DANNY MARTIN,

Grievant,

v. **Docket No. 99-RJA-261**

WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY AUTHORITY,

Respondent.

DECISION

Danny Martin (Grievant) is employed by the West Virginia Regional Jail and Correctional Facility Authority (RJA), as a Correctional Officer (CO) II at the Southern Regional Jail (SRJ). He filed this grievance on May 7, 1999, seeking an "[i]ncrease in pay according to policy and procedure #3013 for promotion to CO II from CO I." This grievance was denied at Level I, by Sergeant Don Pugh, on May 7, 1999; at Level II, by Administrator J. D. Huppenthal, on May 20, 1999; and at Level III, on June 11, 1999, by Hearing Examiner James O. Strother.

A Level IV hearing was held on July 29, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant represented himself, and RJA was represented by Assistant Attorney General Chad M. Cardinal. The parties were given until August 20, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. 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 RJA as a CO II at SRJ.

2. Grievant was hired to work at SRJ on July 11, 1994, as a building maintenance supervisor, at a salary of $17,500.00.

3. On May 1, 1997, Grievant was reclassified as a CO I, at a salary of $18,120.00.

4. On July 1, 1998, Grievant received the $756.00 across the board pay increase awarded to most state employees.

5. On August 1, 1998, Grievant received a $944.00, or five percent, merit pay increase.

6. On December 1, 1998, Grievant received a $1,308.00 pay increase, which was awarded to all COs.

7. On May 16, 1999, Grievant was reclassified as a CO II upon completion of the requirements set forth in RJA Policy and Procedure Statement 3013, Procedure B, Paragraph 3. Grievant received no additional pay upon his reclassification.

8. His current salary is $21,884.00.

9. The salary range for a CO II is from $17,256.00 to $28,104.00.

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 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). 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 did not receive a five percent raise upon his reclassification to CO II, claiming that other similarly situated officers received the five percent raise. RJA responds that Grievant was already being paid more than the minimum salary for a CO II, and so was not entitled to a pay increase upon his reclassification.

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 established that he was similarly situated, in a pertinent way, to other CO Is who were reclassified as CO IIs. However, he has failed to show that he was, to his detriment, treated in a manner that the other COs were not.

RJA Policy and Procedure Statement 3013, Procedure B, Paragraph 3 provides that reclassification from CO I to CO II is automatic upon completion of certain requirements, and that, upon reclassification from CO I to CO II, a “salary adjustment to the minimum salary for Correctional Officer II shall be made.” This policy is in accord with 143 CSR § 5.4 (f)1.b., Administrative Rule, W. Va. Div. of Personnel (July 1, 1998), which states “[a]n incumbent whose salary falls below the minimum rate for the new range shall have his or her salary adjusted to the new minimum.” It is undisputed that Grievant's salary at the time of his reclassification was higher than the minimum salary for a Correctional Officer II. Accordingly, RJA complied with Policy and Procedure Statement 3013, and 143 CSR § 5.4 (f)1.b, when it did not increase Grievant's salary upon his reclassification to CO II.

Grievant has a different way of looking at his pay situation than does RJA. Essentially, Grievant believes that his reclassification to CO II was, in fact, a promotion (although RJA presented policies tending to show otherwise), and that other COs receivedpay increases upon promotion. Grievant also points to several CO IIs who earn more than he does. However, RJA presented testimony at Level IV establishing that these CO IIs have greater seniority than Grievant, or began work with police

experience, justifying their greater pay. RJA also showed that when these workers were given percentage pay increases, they naturally moved farther ahead of Grievant in salary, because their percentage increases were based upon their higher salaries. Grievant presented no witnesses or documents to show that any CO I with a salary above the minimum for the CO II classification received a raise upon reclassification to CO II. Accordingly, Grievant has failed to prove a prima facie case of discrimination.

As noted above, Grievant looks at his pay situation differently than RJA does. It appears that Grievant's view is a perfectly reasonable one, one that could have been adopted by RJA, but was not. Unfortunately for Grievant, RJA, which is authorized by statute to create its own policies, W. Va. Code § 31-20-5(w), also is entitled to deference when it comes to interpreting those policies. Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999). See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996).

Finally, this result is in accord with Baisi, et al. v. W. Va. Dep't of PublicSafety/Regional Jail Auth., Docket No. 92-RJA-339 (May 27, 1993), which involved virtually identical facts. This Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance proceedings. Oxley v. Summers County Bd. of Educ., Docket No. 98-45-104 (Nov. 19, 1998); Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997); Oxley v. Summers County Bd. of Educ., Docket No. 95-45-123 (Feb. 13, 1997). See In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947). The undersigned can see no reason here to depart from the Board's holding in Baisi, supra.

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. Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency'sinterpretation of its own policy. Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999). See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996).

4. 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).

5. 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. 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 appealingparty 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated September 10, 1999