

**JOHN A.N. STEELE and HARRY P. FREY**

**v. Docket No. 92-CORR-048**

**WEST VIRGINIA DIVISION OF CORRECTIONS**

**DECISION**

Grievants Steele and Frey are employed by Respondent West Virginia Division of Corrections (CORR); each is classified as a Correctional Officer I (CO I) and assigned to the West Virginia Penitentiary (WVP). Grievants seek back wages for allegedly performing out-of-classification supervisory work in their respective units during their shifts at WVP and other relief. Ultimately, three separate complaints on this issue were filed by a total of five CO Is and processed at the lower levels at different times; thus, upon appeal to level four, they were also received and docketed separately at different times. [\(See footnote 1\)](#) It is undisputed that a CO I is to perform the "entry level" duties of a correctional officer. However, based on the facts of record, the undersigned concludes that Grievants herein were instead assigned to perform "lead worker" supervisory CO II duties for several days a month or more extended periods on an ongoing basis without a right of refusal. As will be more fully explained below, Grievants are entitled to some relief on their claims.

Initially, some classification information is essential. The "Nature of Work" sections found in the West Virginia Division of Personnel's (Personnel) specifications for both the CO I and CO II classes are nearly identical. Each states that the worker "under direct supervision" performs a number of duties. The only difference in the wording is that the CO I "performs entry level security work at a state correctional institution" while the CO II "works as a full performance/lead worker security officer." The "Examples of Work Performed" in the two classes are identical except for two additional duties which are listed for a CO II: "May provide guidance, direction, and training to lower level correctional officers" and "Participates in committees such as disciplinary, furlough, and classification." Under "Required Knowledge, Skills and Abilities," the CO I and CO II listings are nearly the same. However, the CO II is also required to possess "Knowledge of the rules and regulations of the correctional facility" and "Ability to instruct and train lower level correctional officers." "Minimum Training and Experience Requirements" are the same for the two classes except that a CO II must have attained two years' experience in some facet of law enforcement or have earned an associate or baccalaureate degree in one of several specified disciplines. CO II personnel have an in-house

title of "sergeant" at WVP. [\(See footnote 2\)](#)

Some further background information is necessary. During the winter months in 1992, George Trent was named Acting Warden of WVP following the breakout of three prisoners. Prior to that, sometime in mid-1990, former Warden Carl Legursky initiated a new operational system, the Unit Management Program, for the three work shifts and various work units of the prison's security forces. [\(See footnote 3\)](#) The designated six work units at the time, Medical, New Wall, Towers, Protective Custody (PC), North Hall and Support Units [\(See footnote 4\)](#) were administered by Chief Correctional Officer (CCO) Richard Lohr. In addition, each working shift was also assigned an Operations Officer to oversee the units, usually a CO III.

Finally, to complete the administrative chain of command, each unit was assigned a Unit Commander, also called the Officer in Charge (OIC). Each unit's OIC could be assigned to either the day, afternoon or night shift; the unit's other two work shifts were then each manned with an Assistant Officer in Charge (AOIC). The eighteen OIC and AOIC assignments were to be filled with CO II "working administrators." In other words, these "full-service/lead worker" staffers were to oversee the daily placement of six or more subordinate CO I staff on the shift to various duty posts, to perform related record-keeping and initial-level supervisory work, and, for the most part, to work their own duty posts.

However, WVP did not have enough CO II or "sergeant" positions on the roster to implement the program when it started. Moreover, the prison was fully funded for only existing personnel. As a result, Grievants and other CO I personnel who were deemed to be the most qualified and capable for the task, and who, incidentally, met Personnel's stated qualifications for a CO II, were ordered at various times to perform AOIC duties.

At the conclusion of the level four hearing in August, the parties agreed that WVP's personnel assistant, Gertrude Campbell, would research her files and identify the precise dates of Grievants' AOIC services. [\(See footnote 5\)](#) Some materials were filed by Ms. Campbell on August 20, 1992. Included was a separate statement from each grievant, signed and notarized, agreeing with Ms. Campbell's findings as to the actual dates he "worked out of class." A separate page submitted and signed by Ms. Campbell listed the total AOIC days worked by each grievant and the sum total of "the difference between their present salary[ies]" at the CO I daily level and "a salary one step up on a Correctional Officer II level."

Accordingly, there is total agreement that each Grievant performed as an AOIC on the days claimed. Over time, Grievant Steele worked forty-six days and five hours as an AOIC, sixteen days from August 9 through December 9, 1990, and thirty days and five hours from January 29 through December 16, 1991. The difference between his CO I salary and that of a CO II is \$1.84 per day for a total amount of \$85.79 during the times in question. Grievant Frey worked one hundred twenty-one and one-half days, twenty-eight days from August 8 through December 31, 1990, ninety-two and one-half days from January 1 through December 17, 1991, and one day in 1992, January 28. The daily difference between his salary and that of a CO II is \$2.02 for a total of \$281.88. Grievants filed their complaints at level one on December 8, 1991; both were relieved of AOIC duties "until further notice" sometime after filing their grievances. ([See footnote 6](#))

The first issue for consideration is whether the AOIC duties that Grievants performed can be construed as some type of labor for which CORR is liable to pay extra wages. The answer to this query is yes. CORR did not present any convincing evidence or argument in support of its position that it was not obligated to pay some additional salary to Grievants who, under direct orders to do so, assumed AOIC status and performed CO II supervisory duties. For example, CORR cites Hayes v. DNR, Docket No. NR-88-038 (March 28, 1989) and Dollison v. W.Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989) for the proposition that "Grievants are not misclassified." CORR then mainly relies on the testimony of an official with Personnel, Lowell Basford.

Mr. Basford stated that he was Personnel's Assistant Director "in charge of the Classification [and] Compensation Section." He appeared and testified at both the February level three hearing and the March 1992 level four hearing and opined that, based on the "predominant duty concept," Grievants were not performing CO II duties. According to him, Grievants were assigned to perform as OIC or AOIC on an "acting" basis and, as such, were placed in temporary situations which were not representative of their predominant or overall duties as CO Is. He likened the situation to that which occurs when he leaves his office to attend an out-of-town hearing and appoints a subordinate to "cover" his office's operations for him.

The situation described by Mr. Basford does not even come close to the circumstances which existed at WVP with respect to Grievants. First, there was no information of record that Grievants were assigned to perform AOIC duties on an occasional basis when CO IIs were temporarily absent or unavailable. Rather, CORR did not dispute that Grievants were asked to perform the AOIC duties

because of under-staffing and insufficient numbers of CO II personnel. In addition, at the August 1992 hearing Warden Trent essentially confirmed that AOIC duties were above and beyond those required of a CO I and that a CO I who does AOIC work should be paid for it. T4(8/6/92).78-89. Hence, it is determined that CORR is liable to pay extra wages when it orders a CO I staffer to assume AOIC status and perform supervisory CO II duties.

CORR next argues, "If grievants were working out of their job classification they are not entitled to the relief sought." It cites AFSCME v. CSC, J. Neely dissenting, 341 S.E.2d 693, 699-700 (W.Va. 1985); Eastham v. Tyler County Bd. of Educ., Docket No. 91-48-519 (June 30, 1992); Freeman v. W.Va. Div'n. of Health, Docket No. 90-H-237 (Dec. 26, 1990); Thornton v. W.Va. Workers Comp., Docket No. 90-WCF-077 (Dec. 26, 1990); and Wolfe v. W.Va. Tax Dept., Docket No. T-88-111 (July 28, 1989), on the theory that an employee is "compensated" by additional experience and potential for promotion as a result of assuming additional duties. This argument is without merit. It is also undermined by the present WVP warden who testified that CORR should pay extra wages to CO I personnel who perform AOIC duties. In fact, both the past and present wardens removed the AOIC duties from CO I personnel who filed grievances.

It also must be stressed that Grievants do not allege present misclassification. More importantly, they do not seek reclassification as CO IIs. Instead, Grievants seek wages for AOIC work performed in the past and "future" relief in this matter. As to future relief, they request that they be given opportunities to perform AOIC work in the future for additional wages, that is, "job differential" payments when they perform AOIC duties via a system which would operate much like that which is used to provide workers with "shift differential" payments. See T4(3/25/92).4-8 and Grievants' Brief. [\(See footnote 7\)](#)

CORR's remaining arguments seek to deny or limit Grievants' relief of back wages on still different theories. Before these matters are discussed, it is important to know more about the proceedings at all grievance levels. As was explained at n. 1, this case's level four hearing had, for all intents and purposes, concluded on March 25, 1992. The issue of timeliness was not raised by CORR during the lower-level proceedings or by way of any lower-level decision. Moreover, on March 25, 1992, CORR's counsel waived both opening and closing statements. Specifically, CORR never charged Grievants with untimeliness or raised any other affirmative defense. In fact, the parties to this grievance had rested their cases on March 25, 1992.

The only reason that this particular grievance had not been deemed "closed" at the conclusion of the March hearing was because the parties' representatives agreed with the undersigned during a brief post-hearing conference that good-faith negotiations were in order, especially in light of the similar cases still pending and possibly more forthcoming at the lower grievance levels.

T4(3/25/92).50-57. In essence, an immediate judgement on the case was to be deferred, with Grievants' permission, pending what was hoped to be an amicable settlement of all of the outstanding like grievances mentioned above and in n.1.

However, a settlement did not ensue. Subsequently, although they had no real reason to reappear, Grievants herein also attended the August 6, 1992, "consolidation" hearing, said hearing specifically set for the parties to the second and third grievances. At that time, CORR for the first time raised an issue of timeliness with respect to these Grievants. Without any prior notice to anyone, including Grievants herein, CORR's counsel cited Hatfield v. W.Va. Alcohol Beverage Control Comm., Docket No. 91-ABCC-052 (Sept. 27, 1991), and moved that all of the grievances be dismissed "for laches and failure to timely file the grievance." She then stated that all of WVP's employees were provided training in how to file a grievance and that all of the grievants had sat on their grievance rights. She conceded that "we talked about settlement negotiation" but added that CORR was presently under-funded and that there was no money for which to settle the case.

T4(8/6/92).5-7.

The untimely-filing charge and theme was repeated by CORR in its last major argument in its level four brief: "Grievants are time barred by [W.Va. Code] §29-6A-4 from receiving more than ten (10) days back pay. By statute grievances must be filed within ten (10) days of the date the grievable event became known to the grievant." ([See footnote 8](#)) CORR's Brief at 14. The argument which CORR advances to limit the full payment of appropriate back wages on the basis of timeliness and Hatfield must be rejected.

In Hatfield, the grievant worked out of classification for over a year and then took a personal leave for approximately ten months until he formally resigned without ever returning to his job. At that time he filed a grievance to collect back wages for the period of time he had been misclassified. The respondent raised a timeliness issue and claimed the grievant failed to file a grievance within ten days of the last day he worked out of class. The Administrative Law Judge determined that a proviso in W.Va. Code §29-6A-3(a) "tolled the running of the limitation period while Grievant was on leave

and thereby precluded the claim from being time-barred." Therefore, because the grievant filed just prior to his resignation notice, his claim was deemed timely filed. In addition, Hatfield also reinforced earlier Grievance Board cases which held that if an employer raises a timeliness defense and the grievant asserting a right to back wages has no valid excuse for not filing a grievance when the grievable event or facts constituting the grievance first became known to him or her, monetary relief is limited to payment for the ten working days prior to the filing of the grievance. Thus, the grievant in Hatfield was awarded back wages for only the "ten-working-day period immediately preceding the commencement of [his] personal leave. . . ."

However, the instant case differs from Hatfield in a significant way. While CORR contends that the case herein remained "open for the taking of evidence" after the March 1992 level four hearing and that it was therefore not precluded from raising a timeliness argument in August 1992, this view does not reflect the parties' intentions at the conclusion of the March level four hearing. Judgment in this case was to be deferred due to the possibility that a resolution to the AOIC problem affecting these grievants and others in separately-filed cases might be forthcoming. For the undersigned now to rule that this case remained open from the conclusion of the March hearing until the August hearing for the purpose of permitting CORR to raise a defense not previously asserted would be to impermissibly ignore the good faith intentions of the parties in March.

Notably, the ALJ in Hatfield also reminded the parties, "Timeliness is an employer defense that is waived if not asserted." At 4, n.3. [\(See footnote 9\)](#) CORR failed to raise a timeliness issue at Grievants' March 1992 level four hearing; therefore, it is concluded that it waived the defense. Surely, CORR was not acting in bad faith when it agreed after the March hearing herein to accept the decisional delay for settlement purposes. Hence, Hatfield will not be applied in this case.

CORR also argues that "Grievants are estopped by the equitable doctrine of laches [sic] from recovery. . . ." It cites the cases of Maynard v. Bd. of Educ of Wayne County, 357 S.E.2d 246 (W.Va. 1987), and Hart v. Berkeley County Bd. of Educ., Docket No. 89-02-80 (May 31, 1989). The irony of this late-breaking claim is that CORR admits to having the funds to pay CO Is to perform AOIC duties when the assignments were given and probably still at the time the grievances were filed. Moreover, CORR's mere assertion about its present budget was not supported by any documentary evidence. Finally, Grievants had no real opportunity to respond to the laches defense with their own evidence. Therefore, given CORR's failure to timely assert the laches defense, it is estopped from raising that

issue in what is essentially a post-hearing defense.

Other arguments advanced by CORR for not paying Grievants extra wages for working out-of-class are also not persuasive. One reason posed by CORR for not paying an officer who performs AOIC duties is that the AOIC/CO I is not additionally required to sit on review committees to decide promotional matters or advancements in rank for officers. [\(See footnote 10\)](#) CORR also maintained that it does not have any mechanism by which to effect such payment. As noted by Grievants, under one of Personnel's regulations, Section 6.04(d), "Additional Pay," CORR could have in the past and could now institute a mechanism to pay CO Is for working as an AOIC on a time-to-time basis. [\(See footnote 11\)](#) According to Grievants' representative, this regulation is utilized by the West Virginia Division of Highways to pay workers at a higher rate when the workers assume the duties of a higher classification on a temporary basis.

Moreover, Michael Coleman, a CO II and WVP's "institutional training officer," testified on CORR's behalf at the August level four hearing and conceded that WVP's administrators envisioned "problems" about CO Is being assigned to supervise other CO Is without additional rank or pay. He also admitted that in the past WVP officials had established a "rank" between a CO I officer/rank and a CO II sergeant/rank, that of corporal, for which extra wages were paid but that that system had not been in effect for a period of time. [\(See footnote 12\)](#) Therefore, for all of the above reasons, it is determined that CO I security personnel such as Grievants who have been ordered in the past to perform the AOIC duties are entitled to the difference between their CO I salaries and the appropriate amount had they been classed as a CO II. [\(See footnote 13\)](#) While Grievants have succeeded in proving damages and have established their entitlement to back wages, back pay is the only relief provided. The undersigned has no authority to order CORR to formulate and implement a policy to henceforth pay CO I personnel for performing out-of-class AOIC duties on some kind of paycheck-to-pay check basis. Moreover, Grievants and any other CO I personnel who are assigned to perform AOIC duties in the future must perform the duties and then file a prompt grievance to halt any further such assignments or perform the duties without any hope of extra compensation.

In addition to the foregoing factual and legal determinations contained in the foregoing discussion and analysis, the following formal findings of fact and conclusions of law are appropriate.

#### Findings of Fact

1. Grievant Steele, a CO I, was directed by a superior at WVP to work as an assistant officer in

charge (AOIC) of his work unit at various times from August 1990 through December 1991 for a total of forty-six days and five hours.

2. Grievant Frey, also a CO I, was directed to work as an assistant officer in charge (AOIC) of his work unit at various times from August 1990 through December 1991 (and one day in January 1992) for a total of one-hundred twenty-one and one-half days.

3. While Grievants were not promised any additional compensation for performing out-of-class CO II supervisory duties, they were not given a bona fide right of refusal.

4. Grievants timely filed their grievances during a period in which they were currently working out-of-class as AOICs.

5. CORR failed to raise a timeliness defense or a laches argument with respect to Grievants' complaints all through the lower grievance levels or by the conclusion of Grievants' March 1992 level four hearing, at which time the parties had completed their respective presentations.

#### Conclusions of Law

1. The grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. CO I personnel who have been ordered to assume AOIC status and to perform out-of-class CO II supervisory duties are entitled to the difference of their CO I salaries and the appropriate amounts had they been classed as a CO II.

3. Grievant Steele established that he is entitled to the daily difference of his salary as a Correctional Officer I and that of a supervisory Correctional Officer II on those days he performed AOIC duties for a total of \$85.79.

4. Grievant Frey proved that he is entitled to the daily difference between his salary as a Correctional Officer I and that of a supervisory Correctional Officer II on those days he performed AOIC duties for a total of \$281.88.

Accordingly, the grievance is **GRANTED** to the extent set forth above, and Respondent CORR is **ORDERED** to pay Grievants in the amounts specified.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days

of receipt of this decision. W.Va. Code §29-6A-7. 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. And appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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**NEDRA KOVAL**  
**Administrative Law Judge**

**Date: January 29, 1993**

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[Footnote: 1](#)

*The instant matter was heard at level four on March 25, 1992. At the conclusion of the hearing, the parties agreed to conduct post-hearing negotiations and, hopefully, to settle all of the outstanding grievances; the record herein remained "open" for this purpose only. Thereafter, the three cases were "consolidated" for hearing on August 6, 1992. Respondent submitted fact/law proposals on October 7, 1992; Grievants responded with their brief on October 20, 1992.*

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[Footnote: 2](#)

*WVP apparently utilizes CORR's own regulations or "promotion protocol" to promote its uniformed officers. Apparently, an officer must satisfy requirements in addition to those found in Personnel's specifications to advance from CO I to CO II (sergeant) status. This matter was not at issue herein; thus no further comment is necessary.*

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[Footnote: 3](#)

*Naturally, WVP is staffed as needed around-the-clock, year-round.*

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[Footnote: 4](#)

*Warden Trent refined and/or revised the operational system somewhat. At some point it appears that the units were down-sized to five, Medical, New Wall, Towers, PC and Control. In any event, the record contains information that Grievants worked either in North Hall or, later, Control.*

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[Footnote: 5](#)

*It is noted that Grievants had already submitted some evidence of their AOIC work days (Grievant Exs. 4 and 5) at their February 6, 1992, level three hearing.*

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[Footnote: 6](#)

*Actually, Grievant Frey worked as AOIC for four days after he filed the grievance while Grievant Steele worked only one day thereafter. It is also noted that adverse decisions at the three lower grievance levels were rendered on December 16*

and 23, 1991, and February 6, 1992, respectively.

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[Footnote: 7](#)

Shift differential payments usually provide higher hourly amounts for work performed at times other than the business-day oriented, nine-to-five "day shift." Thus an "afternoon" or "evening" shift from 4:00 p.m. until midnight might pay several more cents or dollars on the hour while a "night" shift from midnight to 8:00 a.m. would bring still more money than the afternoon shift.

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[Footnote: 8](#)

CORR cited Hatfield, Hall v. W.Va. Tax and Revenue, Docket No. 90-T-239 (Aug. 10, 1990), and Allman v. Harrison County Bd. of Educ., Docket No. 89- 17-215 (June 29, 1990).

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[Footnote: 9](#)

A 1992 amendment to the education employees' grievance statute requires an employer to assert a level one untimely filing "at or before the level two [evidentiary or record] hearing." W.Va. Code §18-29-3(a). While the state employees' grievance statute has not been likewise amended to date, it is again noted that, in this case, CORR even failed to raise a timeliness defense "on the record" at level three. Finally, it is mentioned that Grievance Board decisions have discounted timeliness defenses raised for the first time in a level four brief when the case had been submitted on the record or raised for the first time in a brief following a level four hearing.

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[Footnote: 10](#)

Grievants responded that no hirings or promotions occurred during the periods in which they served as AOIC.

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[Footnote: 11](#)

The pertinent portion of Section 6.04(d), "Additional Pay," is as follows: "Upon approval by [Personnel's] Board, the appointing authority may provide additional pay for certain classes based on rate of work or other specifically quantified measures of employee productivity. Employees in that agency in classes approved for this pay provision shall not be eligible for salary advancements."

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[Footnote: 12](#)

Officer Coleman explained how the "unit operation concept" was initiated and developed throughout the "security division." He noted that WVP did not have enough CO II officers to fully implement the plan or enough funding to establish additional CO II positions. He stated that there had been discussions about the lack of sufficient CO II/sergeants and about "reinstating" the in- house, one-step promotions of CO Is to "corporal" but that he did not know why this was not carried out.

Interestingly, Ms. Campbell testified that, prior to the current fiscal year, WVP had been fully funded. She agreed that Warden Legursky could have instituted proceedings to provide CO I/AOICs with extra wages for performing supervisory duties in the form of merit increases.

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[Footnote: 13](#)

*As noted above, the record in this case supports that Grievants could not decline the AOIC duties under the circumstances which existed when those duties were assigned during the periods in question. In other words, Grievants never had a "right of refusal" as CORR originally claimed. For that reason and due to the determination that Grievants were entitled to extra wages for performing AOIC duties, one of CORR's alternative arguments set forth in its level four brief, "An employee, who with full understanding that he has no guarantee of additional compensation accepts additional duties cannot later demand compensation for these duties" is also discounted.*