**JOHN MILLER,**

**Grievant,**

**v. Docket No. 01-CORR-497**

**WEST VIRGINIA DIVISION OF**

**CORRECTIONS/HUTTONSVILLE**

**CORRECTIONAL CENTER,**

**Respondent.**

# D E C I S I O N

**Grievant, John Miller, filed this grievance against his employer, the Division of Corrections ("CORR"), on July 30, 2001, alleging three areas of grievance: 1) he should have been re-employed July 1, 2001, rather than July 16, 2001; 2) he should not have been required to undergo psychological testing before re-employment; and 3) he should be reinstated as the Lieutenant in the K-9 Unit (Canine Unit). Relief sought was a change in start date and reinstatement to the K-9 Unit.**

**At Level II, this grievance was granted in part, and Grievant's start date was changed to July 1, 2001, and he was paid for these days even though he did not work them. This grievance was denied at Level III. Grievant appealed to Level IV on September 6, 2001, and multiple continuances were granted for good cause and by agreement of the parties. A Level IV hearing was held on June 25, 2002.** (See footnote 1) **This case became mature for decision on September 3, 2002, after receipt of Respondent's proposed findings of fact and conclusions of law.**

## Issues and Arguments

**Although the issue of earlier re-employment has been resolved, it appears Grievant is still arguing he should have received annual increment pay. The reasoning for this assertion is unclear, as Grievant did not begin work for the state until after the start of the new fiscal year and was not employed by the state during the prior fiscal year. At Level IV, Grievant informed**

**the undersigned Administrative Law Judge that the issue of the psychological exam was moot. The major focus of the grievance at this time is Grievant's assertion that Respondent must return him to the Lieutenant's position in the K-9 Unit. Grievant also asserted, for the first time at Level IV, that he should be employed as a Captain, Major, or Associate Warden. Prior to that time, Grievant had specifically stated he was not requesting a promotion. Indeed, this change in relief sought was not clarified until the undersigned Administrative Law Judge asked, toward the end of Grievant's presentation of evidence, why certain documents needed to be placed in the record.**

**Respondent notes no annual increment can be paid for a year an employee was not in pay status with the state. Grievant was given all salary increases to which he was entitled, and that occurred while he was gone. Respondent also maintains it has returned Grievant to a position of "like class, seniority, and/or pay," and that is what it is required to do. Respondent objected to Grievant's change in relief at Level IV, contended it was not prepared to defend against this change in argument, and this new issue should not be allowed. Grievant asserted this change was inherent in his prior arguments. The parties were to address this issue in their proposed Findings of Fact and Conclusions of Law .**

**W. Va. Code § 29-6A-2 (k) states, "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion ofthe hearing examiner." Respondent did not consent to the change in relief. The undersigned Administrative Law Judge considered Grievant's assertions at Level III and his assertions at Level IV. Since Grievant clearly stated at Level III that he was not pursuing this relief at the current time, and never put Respondent on notice that he wished to change his relief sought until the middle of the Level IV hearing, the undersigned Administrative Law Judge denies this "motion."**

**Additionally, the undersigned Administrative Law Judge notes all promotions within Corrections are based on merit and none are automatic; thus, Grievant's claim to promotion is speculative and would enter the realm of an advisory opinion. The Grievance Board does not render advisory opinions. W. Va. Educ. & State Employees Grievance Bd. Procedural Rules § 4.22. See Prickett v. Monogalia County Bd. of Educ., Docket No. 00- 30-280 (Nov. 16, 2000); Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Keys v.**

**Div. of Envtl. Protection, Docket No. 97-DEP-176 (Sept. 4, 1997); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Bryant v. Fayette County Bd. of Educ., Docket No. 91-13-198 (Mar. 13, 1992); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991); Lewis v. Greenbrier County Bd. of Educ., Docket No. 91-13-198 (June 12, 1991).**

**After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.**

## Findings of Fact

**1. Grievant was employed at the Huttonsville Correctional Center ("HCC") for thirteen years as a Correctional Officer before he entered into active military duty on or about November 5, 1997.**

**2. Prior to entering active duty, Grievant was assigned as Lieutenant in the K-9 Unit, but on April 22, 1997, he was placed "on temporary duty as the Security Specialist for new construction." Resp. Ex. No. 1, at Level III. He was still on this temporary assignment when he left for the military.**

**3. Grievant's work in the military did not include working with dogs in any capacity.**

**4. Grievant was discharged from the military on June 2, 2001.**

**5. Shortly thereafter, Grievant notified CORR he wished to be reinstated and he was.**

**6. During Grievant's absence, all the policies governing the agency were rewritten, and many changes were made at the facility and in the staffing.**

**7. The K-9 Unit has been reorganized, no longer does drug searches, and has fewer duties and staff.**

**8. Grievant does not have a properly trained dog, and this is a requirement for placement in the K-9 Unit. It would take at least 12 weeks to train a dog after one was found. Grievant has taken no action to acquire a dog.**

**9. Grievant was reinstated as a Lieutenant and received all automatic pay increases for the time he was on active duty, including yearly across-the-board raises. 10. Grievant was assigned to the E-1 Unit, a Behavioral Segregation Unit for maximum security prisoners. He worked with the Lieutenant in charge of the unit, and was considered to be in training. This time was an opportunity for Grievant to familiarize himself with the changes in rules,**

**regulations, inmates, and new units.**

**11. During Grievant's absence, there were postings and promotions for a variety of positions at HCC. These promotions are based on merit and are not automatic. Test. Murphy, Level IV Hearing.**

**12. No employee is entitled to maintain a specific assignment, as assignments are at the discretion of the Commissioner and are based on the security needs of the facility.**

**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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Grievant's arguments will be addressed separately. I. Annual increment**

**Grievant asserts he should receive an annual increment.** (See footnote 2) **The Division of Personnel's Annual Increment Policy states an eligible employee who has "provided no service during the fiscal year, . . . shall receive no annual increment consistent with the provisions of W. Va. Code § 12-3-13 except for the special provisions made for Workers' Compensation temporary total disability benefits. . . ." It is undisputed Grievant provided no service during the preceding fiscal year, accordingly, no annual increment can be paid to Grievant.**

**II. Reinstatement to K-9 Unit**

**Grievant maintains Respondent is required to place him in his prior assignment in the K-9 Unit. 38 U.S.C. 4313 discusses re-employment of individuals returning from military service. It states the following:**

**(a) [A] person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:**

**. . .**

**(2) [I]n the case of a person whose period of service in the uniformed services was for more than 90 days -**

**(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which theperson is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.**

**The Division of Personnel Rule 12.6 states:**

**(b) Appointing authorities shall reinstate provisional, probationary, or permanent employees who leave the classified service to enter the armed forces of the United States in time of war or national emergency or under compulsory provisions of law of the United States in time of peace <u>to their former positions or to positions of like class, seniority and pay within 30 days following application</u> provided that within 90 days after release from active military service the employees indicate in writing or in person to the agency their readiness and ability to return to classified employment.**

**. . .**

**(c) Any veteran who has been in the armed services of the United States and who has been granted military leave from one of the agencies and who returns to the agency shall be granted all within-grade salary adjustments and may be granted salary advancements he or she would have received had he or she remained in active status in the classified service. He or she shall be credited with all annual and sick leave accumulated and unused at the time the military leave began. The appointing authority shall uniformly apply the provisions in this subdivision to all veterans within an agency having had military leave and who return to the agency.**

**(Emphasis Added.)**

**Grievant asserts he must be returned to the exact same position he held before, the Lieutenant's position on the K-9 Unit, on the day shift. He maintains this is a position not an assignment. Respondent avers Grievant's position is that of a Lieutenant, and the Lieutenant of the K-9 Unit is an assignment, not a position. Respondent notes there is no opening for a Lieutenant with the K-9 Unit, as that position has been filled for some time. The assignments at HCC are based on need and at the Commissioner's discretion. HCC assigned Grievant to the E-1 Unit based on Grievant's need for training and the needs of the institution. The above-cited rules indicate an employee is to be returned to a position of "like seniority, status and pay" (federal) and "like class, seniority and pay" (state). When Grievant left, he was in a Lieutenant's position, this was his class or status. The change in his seniority is the appropriate addition of his years in the military to his years of service. His pay was adjusted to reflect the salary he would have received if he had been employed, and he received the various pay increases. There is no violation of the regulations in this case.**

**While it is understandable Grievant would wish to be the Lieutenant with the K-9 Unit, as he believes it is less intense and less stressful, and he is more familiar with the K-9 duties, HCC has followed both state and federal mandates.** **(See footnote 3)**

**The above-discussion will be supplemented by the following Conclusions of Law.**

## Conclusions of Law

**1. 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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.**

**2. The post in the K-9 Unit is not a position, but an assignment.**

**3. Grievant has not met his burden of proof and demonstrated HCC must return him to the assignment he held prior to his military service, as he has not demonstrated a violation of any rules, regulations, policies, or statutes.**

**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.**

**JANIS I. REYNOLDS**

**ADMINISTRATIVE LAW JUDGE**

**Dated: September 26, 2002**

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***Footnote: 1***

***At the Level III and Level IV hearings, Grievant was represented by Attorney Scott Curnutte. Respondent was represented by its Attorney Heather Connolly at Level IV.***

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***Footnote: 2***

***It is unclear from the brief statements in the transcript, but it is believed Grievant means for the 2000 - 2001 fiscal year.***

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***Footnote: 3***

***It did appear during the questioning that Grievant was not aware of the many changes the K-9 Unit had undergone during his absence.***