HARRY FREY,

Grievant,

v. Docket No. 97-CORR-481

WEST VIRGINIA DIVISION OF CORRECTIONS/

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Harry Frey, employed by the Division of Corrections (DOC) as a Correctional Officer III at the Northern Regional Jail and Correctional Facility, filed a level one grievance on October 4, 1996, in which he alleged that he was "[m]ade to work out of job classification." For relief, he requested "[t]o be compensated with pay for time work [sic] out of job classification and/or otherwise made whole." The grievance was denied at levels one and two. The Division of Personnel (Personnel) was joined as an indispensable party at level three. Following an evidentiary hearing, the grievance was denied at level three, and the matter advanced to level four on October 31, 1997. A hearing was conducted on January 23, 1998, to supplement the lower-level record, and the matter became mature for hearing on February 6, 1998, the due date for filing proposed findings of fact and conclusions of law.

The following findings of fact are made from a review of the record in its entirety.

Findings of Fact

1. Grievant is employed by the Division of Corrections as a Correctional Officer III at the Northern Regional Jail and Correctional Facility.

2. Grievant was assigned as the Operations Officer on the midnight shift to cover regular days off, and medical and annual leave, for employees classified as a lieutenant and captain, fromApril 1996 through January 1997.

3. Specifically, Grievant worked as Operations Officer on the following dates in 1996: April 10, 11, and 12; May 19 and 20; June 4, 10, 11, 17, 18, and 19; July 1, 2, 3, 9, 10, 14, 16, 17,

18, 23, 24, 29, 30, 31; August 1, 7, 8, 14, 15, 16, 21, 22, 19, 30; September 2, 3, 4, 5, 6, 19, 20, 26, 27, and 28; October 4, 5, 11, 12, 17, 18, 19, 20, 25, 26, 27; November 2, 3, 10, 16, 17, 21, and 22; and December 8, 9, 10, 13, 14, 15, 16, 22, 23, 24, 30, and 31. In 1997, Grievant worked as the Operations Officer on January 4, 5, 6, 7, 13, 14, 19, 20, 21, 22, 28, and 29.

Grievant argues that as Operations Officer he is responsible for the entire facility, supervising employees classified at higher grades than himself. He asserts that he was never aware that he could have refused the assignment, and does not recall that he ever agreed to perform the duties at his regular salary. He requests compensation as a Correctional Officer IV for the hours worked as the Operations Officer.

DOC asserts that Grievant's assignment was temporary in nature, and required no independent decision making ability. DOC argues that the assignment falls within the "Nature of Work" section of the Correctional Officer III classification description, which states that the employee shall:

[u]nder direct supervision, serves as a first-line supervisor of Correctional Officers. The officer is responsible for enforcing or supervising the enforcement of the rules, regulations and state law necessary for the control and management of offenders and the maintenance of public safety. The officer supervises and reviews the work of subordinates to ensure facility security or the functioning of a specialized post or unit. Performs related work as required.

DOC notes that Grievant supervised functions which were directed by operational procedures andpost orders, and he remained under the supervision of the Chief Correctional Officer who was on-call at all times. Differential pay was disallowed because it is granted only when the employee assumes the duties of a higher classified position on a temporary, but full-time basis. DOC also argues that the grievance was not timely filed.

Lowell T. Basford, Assistant Director of Personnel, testified that during the level three review, Grievant was asked to complete a Position Description form on which he was asked to detail the tasks he routinely performed as Operations Officer, and the amount of time required by those tasks. Upon review, Personnel determined the duties fell within the responsibilities of a Correctional Officer III. Mr. Basford concluded that Grievant was not misclassified based on any temporary, intermittent, or occasional job assignments outside his

classification.

Discussion

W. Va. Code §29-6A-4(a) provides:

[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

For purposes of this grievance, Grievant first worked as Operations Officer in April 1996. He did not initiate these proceedings until October 4, 1996, some ten months later. Grievant offered no explanation for the delay in filing, but continued to work as Operations Officer through January 1997. Under these circumstances, it must be determined that the grievance was timely filed;however, any relief will be limited to a period of ten days preceeding the initiation of the complaint. See generally Kobily v. Hancock County Bd. of Educ., Docket No. 95-15-200R (Feb. 28, 1998).

Addressing the merits of Grievant's claim, it cannot be determined that he is entitled to the relief requested. The duties Grievant performed as Operations Officer are not outside the scope of his employment as a Correctional Officer III. Although Grievant's belief that he should be compensated at a higher classification based upon the enhanced responsibilities is understandable, the advanced level work was only temporary, and not full-time. Unlike the situation of a prior grievance in which Grievant was awarded additional compensation for performing supervisory duties while classified as a Correctional Officer I (Steele and Frey v. Div. of Corr., Docket No. 92-CORR- 048 (Jan. 29, 1993)), supervisory duties are integral to the work of a Correctional Officer III. Therefore, while the duties of Operations Officer required that Grievant perform some duties outside his classification, the temporary and occasional nature of this work did not render him misclassified. Dooley v. W. Va. Dept. of Health and

Human Resources, Docket No. 90-H-498 (Mar. 19, 1991). See Div. of Personnel Administrative Rules, Series I (Amended), §4.04(d) (193); Broaddus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Hayes v. DNR, Docket No. NR-88-038 (Mar. 28, 1989); Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996). See W. Va. Code §29-6A-6.

2. Personnel's interpretations of the classification specifications for the positions of Correctional Officer III and Correctional Officer IV, as they apply to the duties being performed by Grievant during the relevant period of time, are not clearly erroneous, and therefore, should be accorded great weight. W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993).

3. Grievant has failed to prove by a preponderance of the evidence that he was misclassified from April 1996 through January 1997, or that he was entitled to any additional compensation for work performed during that period of time.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred 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 number so that the record can be prepared and transmitted to the appropriate court.

DATE: March 31, 1998 _____

SUE KELLER

Senior Administrative Law Judge