PERCY A. LANHAM,

Grievant,

v. **Docket No. 99-CORR-194**

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

On April 11, 1999, Percy A. Lanham (Grievant) initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Division of Corrections failed to begin paying him as a Correctional Officer II in a timely manner. Grievant seeks "appropriate back pay with interest." The grievance was denied at Level I on April 11, 1999, by Grievant's immediate supervisor, Lieutenant D.R. Miller. Grievant elevated this grievance to Level II where it was denied by Deputy Warden Keith Weese on April 13, 1999. Grievant appealed to Level III that same day, and a Level III evidentiary hearing was conducted on April 23, 1999. On April 30, 1999, the Grievance Evaluator, Franklin Phares, recommended that the grievance be granted, to the extent that Grievant would receive back pay to October 1, 1998, approximately 60 days after he had completed the training requirements for promotion to Correctional Officer II. However, that recommendation was rejected, and the grievance was denied by Commissioner Paul Kirbyin a decision issued on May 12, 1999. Following a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Elkins, West Virginia, on July 20, 1999. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on July 26, 1999, following receipt of Respondent's written post-hearing argument, and a transcript of the Level III hearing. Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this

grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Division of Corrections (WVDOC) as a Correctional Officer II at its Huttonsville Correctional Center (HCC).

2. WVDOC has adopted Policy Directive Number 442.00 (PD 442.00) entitled “Apprenticeship Program for Correctional Officer I.” PD 442.00 became effective April 1, 1998. J Ex 1 at L IV.

3. PD 442.00 is intended to establish procedures for the administration and management of a formal Apprenticeship Training Program for Correctional Officer I's employed by WVDOC in its various facilities. §§ 1.01 & 1.03 of J Ex 1 at L IV.

4. All Correctional Officer I's are required to participate in the Apprenticeship Training Program as a condition of their employment. § 2.03 of J Ex 1 at L IV. The program consists of 4,000 hours of specified on-the-job training subjects, and 400 hoursof related studies approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training. § 2.01 of J Ex 1 at L IV.

5. Any Correctional Officer I who successfully completes the Apprenticeship Training Program is eligible for reallocation to Correctional Officer II, with a five per cent (5%) pay increase. § 2.02 of J Ex 1 at L IV.

6. PD 442.00 provides in § 2.02:

> Additional pay or promotion shall not be effective until compliance with the following:
>
> 1. Proof of completion of Apprenticeship Program (Certificate).
>
> 2. Submission and final approval of a West Virginia Personnel Action Form WV-11.

J Ex 1 at L IV.

7. Primary responsibility for implementation of the Apprenticeship Training Program is assigned to the WVDOC Corrections Academy. PD 442.00 specifies that “[t]he Director of the Academy shall request a Certificate of Completion from the Bureau of Apprenticeship and Training upon the officer's completion of the program.” § 2.01 of J Ex 1 at L IV.

8. Grievant completed the Apprenticeship Training Program on July 23, 1998. J Ex 5 at L IV.

9. Sgt. Randy Sprinkle is employed by WVDOC as the Institutional Training Officer at HCC. L III HT at 2.

10. Sgt. Sprinkle submitted Grievant's file to the Academy in July 1998. L III HT at 5. 11. Sgt. Sprinkle called the Academy on several occasions to check on the progress of Grievant's paperwork. Once Sgt. Sprinkle received the files back from the Academy, he found that Grievant's paperwork had not been forwarded to the Department of Labor until approximately December 1, 1998. L III HT at 6-7.

12. It routinely takes from three to six weeks to receive the Certificate of Completion of Apprenticeship from the United States Department of Labor. L III HT at 6.

13. Grievant's Certificate of Completion was received from the Department of Labor on or about January 15, 1999. J Exs 3 & 4 at L IV.

14. Joyce Gumm is employed by WVDOC as the Assistant Business Manager at HCC. Gumm testimony at L IV.

15. HCC is not authorized to process a WV-11 reallocating employees from Correctional Officer I to Correctional Officer II until a Certificate of Completion of Apprenticeship is received from WVDOC's Corrections Academy. Gumm testimony at L IV.

16. Ms. Gumm received the required paperwork from the Corrections Academy on January 22, 1999. Gumm testimony; J Ex 4 at L IV.

17. It normally takes four to six weeks to complete processing of a WV-11 reallocating an employee to Correctional Officer II. Gumm testimony at L IV.

18. The WV-11 reallocating Grievant to a Correctional Officer II position was initiated by HCC on January 25, 1999, and received the required final approval from the West Virginia Department of Administration on February 17, 1999. Grievant's reallocation and 5% pay raise became effective on March 1, 1999, and Grievant began receiving hisincreased pay in his end-of-month pay on March 31, 1999. Gumm testimony; J Exs 2 & 6 at L IV.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. Dep't of Energy, Docket No.

ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Delays encountered in processing personnel actions reallocating WVDOC employees to Correctional Officer II under PD 442.00 have generated a number of grievances adjudicated by this Grievance Board. See, e.g., Highley v. Div. of Corrections, Docket No. 99-CORR-154 (July 12, 1999); Pritt v. Div. of Corrections, Docket No. 98- CORR-501 (Mar. 11, 1999). Prior decisions have concluded that an extended delay in effecting a pay raise upon reallocation does not necessarily establish a violation of PD 442.00, because the policy does not contain a specific time limit for completing the reallocation process, and WVDOC does not control the other entities involved in the process. Reynolds v. W. Va. Div. of Corrections, Docket No. 99-CORR-006 (Feb. 22, 1999); Highley, supra. Thus, significant delays in implementing pay increases previously earned by WVDOC's employees under PD 442.00 do not contravene the terms of that policy when the agency employs due diligence in processing the documentation required, and there is no evidence, beyond the amount of time elapsed from the employee's completion of the apprenticeship requirements to the implementation of the resulting pay raise, that the agency was derelict in completing the required paperwork. Indeed, eventhough the overall time elapsed appeared excessive, it was noted that delays occurred when the documentation being processed was in the control of the U.S. Department of Labor, or the West Virginia Division of Personnel and Department of Administration, and thus beyond the control of WVDOC. Highley, supra.

However, in Thornhill v. Division of Corrections, Docket No. 99-CORR-215 (Aug. 9, 1999), WVDOC failed to initiate the process to approve an employee's promotion in accordance with PD 442.00, unnecessarily delaying the effective date of the pay increase. In that situation, where the failure to act was a matter within the control of WVDOC, and resulted from an apparent misinterpretation of the established policy, appropriate relief was granted to the employee whose promotion was unnecessarily delayed. Thornhill, supra. In this matter, Grievant established by a preponderance of the evidence that a significant portion of the delay in effecting his promotion to Correctional Officer II occurred while his paperwork was languishing at the Corrections Academy before it was submitted to the Department of Labor. It does not appear that evidence of this nature was produced in Reynolds, supra, or the other decisions which have followed Reynolds.

“An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). PD 442.00 requires the

Director of the Academy to initiate the process upon the officer's completion of the program. J Ex 1 at L IV. A preponderance of the evidence indicates that, although Grievant completed the program on July 23, 1998, and HCC promptly provided the required paperwork to the Academy, the Academy delayed several months in forwarding that documentation to the Department of Labor. No one from theAcademy testified in this matter in an effort to explain this inordinate delay. Therefore, the undersigned Administrative Law Judge finds that a significant portion of the delay in effecting Grievant's promotion is directly attributable to the employer, and the failure to advance Grievant's promotion paperwork by forwarding the appropriate documentation to the Department of Labor within a reasonable time constitutes a failure by WVDOC to comply with its own written policy. See Powell v. Brown, supra; Thornhill, supra; Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

More than seven months elapsed from July 23, 1998, when Grievant completed the apprenticeship program, and March 1, 1999, when his reallocation to Correctional Officer II became effective. During that entire time, WVDOC received the benefit of an employee who was fully qualified to perform the duties of a Correctional Officer II, but lacked certification from the Department of Labor. The WV-11 effecting Grievant's reallocation to Correctional Officer II was processed in just over four weeks, between January 15 and February 17, 1999. That is not an unreasonable time period. Likewise, Grievant concedes that it may reasonably take four to six weeks for the Department of Labor to approve his apprenticeship documentation.

Accordingly, approximately three months of the seven-month delay can be attributed to the Department of Labor and the steps in the WV-11 process. However, WVDOC has failed to account for the remaining four months this application was allowed to languish at the Corrections Academy. The Level III Grievance Evaluator found that Grievant shouldhave begun receiving his pay increase approximately sixty days after he completed the apprenticeship program. That does not provide enough time for agencies outside WVDOC's control to process the paperwork. Moreover, consistent with Reynolds, WVDOC cannot be held responsible for time that the documentation is out of its control in the hands of another agency.

W. Va. Code § 29-6A-5(b) charges the undersigned with fashioning relief that is fair and

equitable. Accordingly, Grievant's reallocation to Correctional Officer II should have become effective on November 1, 1999, approximately 14 weeks after he completed the apprenticeship program. Grievant is entitled to back pay, with interest, based upon the difference between the pay he received as a Correctional Officer I and the pay he should have received as a Correctional Officer II, from November 1, 1998, to March 1, 1999, in addition to seniority and any other benefits he would have received during that time period.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving his grievance 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Powell v. Brown, 160 W. Va. 723, 238 S.E.2d220 (1977).

3. WVDOC's PD 442.00 provides that the Director of WVDOC's Corrections Academy "shall request a Certificate of Completion of Apprenticeship from the Bureau of Apprenticeship and Training" in the United States Department of Labor "upon the officer's completion of the program."

4. Grievant established that WVDOC failed to comply with PD 442.00 when it delayed requesting a Certificate of Completion from July 23, 1998, when he completed the requirements of the Apprenticeship Training Program, until approximately December 1, 1998, without any explanation or excuse.

Accordingly, this grievance is **GRANTED**. Consistent with this decision, Respondent West Virginia Division of Corrections is hereby **ORDERED** to retroactively reallocate Grievant to Correctional Officer II, effective November 1, 1998, and pay him back pay, with interest, based upon the difference between the pay he received as a Correctional Officer I and the pay he would have received as a Correctional Officer II, from November 1, 1998, to March 1, 1999, in addition to

seniority and any other benefits he would have received from holding the higher classification during that period of time.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 20, 1999

Footnote: 1

Grievant was represented by a fellow employee, John H. Jeffers. Respondent was represented by Assistant Attorney General Charles Houdyschell, Jr.