TERRY KYLE,

Grievant,

v.

DOCKET NO. 99-CORR-077D

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Terry Kyle, a Correctional Officer at the Huttonsville Correctional Facility, filed the following grievance on July 1, 1998:

> On 1 August 1997 I was awarded a settlement from the Division of Corrections for completing the apprenticeship program. This settlement was for the time frame of 1 April 1994 thru April 16, 1997. Staff at the Pruntytown Correctional Center have taken the issue to court and won and the Division has been ordered to pay all back pay to the time of completion of the apprenticeship program. In my case this would be 8 March 1993.
>
> Relief sought: To be granted back pay for the completion of the program on 8 March 1993 thru 1 April 1994. This will bring the Division in compliance with the recent court order.

Corrections failed to answer the grievance or schedule hearings on the matter in a timely manner. A level three hearing was conducted on February 17, 1999, and the grievance was denied by Grievance Evaluator, Franklin D. Phares, on February 23, 1999. Grievant appealed to level four on February 25, 1999, and a level four hearing was conducted in the Grievance Board's Elkins, West Virginia, office, on June 28, 1999. Thismatter became mature for decision on July 15, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant appeared pro se, and the Division of Corrections (“Corrections”) was represented by Charles Houdyschell, Jr.,

Assistant Attorney General. (See footnote 1)

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Undated letter from Terry Kyle to Hilda Williams.

Ex. 2 -

January 23, 1999 letter from Deputy Commissioner Duncil to All Supervisory Staff and Third Level Grievance Evaluators.

Level Three Corrections' Exhibits

Ex. 1 -

Chart summarizing the grievance procedure.

Ex. 2 -

Settlement Agreement between Terry Kyle and Corrections, dated September 9, 1997.

Level Four Grievant's Exhibit

None.

Level Four Corrections' Exhibit

Ex. 1 -

Settlement Agreement between Terry Kyle and Corrections, dated September 9, 1997.

Testimony

Grievant testified in his own behalf. Corrections presented no additional witnesses.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed as a Correctional Officer at Huttonsville Correctional Center.

2. Since 1994, all Correctional Officer Is employed by Corrections have been required to complete an Apprenticeship Training Program (OAP), which consists of two years (4,000 hours) of on-the-job training and 400 hours of related studies.

3. Upon completion of this program, and the subsequent required paperwork, Correctional Officer Is are promoted to Correctional Officer IIs, with a commensurate 5% pay increase.

4. Grievant completed the OAP in March 1993.

5. Grievant entered into a Settlement Agreement with Corrections on September 9, 1997, compensating him for back pay from April 1, 1994 through August 16, 1997. This Settlement was to compensate Grievant for a 5% pay increase he claimed he should have received upon completion of the OAP in March, 1993.

6. Grievant agreed in the Settlement Agreement to dismiss any and all claims arising from the facts and circumstances of that claim.

7. In 1996, Officer James Whorton and other similarly situated Correctional Officers were awarded back pay for the difference between the salary they earned from April 1, 1994 to September 1, 1995, the day the 5% salary increase became effective.

8. In Livesay v. W. Va. Div. of Corrections, Docket No. 96-CORR-459 (Nov. 4, 1997), this Grievance Board ordered those grievants be awarded a 5% salary increase retroactive to the date of each grievant's successful completion of the OAP, plus interest.

9.

Grievant filed this grievance on July 1,1998. 10. Corrections failed to respond to the grievance in a timely manner and concedes it has defaulted on this grievance.

DISCUSSION

Corrections concedes that it defaulted on this grievance, but argues that the relief sought by Grievant is clearly wrong and/or contrary to law. W. Va. Code § 29-6A-3(2) provides that an employer may argue that the relief sought by a grievant who has prevailed by default is clearly wrong or

contrary to law. If the remedy is clearly wrong, then the Administrative Law Judge can modify the relief in such a manner as to make the Grievant whole.

Grievant entered into a Settlement Agreement with Corrections in September 1997, over the 5% pay increase at issue resulting from the completion of the OAP in March 1993. In that Settlement Agreement, Grievant agreed to accept back pay from April 1, 1994 though August 31, 1997, in full compensation for the back pay to which he claimed he was entitled due to completion of the OAP. Grievant now attempts to undo the Settlement Agreement to claim additional back pay to March 1993, when he actually completed the OAP, based on the outcome of the Livesay grievance. Grievant established no evidence to show that the Settlement Agreement was invalid and should be set aside. Quite simply, Grievant was entitled to no relief on his grievance, and Corrections' default does not change that outcome. The Settlement Agreement which Grievant signed clearly states that, in return for the stated compensation, he “shall dismiss with prejudice this claim and any and all other claims against the WV Division of Corrections/Corrections Academy resulting from the facts and circumstances of this claim.” By filing the instant grievance,Grievant breached the terms of his own Settlement Agreement with Corrections, and the grievance should have been dismissed.

Grievant has been made whole by the Settlement Agreement. It is clearly wrong to reward a party seeking to breach a Settlement Agreement, with no evidence that the Agreement should be set aside.

CONCLUSION OF LAW

It would clearly wrong within the meaning of W. Va. Code § 29-6A-3(a) to afford Grievant relief by default where he has previously entered into a Settlement Agreement in which he agreed to dismiss any and all claims arising from the 5% pay raise commensurate with completion of the Officers Apprenticeship Program.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 3, 1999

Footnote: 1

This case was transferred to the undersigned on May 27, 1999, for administrative reasons.