TIMOTHY POLCE,

Grievant,

v. **Docket No. 03-CORR-356**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER, and DIVISION OF PERSONNEL,

Respondents.

DECISION

Timothy Polce ("Grievant") initiated this proceeding on October 2, 2003, requesting reallocation to Correctional Officer II ("CO II"). The grievance was denied at level one on October 3, 2003, and at level two on October 9, 2003. A level three hearing was conducted on November 5, 2003, and the grievance was denied in a decision dated November 12, 2003. Grievant appealed to level four on November 17, 2003. A level four hearing was conducted in the Grievance Board's office in Westover, West Virginia, on February 13, 2004. Grievant was represented by counsel, Lisa R. Hartley, and Respondent was represented by Assistant Attorney General John H. Boothroyd. (See footnote 1) This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 12, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant began employment at the Huttonsville Correctional Center ("HCC") on March 1, 2003, as a Correctional Officer I ("CO I").

2. Prior to his employment at HCC, Grievant had completed a Bachelor of Science degree in Criminal Justice Administration.

3. Grievant completed basic training and his probationary period by September 1, 2003.

4. Grievant is currently enrolled in the Officer Apprenticeship Program ("OAP"), but he has not

yet completed it.

5. DOP's classification specification for CO II provides, in pertinent part:

Nature of Work: Under direct supervision, performs full-performance, journey level Correctional Officer work in enforcing rules, regulations and state law necessary for control and management of offenders and the maintenance of public safety. Employee may be assigned as a lead officer within a unit or shift or as an officer assigned to a post or a position requiring special technical skills. Performs related work as required.

Distinguishing Characteristics: This is the first full-performance level worker within the Correctional Officer class series. The employee may function as a field training officer, but most officers are assigned to a specific unit to oversee and direct the activities of inmates.

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Minimum Qualifications

Training: Graduation from a standard high school or the equivalent, plus successful completion of a fundamental training course for correctional officer, police officer, military police officer, probation/parole officer, or related area **AND** the Correctional Officer Apprenticeship Program.

OR

Graduation from a standard high school or the equivalent plus successful completion of a fundamental training course as described above **AND** four years of full-time or equivalent part-time paid experience as a correctional officer, police officer, military police officer, probation/parole officer, or in criminal justice or related field.

Substitution: Successfully completed study from an accredited college or university in corrections, criminal justice or related field with a minimum of two semester hours in corrections, criminal justice or related field may substitute at the rate of thirty semester hours for each year of experience.

Note for the Division of Corrections only: All appointees must successfully complete the Correctional Officer Apprenticeship Program within two years of appointment.

6. The classification specification for CO I provides, in pertinent part:

> **Nature of Work:** Under direct supervision, performs beginning level Correctional Officer work. The employee is responsible for enforcing rules, regulations and state law necessary for the control and management of offenders and the maintenance of public safety. Performs related work as required.
>
> **Distinguishing Characteristics:** This is the entry level into the Correctional Officer series. The employee is considered as having trainee status until the apprenticeship program is completed and the supervising officer determines that the Correctional Officer I can function independently.

6. The distinguishing factor between a CO I and CO II is that a CO II is considered to be fully trained and able to function as a lead officer, supervising other officers on a shift. Both CO Is and CO IIs work alone on shifts, supervising inmate activities, but a CO I must report to a supervising officer. A CO II is responsible for the entirety of his unit for the particular shift he works.

7. After he completed basic training, Grievant was assigned to the night shift and worked there alone. He was responsible for inmate counts, supervision of the inmates, and completion of a shift log. Grievant was assigned to a unit by himself,because there is little inmate activity during the night, and HCC does not have enough personnel to assign two officers to each unit during the night. Although Grievant was physically on the unit by himself, a superior officer would come to the unit and “check” on Grievant every hour and stay about five minutes. In addition, Grievant was constantly in radio contact with a supervising officer, who could reach the unit within about three minutes.

8. Grievant left HCC for employment with another correctional facility on November 1, 2003. Although he is no longer employed by HCC, Grievant seeks back pay to October 1, 2003, when he believes he should have been reallocated, along with attorney's fees.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); See W. Va. Code § 29-6A-6. Grievant is seeking reallocation to CO II, based upon his qualifications and his alleged performance of the duties of a CO II.

DOP's Administrative Rule (2003) defines reallocation in § 3.78 as “reassignment . . . of a position from one classification to a different classification on the basis of a significant change in the kind of level of duties and responsibilities assigned to the position.” In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, DocketNo. NR-88-038 (Mar. 28, 1989). DOP job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

The key to the analysis is to ascertain whether the employee's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dep't of Health and Human Resources, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993). The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting his classification with a substantial obstacle to overcome in attempting to establish that he is misclassified.

It has previously been held by this Grievance Board that a CO I who has completed basic training and possesses a Bachelor's Degree in Criminal Justice is minimally qualified for the CO II classification, pursuant to the provisions of that classification specification. See Siler v. Div. of Corrections, Docket No. 02-CORR-044 (March 27, 2003). Indeed, the Grievant in Siler, supra, was successful in proving that she was entitled to reallocation, based upon unrefuted evidence that she was working independently as a lead officer. In the instant case, however, Respondent disputes

Grievant's contention that he is performing CO II duties.

As has been acknowledged by both parties, the duties of CO Is and CO IIs are virtually identical, as both perform counts and searches, supervise inmate activities, and are responsible for completing the shift log. In addition, both CO Is and CO IIs may be assigned to work on a unit alone. However, the distinction between the two levels is the independence with which the officer is entrusted. Although Grievant may have been physically alone for much of his shift, another officer came to the unit to check on him every hour. In addition, a supervisor was available by radio at all times to assist him. Conversely, a CO II is charged with the entire responsibility for his unit on that particular shift and is often in charge of other officers or assigned to a special unit. Accordingly, the evidence establishes that Grievant was not working at the “full performance level” of correctional officer work, and he was still being somewhat closely supervised. Therefore, he was not misclassified as a CO I while he was employed at HCC.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Grievant bears 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 § 4.21 (2000); See W. Va. Code § 29-6A-6. 2. Reallocation is the “reassignment . . . of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position.” Division of Personnel Administrative Rule § 3.78 (2003).

3. In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

4. Grievant has failed to prove by a preponderance of the evidence that he was misclassified as a CO I while employed at Huttonsville Correctional Center.

5. In level four grievance hearings, an “Administrative Law Judge has no authority to award attorney's fees under the law. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998); Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996). *See e.g.*, Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).”

Wyant v. W. Va. Dep't of Trans./Div. of Highways, Docket No. 00-DOH-219 (Nov. 29, 2000).

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 grievanceoccurred, and 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.

Date: March 19, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Assistant Director Lowell Basford appeared on behalf of the Division of Personnel at the level three hearing, but DOP did not participate at level four.