivalent to the position that [Grievant] held at the penitentiary” became available, Respondent had no obligation to employ him. Arguably, the Division of Corrections did not even have to offer Grievant employment in a ninety-day exempt capacity, because such a position would not be “equivalent” to his prior position as a permanent, full-time correctional officer at the penitentiary. However, the NRJ elected to hire laid-off employees from the penitentiary, rather than individuals it had not previously employed, to fill its temporary needs until permanent positions were created. Respondent then acted appropriately by placing Grievant and others from the preferredhiring list created pursuant to W. Va. Code §25-1-21 in the permanent positions.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In nondisciplinary matters, a grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Crow v. W. Va. Dept. Of Corrections, Docket No. 89-CORR-116 (June 30, 1989).

2. W. Va. Code §25-1-21 requires the Division of Corrections to give hiring preference to employees who were laid off from the West Virginia penitentiary when filling available positions equivalent to positions held by those employees at the penitentiary.

3. The West Virginia Division of Personnel's Administrative Rule (1995) permits the hiring of ninety-day exempt employees who do not earn sick or annual leave.

4. Respondent did not violate any statute, rule or policy when it hired Grievant as a ninety-day exempt employee prior to the availability of a permanent position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action numberso that the record can be prepared and transmitted to the appropriate court.

Date: November 25, 1997 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The parties did not file any post-hearing submissions, so this matter became mature for decision at the conclusion of the level four hearing.

Footnote: 2

Grievant does not challenge the propriety of the layoff itself.

Footnote: 3

Mr. Kirby did not explain how it was possible to hire people in temporary positions when there were no permanent positions available.