LARRY W. LOWE,

Grievant,

v. Docket No. 98-CORR-350

WEST VIRGINIA DIVISION OF CORRECTIONS/
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Larry W. Lowe (Grievant) is employed by the West Virginia Division of Corrections (Corrections), as a Correctional Officer at the Mount Olive Correctional Complex (MOCC). He filed this action on June 24, 1997, alleging he was subjected to discrimination when he was denied $300.00 in relocation expense reimbursement by Corrections. This grievance was denied at Level II, by Rita Albury, on July 25, 1997. On September 2, 1998, this grievance was denied at Level III by Commissioner William K. Davis.

A Level IV hearing was held on November 9, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Jack Ferrell of the Communications Workers of America, and Corrections was represented by Assistant Attorney General Charles Houdyschell, Jr. The parties were given until November 30, 1998, to submit proposed findings of fact and conclusions of law and this grievance became mature for decision at that time. The following findings of fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by Corrections as a Correctional Officer at MOCC.

2. Grievant was hired to work at MOCC on July 11, 1994, on the MOCC payroll. He was temporarily assigned to the West Virginia Penitentiary (WVP) at Moundsville until MOCC opened in

March, 1995.

3. No employees were hired on the WVP payroll after July 1, 1994, when the MOCC payroll was established.

4. Grievant, and other officers assigned to WVP pending MOCC's opening, received a one-time payment of $500.00 to defray living expenses.

5. At least 30 Correctional Officers received a $300.00 relocation expense reimbursement to defray the cost of moving from the Moundsville area to the Mount Olive area.

6. To be eligible for the $300.00 relocation expense reimbursement, a Correctional Officer must have been an employee of WVP transferring to MOCC.

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. A preponderance of the evidence is defined as “evidence which is of greater weight ormore convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant alleges that he was subjected to discrimination when he was denied $300.00 in relocation expense reimbursement by Corrections, claiming that other similarly situated officers received such reimbursement. Corrections maintains that Grievant was never an employee of WVP, and so cannot be paid relocation expenses because he never transferred from there to MOCC.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." To establish a prima facie case of discrimination, Grievant must show:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of discrimination. He has not shown that he is similarly situated, in a pertinent way, to one or more other employee(s). The 30 Correctional Officers who received the relocation expense reimbursement were employees on the payroll of WVP who were transferred upon its closing to MOCC, whereas Grievant was, at all times, an employee on the payroll of MOCC. Although Grievant argued that two other officers on the MOCC payroll received the relocation reimbursement, he failed to establish this by a preponderance of the evidence.

Corrections established that Grievant was hired to work at MOCC and was, at all times, on MOCC's payroll, although temporarily assigned to WVP. Senate Bill No. 1009, which authorized the relocation reimbursements, provided them for “correctional staff transferring from the West Virginia penitentiary to the Mt. Olive correctional complex[.]” Grievant failed to cite any statute, policy or regulation which would prohibit Corrections from using his assignment to the MOCC payroll to determine that Grievant did not transfer from WVP to MOCC.

The record revealed that Grievant knew, when he was hired, that he would be assigned to MOCC. He lived near MOCC in Fayette County at that time, and he lives there today. While he was temporarily assigned to WVP, he was paid a one-time payment of $500.00 to defray his living expenses in Moundsville. As an officer newly hired to work atMOCC, he simply was not in the same position as those who were hired to work at WVP and faced the expenses of relocating from Moundsville to MOCC.

The following Conclusions of Law support the Decision reached.

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 (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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

3. To establish a prima facie case of discrimination, Grievant must show:(a) that he is similarly situated, in a pertinent way, to one or more other employee(s); (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and, (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing. Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

4. Grievant failed to establish a prima facie case of discrimination.

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. Any 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated December 8, 1998