JOHN LOGSDON, et al.,

Grievant,

v.

DOCKET NO. 98-DJS-101

WEST VIRGINIA DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY/DIVISION OF JUVENILE SERVICES/ERJDC,

Respondent.

D E C I S I O N

Grievants, John Logsdon and Robin Sharff, filed individual grievances against their employer, the West Virginia Department of Military Affairs & Public Safety/Division of Juvenile Services ("MAPS"), on January 6, 1998, alleging that:

> In a group meeting we were all told as of November 1, 1997 we would be transferred from D.H.H.R. to MAPS. At which time we were given no pay raise. We were again advised the pay raise would possibly be March. We feel we are being discriminated against.
>
> Relief sought: We want to be brought up to Correctional pay, including back pay beginning November 1, 1997. (See footnote 1)

The grievance evaluators at levels one and two did not have the authority to grant the relief requested, and the grievances were heard at level three on February 17, 1998, and March 10, 1998. The level three grievance evaluator, Lowell McAfee, recommendedthe grievances be denied, and his recommendation was upheld by Phyllis H. Carter, Director, Division of Juvenile Services, on March 17, 1998. and April 8, 1998, respectively. The matters were appealed to level four on April 2 and April 23, 1998, respectively. The matters were consolidated by Order dated June 26, 1998. Following several continuances for good cause, this matter came on for hearing at level four on October 26,

1998, at which time it became mature for decision. (See footnote 2) Grievants appeared pro se, and MAPS was represented by Don Darling, Esq., Senior Deputy Attorney General.

FINDINGS OF FACT

1. Prior to November 1, 1997, Grievants were employed by the West Virginia Department of Health and Human Resources ("DHHR"), classified as Youth Service Workers II.

2. On November 1, 1997, all Juvenile Detention Centers under the control of DHHR were transferred to the Department of Military Affairs & Public Safety/Division of Juvenile Services ("MAPS").

3. Grievants work in the Martinsburg Juvenile Detention Center, which was under the control of DHHR and transferred to MAPS.

4. The Salem Juvenile Detention Center has always been under the control of MAPS and staffed with Correctional Officers. 5. Grievants were told at the time of the transfer that they would receive pay raises as a result of the transfer.

6. As of January 6, 1998, Grievants had not received any pay raises, and filed this grievance.

7. In September 1998, the West Virginia Division of Personnel reclassified Grievants from Youth Service Workers to Juvenile Detention Officer IIs.

8. The Youth Service Workers were in Pay Grade 7; the Juvenile Detention Officer IIs are in Pay Grade 9.

9. Subsequent to November 1, 1997, two Correctional Officer Is were hired at the Martinsburg Juvenile Detention Center, in Pay Grade 8. The reason for hiring these Correctional Officers was because it was determined there was an increased need for safety.

10. The two Correctional Officer Is have since been reclassified to Juvenile Detention Officers IIs, but are still making the same salary.

11. The Legislature mandated in 1992 and 1994 that all Correctional Officers receive a special salary increase, and an increased hiring salary. Thus, Correctional Officers are hired in at a higher salary than the minimum pay grade salary, and existing Correctional Officers have received two special salary increases that no other State worker has received.

DISCUSSION

As this is not a disciplinary action, the Grievants bear the burden of proving their allegations 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. Grievants allege they have been discriminated against because they perform the same duties as Correctional Officers assigned to Juvenile Detention Centers, but receive less pay. Grievants have not claimed they were misclassified.

MAPS first contends that this grievance is untimely, as Grievants were transferred under MAPS jurisdiction on November 1, 1997, but did not file their grievance until January 6, 1998. Further, MAPS explains that the reason for the disparity in pay is because of the Legislative mandates in 1992 and 1994 that Correctional Officers receive special salary increases. In addition, MAPS contends Grievants have been reclassified to a higher pay grade since the filing of the grievance, and have received commensurate salary increases, thus equalizing their pay with that of Correctional Officers. Finally, there are no longer any Correctional Officers working at the Martinsburg Juvenile Detention Center.

As a timeliness defense may be dispositive of a grievance, that issue will be addressed first. MAPS contends this grievance is untimely as the grievance was not initiated within the time limits contained in W. Va. Code §§ 29-6A-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435(Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a). The running of the relevant time period is ordinarily deemed to begin to run when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd.

of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd 199 W. Va. 220, 483 S.E.2d 566 (1997). In this particular matter, Grievants were moved under the jurisdiction of MAPS, and were told they would be given pay raises on November 1, 1997. Grievants initiated this grievance approximately two months later, on January 6, 1998.

This Grievance Board has held that miscalculated pay checks can give rise to a continuing violation, every time an incorrect paycheck that fails to include proper compensation is issued. MAP's alleged unlawful actions could therefore properly be viewed as a new grievable event every time Grievants were paid without additional compensation from November 1, 1997 forward. There is no dispute that Grievants filed within ten days of receipt of their then most recent paychecks, hence, their claims as to that pay period could be timely. However, Grievants still have the burden of proving they were entitled to pay raises at that time. In that regard, Grievants claim they have been discriminated against in not receiving pay raises. 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, Grievants must show:

(a)

that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants 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).

Grievants have failed to make a prima facie case of discrimination. At the time this grievance was filed, there were no Correctional Officers working at the Martinsburg Juvenile Detention Center. The only Juvenile Detention Center with Correctional Officers was Salem, which has always been under the jurisdiction of MAPS. Further, Grievantshave failed to identify any other Youth Service Workers or Juvenile Detention Officers who were treated differently than they with regard to pay raises and classification.

Even if Grievants had succeeded in making a prima facie case of discrimination, MAPS has offered a legitimate, non-discriminatory reason for the difference in pay between Juvenile Detention Officers and Correctional Officers assigned to Juvenile Detention Centers. The West Virginia Legislature mandated in 1992 and 1994 that all Correctional Officers be given special salary increases, which were not given to other State employees.

CONCLUSION OF LAW

Grievants have failed to prove by a preponderance of the evidence any misapplication or violation of any rules, statutes, or laws on the part of their employer, MAPS.

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: May 24, 1999

Footnote: 1

Grievant Debra Murphy also filed at this time, but has withdrawn from the grievance.

Footnote: 2

This matter was heard at level four by Administrative Law Judge Randy Miller, and was reassigned to the undersigned Administrative Law Judge for administrative reasons on April 26, 1999.