JACK FERRELL,

Grievant,

v. **Docket No. 96-CORR-249**

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Jack Ferrell, employed by the Division of Corrections (Respondent) as a Correctional Officer I at the Mount Olive Correctional Center (MOCC), filed the following grievances in 1995. (1) On April 20, 1995, Grievant alleged "I am assigned as the lead officer in Quilliams II [inmate housing unit]. In accordance with the responsibilities assigned the lead officer, this position should be filled by an officer of the minimum rank of CO III (Corporal)." For relief, Grievant requested that he be paid as a CO III from the date he assumed the duties of lead officer, and be promoted to the rank of CO III. (2) On June 26, 1995, Grievant alleged "I have been turned down for promotion because of work experience and time in corrections even though I have worked in the positions. I want to know how MOCC can hire people off the street for the position of Sgt., Lt., Cpl. which has [sic] no time in corrections. Some of these people has [sic] not been tested or has [sic] any knowledge of corrections." His request for relief was "I want the promotion of rank investigated."

Following denials at levels one and two, the grievances were consolidated and an evidentiary hearing held at level three. The grievance was again denied, and was then advanced to level four on or about June 17, 1996. The parties agreed that a decision could be rendered based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law filed by Grievant on November 20, 1997. The matter became mature for decision with the submission of the recordby Respondent on January 21, 1998. (See footnote 1)

The following findings of fact are derived from the record.

Findings of Fact

1. Grievant was initially employed by the Division of Corrections at the W. Va. State Penitentiary at Moundsville in May 1994. In March 1995, subsequent to the closure of the facility in

Moundsville, Grievant was transferred to MOCC.

2. Grievant has been classified as a Correctional Officer I since his employment in 1994, although Respondent settled a grievance in 1995, when it paid Grievant a lump sum for wage differential after concluding that he had worked out of classification, as a CO IV, from October 31, 1994 through March 5, 1995.

3. Grievant completed written promotional examinations on February 15, 1995. By memorandum dated March 1, 1995, Kathryn Lucas, Director of Training, advised Grievant that he had attained a passing grade, and was eligible to be interviewed for the positions of CO III and CO IV.

4. By memorandum dated March 22, 1995, Larry D. Hamlin, Unit Manager for Quilliams II, assigned Grievant as Lead Officer on the midnight shift.

5. By memorandum dated April 10, 1995, Mr. Hamlin submitted a request to Rita Albury, Director of MOCC Human Resources, requesting a classification upgrade for those officers he had designated as Lead Correctional Officers for each shift.

6. In May 1995, MOCC posted vacancies for eight positions of CO IV, and twopositions of CO III. Four additional positions for CO IV, and two additional positions for CO III were posted in July 1995.

7. Grievant applied for promotion to CO III and/or CO IV in May 1995.

8. Ms. Albury advised Grievant on June 19, 1995, that he was not eligible for promotion until he met the minimum qualifications for the position, and that his May 1995 application for promotion to CO III and/or CO IV had been rejected by Respondent's Staffing Services based upon a finding that he possessed an insufficient amount of work experience.

9. Minimum qualifications for CO III and CO IV are a high school diploma, or equivalent, WVDOC Apprenticeship or Basic Training, and four years of related experience.

Grievant first asserts that he is entitled to backpay for the time he worked as a Lead Officer, beginning March 25, 1995. The record does not clearly state when, or if, Grievant was relieved of this assignment prior to the termination of his employment in May 1996. (See footnote 2) Grievant next argues that Respondent fills senior level positions with individuals who lack direct corrections experience, yet ignores his experience and qualifications. Grievant asserts that particularly in light of the fact that he was previously allowed to work as a CO IV, Respondent should not be allowed to question his experience or qualifications for the positions of CO III or CO IV. In the nature of an

alternative argument, Grievant claims that he possesses the requisite educational requirements and completed the agency's training course. Additionally, Grievant notes that he has approximately two years of experience in the United States Army, serving during the Vietnam War. Grievant acknowledges that at the time he filed the application for promotion he was six days short for a full year of experienceas a correctional officer, but cites his test score in the eightieth percentile for the position of CO III as reflective of his ability to perform in the position. Conceding that the agency has some discretion in personnel matters, Grievant argues that Respondent acted arbitrarily when it disregarded his equivalent experience in the armed forces during a conflict, and nearly one full year of experience as a correctional officer, while hiring less qualified individuals from outside the agency. Grievant concludes that he clearly possesses the requisite ability and experience, and Respondent has no justification for the denial of his claim for promotion.

Respondent's position, as stated in the level three decision, is that Mr. Hamlin's designation of Grievant as a Lead Officer was never approved by administration or the Division of Personnel, and because a staffing change was never officially implemented, the position did not exist. In reference to Grievant's application for posted positions, Respondent asserts that Grievant did not meet the minimum qualifications established in conjunction with the Division of Personnel.

Discussion

Based upon available documentation, there is apparently no dispute that Mr. Hamlin assigned Grievant work outside his classification of CO I. Notwithstanding the fact the assignment was not approved by Respondent, Grievant is entitled to the proper compensation for work outside his classification. See generally Mancino v. Bureau of Employment Programs/Division of Legal Services and Div. of Personnel, Docket No. 96-BEP-402 (Apr. 30, 1997); Beer v. Div. of Highways, Docket No. 95-DOH-161 (Feb. 27, 1996). Therefore, Grievant is granted the difference in pay between CO I and CO III, retroactive to ten days prior to filing his grievance on April 20, 1995, through the final date he performed the duties of Lead Officer.

Addressing Grievant's application for promotion, it is clear that he lacked the requisite jobtraining or related experience required for the positions of CO III and CO IV. Grievant had not completed the WVDOC Apprenticeship Program. While it appears that he had completed the basic training, he was lacking four years of related experience. By his own admission, Grievant had not yet completed one full year of employment with Respondent when he applied for promotion. His claim of military service

as related experience may or may not be acceptable. Simply because he was in the military during a period of conflict does not guarantee that he performed duties in any way related to those of the Division of Corrections. His application does not provide any information regarding his military assignment. Even if it should be determined that the military experience was acceptable related experience, Grievant would have slightly less than three years of experience, while four years are required. Therefore, Grievant did not meet the minimum qualifications for promotion. Grievant's allegation that Respondent employed other individuals lacking the proper qualifications for higher level positions, may not be considered because he failed to identify any such employee.

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 non-disciplinary grievances, the grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

2. Grievant has proved that he worked outside his classification of CO I, and is entitled to additional compensation for the period of time he was assigned the duties of Lead Officer. 3. Grievant has failed to prove that he was entitled to promotion to CO III or CO IV when he did not meet the minimum qualification of related experience.

4. Grievant failed to prove that Respondent has employed any other individual who did not meet the minimum qualifications of the position.

Accordingly, the grievance is **GRANTED** and Respondent Ordered to pay Grievant for the work he performed outside his classification. All other claims are **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

Footnote: 1 *This matter was transferred to the undersigned on November 4, 1997, for administrative reasons.*

Footnote: 2

2 The termination of Grievant's employment was upheld at level four, and is currently pending appeal in circuit court. Grievant also suggests that should he be reinstated, this decision would be determinative of his proper classification.