KENNETH AKINS, et al.,

Grievants,

v v.

Docket No. 97-CORR-134

DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Grievants, Kenneth Akins, Phillip Nestor, Ernest Nestor, and Phares Evans, employed by the Division of Corrections (Respondent) as Correctional Officers at the Davis Center, individually filed level one complaints on April 30, 1996, in which they alleged,

On April 1, 1994, the Division of Corrections reclassified it's employees. At this time, we were promoted to Correctional Officer II's. The general policy for promotion is to receive a 5% salary increase or a salary increase equal to the minimum starting salary of the new pay grade, which ever is greatest. When we were reclassified, we received a salary increase of 2½%. It was also our understanding that when we completed the Correctional Officer Apprenticeship Program, we would receive another 5% salary increase. But we did not receive any salary increase when we completed the program.

Then in 1996, the Division of Corrections began awarding employees 5% salary increases for completion of the Correctional Officer Apprenticeship.

To date we have yet to receive our 5% salary increase for completing the Correctional Officer Apprenticeship or the remaining 2½ of our reclassification salary increase.

For relief, Grievants requested an additional 2½ % salary increase and back wages from the date of their reclassification, and a 5% salary increase, with back wages, from the date of completion of the Correctional Officer Apprenticeship Program (COAP).

The grievances were denied at levels one and two. Grievants advanced their claims to level four

on July 23, 1996, when a level three hearing was not scheduled. The recorddoes not disclose what arrangements were agreed upon; however, the grievances were consolidated, and a level three hearing was conducted on January 23, 1997. The level three hearing officer granted the grievance in part, and denied it in part, awarding Grievants and addition 2½% salary increase, effective April 1, 1994, with backpay, and denying them the 5% salary increase. Grievants again advanced their claims to level four on March 13, 1997. Grievants, represented by Pat A. Nichols, Esq., and Respondent, represented by Leslie K. Tyree, Esq., agreed to submit the matter for decision based upon the lower-level record. The matter became mature for decision on May 17, 1999, after the parties, including the Division of Personnel (Personnel), indicated that no additional findings of fact and conclusions of law would be submitted. (See footnote 1)

The following findings of fact are based upon a review of the lower-level record in its entirety, including the level three transcript.

Findings of Fact

1. Grievant Phares was first employed by Respondent in 1988, Grievants Ernest Nestor and Phillip Nestor, were both employed in 1989, and Grievant Akins was employed in 1991. Grievants have been assigned as Correctional Officers at the Davis Center at all times pertinent to this grievance. 2. Grievant Evans completed the COAP in August 1993. Grievant Ernest Nestor completed the program in January 1994, and Grievants Phillip Nestor and Akins completed the program in March 1994.

3. None of Grievants were awarded a salary increase as a result of their completion of the program.

4. Effective April 1994, Grievants were reclassified as Correctional Officers II (COII), and each received a salary increase of approximately 2½%, an amount which raised them to the entry level salary for the COII classification.

5. Grievants learned in May 1996, that a number of their coworkers had received a 5% salary increase for completion of the COAP.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their 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. Dept. of

Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

Grievants argue that they were entitled to a full 10% pay increase, 5% at the time of their reclassification, and 5% for the completion of the COAP. Testifying at level three, Grievants indicated they understood that upon promotion to COII they would receive a salary increase to entry level or 5%. All agreed that their increase had taken them to entry level for COII, but assert that they are entitled to the 5% increase anyway. Grievant Evans explained that five or six employees, including himself, had been given a merit raisesometime prior to April 1994. During the reclassification, employees with significantly less seniority were also promoted to Correctional Officer II, and their salaries were increased to the same level as Grievants. Grievant Evans stated that the reclassification process had “wiped out our merit raise” and expressed the concern that the pay gap needed to be maintained. (Level III Transcript, p. 4). Addressing the second issue, Grievant Evans' undisputed testimony was that two of his coworkers had advised him they had received a 5% pay increase, effective May 1996, upon completion of the COAP.

At level three, it was Respondent's position that Grievants' salary increase was correctly calculated to elevate them to the entry level salary for COII, and that any perception they were entitled to a flat 5% was incorrect. Respondent conceded that some employees had been given a 5% pay increase for completion of the COAP. Respondent's level three representative, Mary Sagace, Business Manager at the Davis Center, stated that she only learned the salary increases were being awarded for completion of the COAP when she processed a 5% pay increase for another employee who had completed the program in April 1996. Upon further inquiry to the Central Office, she acted in compliance with a directive from Respondent's Personnel Director Hilda Williams, and, in September 1996, completed the paperwork to adjust Grievants' salaries an additional 2½%, to reflect a full 5% increase for completion of the COAP, to be effective April 1, 1994. Grievants refused to sign the agreement, choosing to pursue the current grievance instead.

Some background information will be helpful in understanding the present case. Effective April 1, 1994, Personnel's reclassification plan for the Division of Corrections became effective. At this time, positions in the correctional officer series were restructured,in part, to enhance training requirements. Part of the new classification system required that newly-hired COIs enroll in and complete the COAP within two years. Upon completion of the COAP, the COI would be eligible for promotion to COII with an attendant five percent salary increase. Current COI staff who had completed the COAP were

"reallocated" as COIIs. Consistent with DOP reclassification procedures, COIs reclassified in this manner were given salary upgrades to the entry level of COII, if their salary was below that level, and no increase if their salary was above that level. Officers who had already advanced beyond COI and had either completed the COAP prior to April 1, 1994, or were scheduled to complete it within a few months after April 1, 1994, were not given any specific salary consideration in the reclassification process relative to their COAP training.

After some of those officers who had received less than a five percent salary increase expressed their dissatisfaction, Respondent and DOP determined, that in the interest of fairness, all newly-reclassified COIIs who complained would receive a salary adjustment equaling an overall five percent increase, with back pay retroactive to April 1, 1994. Following this action, some officers who had voluntarily completed, or nearly completed, the COAP at a time when no salary increase had been mandated, expressed dissatisfaction because they had received nothing. Respondent subsequently awarded those officers a prospective, five percent merit increase, effective September 1, 1995, in recognition of their completion of the COAP. These officers filed a grievance alleging discrimination, and requested backpay to either April 1, 1994, for those who completed the COAP prior to that time, or from the date after April 1, 1994, when they completed the program. In Whorton v. W. Va. Div. of Corrections, Docket No. 96-CORR-078 (June 25, 1996), the Grievance Board held that the grievants had proven discrimination in that all of the salary increases were for the same reason, completion of the training, but that one group of employees had received backpay while another group had not. The ALJ determined that Respondent's reason for the difference, that the first raises for were reallocation purposes while the second group was for merit raise purposes, was pretextual in nature. In conclusion, the grievance was granted, and Respondent ordered to pay the grievants back pay for the period of time in question.

In January 1997, a level four hearing was conducted for a group of correctional officers who alleged discrimination because they did not receive a five percent salary increase upon completion of the COAP. Respondent asserted that the COAP is required of all COIs, and upon completion, the employee is reclassified to COII. Citing Whorton, Livesay v. W. Va. Div. of Corrections/ W. Va. Div. of Personnel, Docket No. 96-CORR-459 (November 4, 1997), was granted based upon a conclusion that grievants had proven a case of discrimination, and Respondent's reason for the difference in treatment was pretextual. Respondent was ordered to provide grievants a five percent salary

increase, plus interest, retroactive to the date the individual had completed the COAP.

___Although Grievants' previous salary increase had been premised on their reclassification, the level three hearing evaluator granted an additional 2½% increase, effective April 1, 1994, based upon the level four decision in Whorton, supra. The brief, one-page decision does not explicitly state, but it appears that the intent was to award them the 5% pay raise given to other officers who had completed the COAP. It wasdetermined that Grievants had failed to prove their claim for additional compensation as a result of the reclassification.

___Grievants' salary advancement of 2½% upon reclassification to COII was in compliance with Division of Personnel Administrative Rules, Section 5.05, which provides that "[a]n employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater". Grievants' concern that employees with significantly less seniority earn the same salary is understandable; however, the classification and compensation system utilized for state employees does, at times, result in salary compression. Although reasonably demoralizing to long-term employees, the process which creates this situation is not in violation of any statute, rule, or regulation. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

By Respondent's own concession, Grievants are entitled to the 5% salary increase for completion of the COAP. Grievants were awarded half of this increase at level three; however, the hearing evaluator apparently considered the reclassification increase to constitute the remainder of the COAP award. This approach is inconsistent with awards made to other correctional officers. The salary increase granted during the reclassification does not offset this award. Grievants are entitled to an additional 2½% pay increase to constitute the full 5% salary increase, with backpay to the date they completed the COAP. Livesay, supra. 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, Grievants have the burden of proving each element of their 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. Dept. of

Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §29-6A-6.

2. Grievants' salary was increased to the entry level of COII upon reclassification, in compliance with Division of Personnel Administrative Rule, Section 5.05. Grievants failed to prove that they were entitled to a greater salary increase based upon comparative seniority.

3. Grievants have proven they were entitled to a 5% salary increase upon completion of the COAP.

4. Respondent erroneously calculated the reclassification increase as part of the 5% increase awarded for completion of the COAP.

5. Grievants are entitled to an additional salary increase of 2½%, plus backpay and interest, to the date they completed the COAP. Whorton v. W. Va. Div. of Corrections, Docket No. 96-CORR-078 (June 25, 1996); Livesay v. W. Va. Div. of Corrections/ W. Va. Div. of Personnel, Docket No. 96-CORR-459 (November 4, 1997).

Accordingly, the grievance is **GRANTED** in part, and **DENIED** in part . Respondent is Ordered to adjust Grievants' salary consistent with this decision. 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: May 25, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

This grievance was transferred to the undersigned on April 5, 1999.

The Division of Personnel was never joined as a party to this matter; however, Lowell D. Basford, Assistant Director for Classification and Compensation, had participated in a conference call, and was given the opportunity to file

submissions.