**MATT McMILLION,**

**Grievant,**

**v. Docket No. 05-CORR-182**

**DIVISION OF CORRECTIONS/**

**ANTHONY CORRECTIONAL CENTER,**

**Respondent.**

## D E C I S I O N

**Matt McMillion ("Grievant"), employed by the Division of Corrections ("DOC" or "Respondent") as a Correctional Counselor 1 at the Anthony Correctional Center, filed a level one grievance on April 1, 2005, in which he alleged:**

**A modified duty position has been filled without a competitive process. I have been requesting a modified duty position for two years and have been denied.**

**For relief, Grievant requests the position of Safety Officer or a similar, modified duty position, back pay, legal expenses, punitive and compensatory damages, and to be made whole.**

**A level one conference was conducted on April 5, 2005, at which time Grievant's request to proceed to level two was granted. The grievance was denied at levels two and three, and appeal was made to level four on May 31, 2005. An evidentiary hearing was conducted on October 30, 2005, and the grievance became mature for decision upon submission of proposed findings of fact and conclusions of law filed by the parties on December 1, 2005.** (See footnote 1) **The following facts have been derived from a preponderance of the evidence made part of the record at level four.**

## Findings of Fact

**1. Grievant has been employed by DOC as a Correctional Counselor I at the Anthony Correctional Center at all times pertinent to this grievance.**

**2. In December 2002, Grievant's shoulder was injured at ACC when he was hit by a closing door. As a result, he was absent from work beginning December 15, 2002, until June 23, 2005. Grievant returned to work after the expiration of his Workers' Compensation benefits and other leave options, even though he continued to suffer some weakness in his arm when lifting overhead. In mid-October 2005, Grievant again discontinued working when no accommodation had been made for his condition.** (See footnote 2)

**3. Grievant has made several requests over the past years for a light duty assignment; however, DOC does not offer light duty assignments.**

**4. On March 29, 2005, the Correctional Officer 3 position held by Corporal Brian Barnett was reallocated to the Division of Personnel classification of Inspector 2, and assigned the duties of ACC Safety Officer. The Safety Officer is responsible for ensuring ACC's compliance with local, state and federal regulations, codes, policies, and standards relating to fire, safety, and health issues.**

## 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 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 Res., Docket No. 92-HHR-486 (May 17, 1993).**

**Grievant asserts that denying him the Security Officer assignment because he was on Workers' Compensation was discriminatory, and in violation of W. Va. Code § 23-5A-3, which establishes**

**preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desires reinstatement.**

**Grievant concludes that because the Safety Officer is not required to work security posts his**

**doctor would release him to work with no restrictions.**

**DOC denies that it has engaged in discrimination, or acted in an arbitrary and capricious manner, regarding the position held by Cpl. Barnett. No posting was required, DOC asserts, because the position was reallocated as a result of a staff assignment change.**

**A grievant challenging the reallocation of a position, arguing it should have been posted, has the burden of demonstrating that a budgeted job opening or vacancy existed. Absent such a showing, an agency is not required to post a position. Junkins v. W. Va. Dep't of Labor, Docket No. 91-DOL-460 (May 29, 1992); Gillum v. Dep't of Transp./Div. ofHighways, Docket No. 01-DOH-012 (May 30, 2001); Hearl v. Dep't of Transp./Div. of Highways, Docket No. 05-DOH-100 (June 23, 2005). There was no budgeted job opening in the present case; Cpl. Barnett's position was reallocated. Because a position of Correctional Officer was reallocated to Inspector, no posting was required.**

**Addressing Grievant's claim of discrimination, W. Va. Code § 23-5A-3(b) states:**

**It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires**

**reinstatement: Provided, That the employee provides to the employer a current mailing address during this one year period.**

**There is no violation of this provision for several reasons. First, it is noted that Grievant's position of Correctional Counselor remains available to him. Second, his physician released him to return to work so long as he was not solely responsible for security, and he is not responsible for security. Third, Grievant returned to work for a period of approximately four months, establishing that he is capable of performing the duties of Correctional Counselor. Grievant is not entitled to a different assignment simplybecause he wants one, and DOC did not engage in discrimination when it decided to reallocate a Correctional Officer position rather than a Correctional Counselor position.** (See footnote 3)

**In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.**

**2. A grievant challenging the reallocation of a position, arguing it should have been posted, has the burden of demonstrating that a budgeted job opening or vacancy existed. Absent such a showing, an agency is not required to post a position. Junkins v. W. Va. Dep't of Labor, Docket No. 91-DOL-460 (May 29, 1992); Gillum v. Dep't of Transp./Div. of Highways, Docket No. 01-DOH-012 (May 30, 2001); Hearl v. Dep't of Transp./Div. of Highways, Docket No. 05-DOH-100 (June 23, 2005).**

**3. Grievant failed to prove that a budgeted job opening existed for the position of Security Officer at Anthony Correctional Center. 4. Grievant has failed to prove that DOC has denied him the right to return to his position of Correctional Counselor, or that it engaged in any discriminatory activity as defined in W. Va. Code § 23-5A-3(b).**

**Accordingly, the 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.**

**DATE: MARCH 20, 2006**

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**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1***

***.For administrative reasons the grievance was transferred to the undersigned on February 20, 2005.***

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***Footnote: 2*** ***[2]The record does not reflect the type of leave Grievant is currently using.***

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***Footnote: 3***

***[3]A prior grievance in which Grievant requested a change in job duties to accommodate his alleged disability was also denied. McMillion v. Div. of Corr./Anthony Corr. Ctr., Docket No. 05-CORR-340 (Dec. 30, 2005).***