ADAM L. SMITH and KENNETH E. AKINS, JR.,

Grievants,

v. **Docket No. 01-CORR-080**

DIVISION OF CORRECTIONS/HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

DECISION

Adam L. Smith and Kenneth E. Akins, Jr., ("Grievants"), initiated this proceeding on February 7, 2001, alleging entitlement to a 5% salary increase upon transferring to unit management in 1998. They seek back pay plus interest as relief. Grievant's immediate supervisor did not have authority to grant relief, and the grievance was denied at level two on February 8, 2001. A level three hearing was held on February 21, 2001, and the grievance was denied at that level on February 26, 2001. Grievants appealed to level four on March 5, 2001. After this matter was held in abeyance for several months, a level four hearing was held on August 6, 2001, and on September 21, 2001. Grievants were represented by counsel, James Fox, and Respondent was represented by counsel, Leslie Tyree. This grievance became mature for consideration upon receipt of Grievants' fact/law proposals on October 11, 2001. (See footnote 1)

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant Akins is currently employed by the Division of Corrections ("DOC") as a case manager at Huttonsville Correctional Center ("HCC"), where he has been assigned since May 16, 2000.

2. Grievant Akins was previously employed at St. Mary's Correctional Center ("St. Mary's"). He began his assignment there on October 1, 1998, transferring from a correctional officer position at the Davis Center to a case manager position at St. Mary's. Because his correctional officer position was

in pay grade 9, and the case manager position was in pay grade 11, he received a 10% salary increase.

3. Paul Korntop, who has been employed at St. Mary's for two years, was also previously employed at the Davis Center. He transferred from a correctional officer position at the Davis Center to a correctional counselor position at St. Mary's on December 1, 1998. Although the two positions were in the same pay grade, Mr. Korntop received a 5% salary increase. Mr. Korntop was not told why he received this raise.

4. Grievant Smith has been employed at HCC as a correctional counselor since August 15, 2000. On April 1, 1998, he transferred from a correctional officer position at Denmar Correctional Center ("Denmar") to a counselor position at Denmar. The two positions were in the same pay grade, and Grievant Smith did not receive a pay raise when he assumed his counselor position.

5. In 1996 and 1997, former Warden William Duncil offered 5% "incentive" pay raises to employees at HCC who voluntarily transferred into unit management. At that time, unit management had just been created, and HCC did not have vacant positions tostaff each unit. Therefore, the warden offered the incentive pay increase to current employees who would transfer into unit management. (See footnote 2)

6. As part of the incentive program at HCC, several employees of HCC received 5% raises upon transferring to unit management, even if their previous positions were in the same pay grade.

7. When Grievant Akins and Mr. Korntop began their positions at St. Mary's in 1998, it was a newly-opened facility.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. At levels two and three, Respondent argued that these grievances were untimely filed. However, that argument was not raised at level four, so it is deemed abandoned.

Grievants contend that they have been subjected to discrimination, because some DOC employees who have transferred to unit management in the past have received 5% salary increases,

whether or not they were entitled to those increases pursuant to the Division of Personnel's ("DOP") Administrative Rule. Pursuant to provisions of that Rule, an employee who receives a "lateral class change," i.e. movement from one class toanother within the same pay grade, is not entitled to any pay increase. DOP Administrative Rule, §§ 3.54 and 5.7. However, when an employee is promoted to a position in a higher pay grade, and his salary is within the pay range for the new pay grade, he is entitled to a salary increase of 5% per pay grade. Id., §§ 5.4 and 5.5.

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, 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 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 support of their discrimination claims, Grievants are comparing themselves to employees at HCC who received pay increases in 1996 and 1997 when HCC firstimplemented unit management. In addition, Grievant Akins believes he should receive the same 5% pay increase given to Mr. Korntop when he transferred into unit management at St. Mary's in 1998. This Grievance Board has previously addressed the issue of discrimination in such salary increases only with regard to HCC employees. In Channell v. Division of Corrections, Docket No. 99-CORR-244 (Dec. 8, 1999), it was

held that it was discriminatory for HCC to grant 5% salary increases to employees who laterally transferred into unit management, but not to grant a similar increase to employees who were promoted and received corresponding pay raises for moving from one pay grade to another. This ruling was based upon evidence establishing that all these employees transferred into unit management because of Warden Duncil's incentive program, and it was unfair to give a salary increase (to which they were otherwise unentitled) to some just for transferring into unit management, but not to others who made the same transfer. “The incentive pay was for the transfer into Unit Management. If one employee was entitled to receive incentive pay for this choice, everyone who chose to transfer was entitled to the incentive pay.” Id. See also, Graham v. Div. of Corrections, Docket No. 00-CORR-124 (July 17, 2000).

With regard to HCC employees, Grievants are not similarly situated and have not established a prima facie case of discrimination. As noted in Graham, supra:

> The pay increases granted to the employees who initially transferred into [unit management] were offered by former Warden Duncil in order to attract employees in an effort to staff the new unit. That situation no longer exists. . . . Warden Duncil has long since left [HCC], and the initial staffing of the Unit Management Section has been accomplished for some time.

Thus, as was the case with the grievants in Graham, Grievants here “are not similarly situated to employees who transferred into Unit Management when the unit was created as part of its initial staffing and received incentive pay increases for making the transfer.” Id., at Conclusion of Law No. 4. Not only were Grievants not part of the initial staffing of unit management at HCC, they were not even employed at the institution when the program was implemented. Accordingly, Grievants' allegations of discrimination as compared to HCC employees must fail.

However, as to Grievant Akins and his comparison to Mr. Korntop, both transferred into unit management positions at the newly-opened St. Mary's facility in late 1998. Mr. Korntop received a 5% salary increase, although his was a lateral transfer, but Grievant Akins did not. Grievant, however, did receive the promotional 10% raise he was entitled to under DOP's Rule. Nancy Swecker, Director of Administration for DOC, was unsure as to why Mr. Korntop received the 5% raise, but she assumed it was because there were recruitment problems at the new facility at St. Mary's, and it was probably given to Mr. Korntop to entice him to make the transfer.

The undersigned finds that Grievant Akins has established a prima facie case of discrimination as

to his comparison to Mr. Korntop. Both took new unit management positions at St. Mary's when it was newly staffed. It is also clear that Grievant was treated differently from Mr. Korntop with regard to the supposed “incentive” increase given to Mr. Korntop, and DOC has provided no legitimate, non-discriminatory reason for this difference, let alone an explanation for it. Accordingly, since the timeliness defense was abandoned by DOC, Grievant Akins is entitled to the retroactive 5% salary increase, plus interest at the statutory rate, as of the date he began his duties at St. Mary's on October 1, 1998.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 grievant alleging discrimination must establish a prima facie case by demonstrating:

(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. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once 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).

3. Grievants were not similarly situated to employees at Huttonsville Correctional Center who transferred into unit management when it was implemented in 1996 and 1997, so they have not established a prima facie case of discrimination.

4. Grievant Akins has established a prima facie case of discrimination, in that he was similarly situated to Paul Korntop, when both employees transferred into new unitmanagement positions at St. Mary's Correctional Center in 1998, and Mr. Korntop received a 5% salary increase which Grievant did not receive.

5. Respondent has failed to provide a legitimate, non-discriminatory reason for the difference in treatment between Grievant Akins and Mr. Korntop.

Accordingly, this grievance is **GRANTED, IN PART**, and Respondent is directed to compensate Grievant Akins with a 5% salary increase, plus interest at the statutory rate, retroactive to October 1, 1998. Grievant Smith's 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, and 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: October 24, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Respondent did not file a written argument.

Footnote: 2

In 1996, DOC directed all institutions to change from the traditional security/treatment type of facility to the unit management concept, which focuses upon making staff more accessible to inmates and resulted in the creation of the new positions of unit manager, case manager, and additional correctional counselor positions.