JEFFREY BOOTH,

Grievant,

v.

DOCKET NO. 99-CORR-073

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievant, Jeffrey Booth, a Correctional Officer at the Huttonsville Correctional Facility, filed the following grievance on December 28, 1998:

> Completed OAP 31 July 1998. Failed to receive 5% increase in pay effective 1 August 1998. Pay increase did not take effect until 1 December 1998.
>
> The relief that is sought is a [r]equest of back pay from August 1998 to 1 December 1998[,] with appropriate interest.

The grievance was denied at level one by Captain Bill Carter on December 30, 1998, and a level two decision by Deputy Warden Keith Weese on January 19, 1999, also denied the grievance. A level three hearing was conducted on February 3, 1999, and the grievance was denied by Grievance Evaluator, James J. Ielapi. Grievant appealed to level four on February 18, 1999, and a level four hearing was conducted in the Grievance Board's Elkins, West Virginia, office, on June 28, 1999. This matter became mature for decision on July 15, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Correctional Officer John Jeffers, and theDivision of Corrections (“Corrections”) was represented by Charles Houdyschell, Jr., Assistant Attorney General. (See footnote 1)

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

Earnings Statement of Jeffrey Booth, dated December 16, 1998.

Ex. 2 -

Certificate of Completion of Apprenticeship Program of Jeffrey Booth, dated July 31, 1998.

Level Three Corrections' Exhibits

Ex. 1 -

WV-11 Personnel Action Form for Jeffrey Booth, effective November 16, 1998.

Ex. 2 -

Policy Directive 442.00 “Apprenticeship Program for Correctional Officer I”, effective April 1, 1998.

Ex. 3 -

October 20,1998 memorandum from Randy Perdue, Coordinator of Apprentices, to various individuals re: Journeyman Officers.

Level Four Grievant's Exhibit

Ex. 1 -

WV-11 Personnel Action Form for Diana R. Miller, effective April 1, 1998.

Testimony

Grievant testified in his own behalf. Corrections presented the testimony of Phil Henline.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed as a Correctional Officer at Huttonsville Correctional Center. 2. Since 1994, all Correctional Officer Is employed by Corrections have been required to complete an Apprenticeship Training Program (OAP), which consists of two years (4,000 hours) of on-the-job training and 400 hours of related studies.

3. Effective April 1, 1998, Corrections adopted Policy Directive 442.00, which establishes procedures for the administration and management of the OAP.

4. Policy Directive 442.00 provides, in Section 2.02, as follows:

> The Director of the Academy shall request a Certificate of Completion of Apprenticeship from the [U.S. Department of Labor] upon the officers['] completion of the program. This certificate shall be the basis for initiating a process to reallocate the journeyman Correctional Officer I to the classification of Correctional Officer II.
>
> **Additional pay or promotion shall not be effective until compliance with the following:**
>
> **1. Proof of completion of Apprenticeship Program (Certificate)**
>
> **2. Submission and final approval of a West Virginia Personnel Action Form WV-11.**

(Emphasis added).

5. Grievant completed all of the requirements of the OAP on July 1, 1998.

6. Grievant received his Certificate of Completion of the OAP from the U.S. Department of Labor on July 31, 1998.

7. Corrections submitted the requisite WV-11 Personnel Action Form, effective November 16, 1998.

8. Grievant was promoted and began receiving compensation as a Correctional Officer II, effective December 1, 1998. 9. Lt. Diana Miller completed the OAP in April 1994, and Corrections submitted a WV-11 Personnel Action Form, effective April 1, 1998, which paid her retroactively for completing the program, back to April 1, 1994. LIV G. Ex. 1.

DISCUSSION

In a non-disciplinary matter, Grievant must prove the allegations of his complaint by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996). Grievant contends his promotion and salary increase should have been effective on the date he completed the OAP, July 1, 1998. Corrections argues that it has fully complied with the provisions of Policy Directive 442.00, and because of the several agencies and offices involved in the process, the delay in completing all of the necessary paperwork until November 16, 1998, was unavoidable. A WV-11 personnel transaction form must be completed by Corrections, then forwarded to the appropriate authorities in the Division of Personnel for approval, before a promotion and pay raise can be effected.

This Grievance Board has previously held that the application of Policy Directive 442.00, prohibiting a pay increase from taking effect until after the Certificate of Completion and the WV-11 (in final form) are submitted, to be proper. Reynolds v. W. Va. Div. of Corrections, Docket No. 99-CORR-006 (Feb. 22, 1999). As in Reynolds, the frustration of Grievant with the delay is understandable, but this Board is without authority to direct Corrections to implement pay increases under an arbitrary time frame that is outside of Policy Directive 442.00. Further, there is no evidence that Corrections engaged in any activity which caused the delay in processing Grievant's WV-11 form. However, Grievant also claims he has been treated differently than another Corrections employee, Diana Miller, who was granted a 5% retroactive pay increase. LIV G. Ex. 1. Mr. Phil Henline, Business Manager for Corrections, testified that Ms. Miller was part of a settlement entered into between certain employees and Corrections. Grievant was not part of that settlement agreement.

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.” In order to establish a claim of discrimination, an employee

must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). In this case, Grievant has failed to make a prima facie case ofdiscrimination, because he is not similarly situated to Diana Miller. She was among a group of officers who entered into a settlement agreement with Corrections to resolve their dispute. Grievant was not among those employees, and did not enter into a settlement agreement with Corrections.

CONCLUSIONS OF LAW

1. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket NO. 97-PEDTA-426 (May 7, 1998); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995).

2. Grievant has not proven by a preponderance of the evidence that Corrections violated any

law, policy, regulation or written agreement with regard to his promotion and pay raise to Correctional Officer II. See Reynolds v. W. Va. Div. of Corrections, Docket No. 99-CORR-006 (Feb. 22, 1999).

3. Grievant has failed to establish a prima facie case of discrimination.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 3, 1999

Footnote: 1

This case was transferred to the undersigned on May 27, 1999, for administrative reasons.