BILLY JOE ISELI,

Grievant,

v. **Docket No. 99-CORR-260**

WEST VIRGINIA DIVISION OF CORRECTIONS,

HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

On May 7, 1999, pursuant to W. Va. Code §§ 29-6A-1, et seq., Billy Joe Iseli (Grievant) initiated the following grievance against Respondent West Virginia Division of Corrections (WVDOC):

> I feel that an act of discrimination has been committed against me by William Haines, Warden of Huttonsville Correctional Center.
>
> My total years of service with the WV Division of Corrections, Huttonsville Correctional Center is approximately twenty-four (24) years and ten (10) months. I have been employed in my current position as Associate Warden of Operations approximately twenty-four (24) months or two (2) years.
>
> Recently the position title Associate Warden of Security was posted. Within the last thirty (30) days that position was filled by promotion of Captain Tim Murphy, Shift Commander to Associate Warden of Security. Tim Murphy has been employed by the Division of Corrections for a lesser number of years than I have. The gross salary which has been given for the position of Associate Warden of Security, which includes an additional five (5) percent given by Warden Haines, exceeds the gross salary which I now receive and have received for a number of months.
>
> I feel that Warden Haines did not review my position as Associate Warden of Operations with regards to salary, years of service and the amount of time in my current position. He did not make the necessary adjustments to bring the salary of Associate Warden of Security into a comparable range to reflect years of service, current salary and current time in my comparable position so as not to exceed my current gross salary.

The grievance was denied at Level I on May 12, 1999. Grievant appealed to Level II where Warden W. S. Haines denied the grievance on May 21, 1999. Grievant subsequently appealed to Level III on May 26, 1999. Following a Level III evidentiary hearing on June 8, 1999, Commissioner Paul Kirby denied the grievance in a written decision issued on June 11, 1999. On June 22, 1999, Grievant appealed to Level IV. Following a series of continuances, each of which was granted for good cause shown, a Level IV evidentiary hearing was conducted on October 28, 1999, in this Grievance Board's office in Elkins, West Virginia. (See footnote 1)

At the conclusion of that hearing, Grievant waived any post-hearing argument, and Respondent was given until November 12, 1999, to submit a post-hearing brief. Respondent was also requested to provide a copy of the Level III hearing transcript. On October 29, 1999, Respondent provided a copy of the Level III hearing transcript, and waived further argument. However, on October 29, 1999, Respondent also filed a Motion to Re-Open Record, offering additional documentary evidence that had not been introduced during the Level IV hearing. Grievant was provided an opportunity to respond to Respondent's motion, and submitted a written objection dated November 8, 1999. On November 18, 1999, the undersigned issued an Order Denying Respondent's Motion to Re-Open Record, and this matter became mature for decision at that time.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Division of Corrections (WVDOC) as Associate Warden for Operations at Huttonsville Correctional Center.

2. Grievant has been employed by WVDOC for over 24 years. Effective June 1, 1996, Grievant was promoted to his present position as Associate Warden, and received a 10% pay increase. DOC Ex 2 at L III.

3. The working title for Grievant's position is Associate Warden. However, the civil service classification title for the position is Corrections Program Manager I.

4. In March 1998, less than two years after Grievant was promoted to Associate Warden, he received a 5% merit raise. DOC Ex 3 at L III.

5. On March 10, 1999, WVDOC posted a vacancy for a Corrections Program Manager I at Huttonsville Correctional Center. The working title for this position is Associate Warden for Security.

6. Grievant did not apply for the vacancy described in Finding of Fact number 5. Had Grievant applied for this position and been selected, he would not have been eligible for a pay raise in accordance with the Administrative Rule of the West Virginia Division of Personnel (DOP), as this would have been a lateral transfer rather than apromotion to a position in a higher pay grade. Haines testimony at L IV. See 143 C.S.R. 1 § 5.7 (1998).

7. The successful applicant was John T. Murphy. Mr. Murphy was promoted from Corrections Officer VI in Pay Grade 14 to Corrections Program Manager I in Pay Grade 16. In accordance with DOP's Administrative Rule, Mr. Murphy was entitled to a minimum 10% pay raise (5% per Pay Grade). See 143 C.S.R. 1 § 5.5(a) (1998). See also DOP Policy No. 19, Pay Plan Implementation (Aug. 1, 1996). In addition, Warden Haines elected to give Mr. Murphy an additional 5% pay raise based upon his experience in accordance with Section 5.5(b) of DOP's Administrative Rule. 143 C.S.R. 1 § 5.5(b) (1998).

8. Mr. Murphy has been employed by WVDOC Since February 1976. As a result of the 15% pay raise Mr. Murphy received upon promotion, he began receiving a higher salary than Grievant, although Grievant has greater seniority with WVDOC.

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.

Grievant complains that when an employee with less seniority and experience was promoted to an Associate Warden position comparable to Grievant's current position as Associate Warden for Operations, the newly-promoted employee was awarded a salaryin excess of what Grievant is receiving. Grievant generally contends he should receive at least the same salary as the newly-promoted co-worker, as they are performing similar work.

The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. Brutto v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-076 (July 24, 1996). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that

provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto, supra; Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

Consistent with Largent, supra, Grievant and Mr. Murphy are being paid in accordance with the pay scale for their employment classification, Corrections Program Manager I. As was the case in Largent, and the prior decisions of this Grievance Board cited above, Grievant has not shown there was any discriminatory motive when CORR set the salary for the newly-promoted Associate Warden for Security at a level higher than the salary Grievant was receiving. As Warden Haines explained, the new Associate Warden was entitled to a pay raise upon promotion in accordance with the West Virginia Divisionof Personnel's (DOP's) Administrative Rule, 143 C.S.R.1 § 5.5(a) (1998). In addition, Warden Haines used this opportunity to give the new Associate Warden an additional 5% discretionary increase as allowed in DOP's Administrative Rule. 143 C.S.R. 1 § 5.5(b) (1998). None of these actions violate the equal pay for equal work doctrine in this state as interpreted by the West Virginia Supreme Court of Appeals in Largent, supra.

However, Grievant further alleges that the inferior salary he is receiving as an Associate Warden, in comparison to Associate Warden Murphy, constitutes “discrimination.” Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differenc es 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 2) of discrimination under Code § 29-6A-2(d), must demonstrate the following:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94- DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Assuming Grievant established a prima facie case of discrimination by establishing that the Associate Warden positions at issue are similarly situated, but he nonetheless receives a lower salary for doing similar work, WVDOC presented legitimate, job-related reasons for these differences. Although Warden Haines believes all Associate Warden positions are important, he considers the Associate Warden for Security position to be more critical to the mission of Huttonsville Correctional Center, thus warranting a greater salary for a highly-qualified employee selected to perform those duties. Based upon WVDOC's primary mission, to safely maintain criminals in a correctional facility, this provides a rational basis for the decision to award Mr. Murphy an additional 5% raise for experience in the corrections field, as authorized by DOP's Administrative Rule. Therefore, in addition to establishing that Grievant and Mr. Murphy are being compensated in accordance with the pay scale for Corrections Program Manager I established by DOP, WVDOC articulated a sufficient, job-related rationale for the salary disparity at issue here. See W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994). Grievant did notpresent persuasive evidence that this rationale was merely a pretext for prohibited discrimination.

Moreover, the record indicates Grievant received a 10% pay raise upon promotion to Associate Warden, and an additional 5% merit pay raise less than two years later. Mr. Murphy received his 15%

pay raise at the same time he was promoted. Mathematically, a 10% pay raise, followed by another 5% raise, would result in a greater sum than a 15% pay raise applied to the same starting salary. Thus, Mr. Murphy began receiving a higher salary than Grievant, following his promotion to Associate Warden, because Mr. Murphy was receiving a higher salary as a Correctional Officer VI at the time of his promotion in 1999 than Grievant was receiving when he was promoted in 1996. Salary disparities which result from such factors as the salary history of the respective employees do not violate applicable equal pay rules or statutes. Brutto, supra. See Largent, supra; Decker, supra. Therefore, WVDOC has not engaged in discrimination prohibited by W. Va. Code § 29-6A-2(d).

Evidence was presented at the Level IV hearing that, after this grievance was filed, Warden Haines awarded a 5% merit raise to Grievant. Grievant notes that, despite this raise, he is still receiving less money than Mr. Murphy. Because this raise was initiated after this grievance was filed, it is not relevant to the merits of Grievant's claim. However, this merit raise suggests to the undersigned that Warden Haines is genuinely concerned with the morale of his subordinate employees, and has taken appropriate action to recognize Grievant's valuable contribution to the mission of WVDOC at the Huttonsville Correctional Center by approving this salary advancement.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the 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. Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classifi cation. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

3. 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 prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

> (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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995).

4. Once a grievant establishes a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the reasons offered for disparate treatment are merely pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

5. Assuming Grievant established a prima facie case of discrimination in regard to the higher salary a similarly situated Associate Warden is receiving, WVDOC established legitimate, non-discriminatory reasons for its actions by demonstrating that the less senior Associate Warden was awarded the minimum 10% pay raise upon promotion to which he was entitled under the West Virginia Division of Personnel's Administrative Rule, and a discretionary 5% pay raise based upon past experience directly relating to the duties of his position. In addition, the disparity between Grievant's salary and the less senior Associate Warden is substantially a result of salary history, based upon the higher salary that the other employee was receiving as a Corrections Officer VI at the time he was selected for promotion to Corrections Program Manager I (Associate Warden). See Brutto v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-076 (July 24, 1996). See also W. Va. Univ. v. Decker, 191 W. Va. 567, 447 S.E.2d 259 (1994). 6. Grievant failed to establish by a preponderance of the evidence that his employer is compensating him, in comparison

to Associate Warden John T. Murphy, or any other similarly situated employee, contrary to the provisions of W. Va. Code § 29-6-10, or any other statute, policy, rule, regulation, or written agreement applicable to his employment situation.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 29, 1999

Footnote: 1

Grievant was represented by Gordon C. Kamka, a Criminal Justice Consultant. Respondent was represented by Assistant Attorney General Charles Houdyschell.

Footnote: 2

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).