MARGARET GRAY,

Grievant,

v. **Docket No. 01-CORR-482**

DIVISION OF CORRECTIONS/NORTHERN

REGIONAL JAIL & CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Grievant, Margaret Gray, employed by the Division of Corrections (DOC or Respondent) as a Correctional Trainer assigned to the Northern Regional Jail & Correctional Facility, filed a level one grievance on July 5, 2001, in which she stated:

On July 1, 2001 all Uniformed Staff were given a pay raise of $2,004 per year. I will receive a pay raise of $1,260 per year. I am a Correctional Officer IV in the position of Institutional Training Officer at Northern Correctional Facility. I am REQUIRED to wear a Class A Uniform every day. As recently as June 23, 2001 I worked as the only Security Staff in the Correctional Industries Building with 52 Inmate Workers.

For relief, Grievant requested the $2,004 salary increase, or in the alternative, to be relieved of wearing a uniform.

___The hearing evaluators at levels one and two lacked authority to grant the requested relief. Following an evidentiary hearing at level three, the grievance was denied. Appeal was made to level four on August 24, 2001, and a hearing was held in the Grievance Board's Wheeling office on October 4, 2001. Grievant represented herself, and DOC was represented by counsel, Leslie K. Tyree. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the close of the hearing.

The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by DOC since 1987, and has held the classification title of

Correctional Trainer, with an in-house designation of Sergeant, since March 1999.

2. The duties of a Correctional Trainer include instructing courses in staff development and training, providing orientation, in-service, and specialized training for employees which may involve a degree of bodily danger. Correctional Trainers may also be assigned to conduct training at the WV Corrections Academy or other correctional institutions.

3. Grievant is assigned to work as a Correctional Officer from time to time.

4. Grievant is required to wear a uniform while on duty. Not all Correctional Trainers throughout the Division are required to wear uniforms.

5. Effective July 1, 2001, “uniformed correctional officers” received a legislative salary increase of $2,004, while “non-uniformed correctional staff” were awarded a $1,260 pay increase.

6. Grievant received a salary increase of $1,260.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); See W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72(Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Grievant argues that because she is required to wear a uniform, and is assigned as a Correctional Officer at times, she is entitled to the same salary increase as that given to Correctional Officers. Respondent asserts that Grievant is a Correctional Trainer, not a Correctional Officer, and is precluded from the larger salary increase by the statutory language making the awards.

W. Va. Code § 29-22-18a created a “state excess lottery revenue fund”, part of which was to provide “salary increases for uniformed correctional officers [of] two thousand dollars ... [and] salary increases for non-uniformed correctional staff [in the amount of] one thousand two hundred fifty

dollars . . . .” (Emphasis added).

While Grievant's perception of this matter is understandable, the facts do not support her claim for additional compensation. First, Grievant is not a Correctional Officer. The in-house designation of CO-IV, or Sergeant, does not override the Division of Personnel designation of her position as Correctional Trainer. Second, even though Grievant is occasionally utilized as a Correctional Officer, she does not assert that any substantial portion of her time is allocated to the performance of those duties. Further, as a Correctional Trainer, Grievant is assigned a higher pay grade than Correctional Officers, and is being paid at the greater rate when performing work in a lower pay grade. In anyevent, DOC is not prohibited from the occasional use of Grievant as a Correctional Officer. Frey v. Corr., Docket No. 97-CORR-481 (Mar. 31, 1998). See Div. of Personnel Administrative Rule, §4.4(d) (2000).

A claim of discrimination is inherent in Grievant's argument. She is required to wear a uniform, and she is used as a Correctional Officer, but did not receive the same salary adjustment. To determine whether DOC engaged in discrimination under W. Va. Code §18-29-2(m) it must first be determined whether Grievant:

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

(b) has, to her detriment, been treated by her 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant is not similarly situated to those employees who received the larger salary increase in that she holds a separate and distinct classification title. It was not discriminatory for DOC to provide different salary increases as directed by the Legislature. (See Cross v. Corrections, Docket No. 93-CORR-365 (Nov. 30, 1993) in which Correctional Counselors did not receive the same salary increase as Correctional Officers.)

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. W. Va. Code § 29-22-18a created a "state excess lottery revenue fund", part of which was to provide "salary increases for uniformed correctional officers [of] two thousand dollars ... [and] salary increases for non-uniformed correctional staff [in the amount of] one thousand two hundred fifty dollars . . . ."

3. Grievant was not subject to discrimination under W. Va. Code § 29-6A-2(d) when varying salary increases were given to employees in different classifications.

4. Grievant has failed to prove that she was entitled to the same salary increase as that awarded to Correctional Officers.

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 EmployeesGrievance 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 §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: October 29, 2001 _____

Sue Keller

Senior Administrative Law Judge