KEVIN SUMPTER,

Grievant,

v. **Docket No. 02-CORR-332**

WEST VIRGINIA DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX

and DIVISION OF PERSONNEL,

Respondent.

D E C I S I O N

Grievant, Kevin Sumpter, filed this grievance on August 15, 2002, against his employer the Division of Corrections ("CORR"). His statement of grievance reads:

> Retaliation and Discrimination causing loss of pay and unequal advancement opportunities by refusing to put me at a pay level comparable to my peers of equal experience due to my having withdrew [sic] money from my retirement fund.
>
> Relief sought: annual salary of $23,520 effective 16 June 2002.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on October 16, 2002. A Level IV hearing was held on February 4, 2003, and this case became mature for decision on February 20, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Issues and Arguments

Grievant asserts he should have been rehired at his former salary, and it was incorrect to make his repayment of retirement funds a prerequisite for this salary. (See footnote 2) Respondent asserts there was no discrimination or retaliation, as Grievant was treated the same as all other rehires.

Acting Warden Michael Coleman maintains the salary he offered Grievant was in no way based on Grievant's retirement moneys, and CORR agrees the decision to rehire and the salary offered cannot be influenced by the repayment of retirements funds.

Findings of Fact

1. On January 31, 2002, Grievant resigned from his position as a Correctional Officer II at Mount Olive Correctional Complex ("MOCC"). Grievant was having numerous financial and personal problems. The main purpose for his resignation was to obtain his retirement funds in an attempt to correct his financial problems.

2. Prior to this resignation, Grievant was counseled by numerous supervisors that this decision was not in his best interest. Grievant was offered many possible accommodations and other alternatives to resolve his dilemma. He did not choose to accept these.

3. At the time of his resignation, Grievant was informed by his supervisors they would recommend his rehire. The recommendation did not assure Grievant of a position. No salary level upon possible rehire was promised or even discussed. 4. Approximately four months later, Grievant asked to return to work. He went through the application process, and was offered his former position, Correctional Officer II, at an entry level salary. The decision to rehire Grievant was made by Acting Warden Coleman after receiving recommendations from Grievant's prior supervisors. (See footnote 3)

5. All Correctional Officers who resign and request to return to work are rehired at the entry level salary for their classification.

6. Grievant received a letter dated May 30, 2002, stating his proposed salary and orientation date. (See footnote 4)

7. Grievant did not sign this letter, but came to orientation. At orientation Grievant complained because his salary was at the entry level. He did not inform anyone that he would not accept the position at this salary and reported to work on subsequent days.

8. If Grievant had not accepted the position at the entry level salary, he would not have been offered the position. Test. Deputy Warden Coleman, Level IV Hearing.

9. On August 15, 2002, Grievant filed this grievance, and he had a Level II conference with then Warden Thomas McBride.

10. Warden McBride was concerned because Grievant had withdrawn his retirement to resolve his financial issues. He told Grievant he would authorize the highersalary if Grievant: 1) repaid all the moneys he owed to the retirement fund; and 2) the Commissioner concurred with this action.

11. The Commissioner would not approve increasing Grievant's salary to greater than the entry level compensation.

12. Grievant checked with the Division of Personnel and discovered he has several years to repay the money he had withdrawn, and he has chosen not to do so at this time. He has not made any payment, nor has he arranged a payment plan.

13. CORR does not want to encourage employees to resolve financial problems by quitting and withdrawing their retirement money because of the hardships it creates for the agency in terms of staffing, training, and planning.

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 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met its burden. Id.

Division of Personnel's Rule 5.4 states:

> (b)Entry Salary - The entry salary for any employee shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the mid-point of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the mid-point where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

As is made clear by the above stated Rule, CORR is not required to rehire Grievant at his former salary. This decision is a discretionary one. Accordingly, Grievant has not demonstrated any violation of Division of Personnel Rules.

Grievant has also asserted he has been subjected to discrimination. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination under W. Va. 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 the offered reasons are 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, 179 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).

Grievant has not established a prima facie case of discrimination as he has not been treated differently than other similarly situated employees. Grievant did note one employee who was rehired as a Case Manager at her former salary. Deputy Warden Coleman testified it was difficult to find experienced and qualified people to fill these classifications, and that is why she was rehired at her

former salary. There is not this level of difficulty in finding Correctional Officers. The evidence demonstrates all Correctional Officers are rehired at entry level salaries.

Grievant has also asserted the failure to rehire him at his former salary was retaliation. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store, supra; Gruen v. Bd. of Directors/Concord College, Docket No. 95- BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has failed to demonstrate he engaged in a protected activity. Accordingly, there can be no reprisal.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Division of Personnel Rule 5.4 indicates an employer has the discretion to hire an employee at greater than the entry level salary, but this is not mandatory.

3. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 6) of discrimination under W. Va. 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;
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> 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).

4. 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 the offered reasons are 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, 179 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).

5. Grievant has failed to demonstrate a prima facie case of discrimination.

6. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store, supra; Gruen v. Bd. of Directors/Concord College, Docket No. 95- BOD-281 (Mar. 6, 1997).

7. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

8. Grievant has not established a prima facie case of retaliation.

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. Theappealing 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 17, 2003

Footnote: 1

Grievant was represented by Jack Ferrell of the Communications Workers of America, and CORR was represented by Charles Houdyschell, Assistant Attorney General. Division of Personnel did not appear.

Footnote: 2

Grievant originally maintained he did not sign his offer of employment letter, thus he never accepted the salary he was offered even though he reported for work at the time designated and remained. At the Level IV hearing, Grievant testified he did not want the offer of employment withdrawn. Accordingly, this issue is resolved.

Footnote: 3

The rehire rate at MOCC is approximately fifty percent of the requests received.

Footnote: 4

Grievant testified he did not receive this letter, and did not know his starting salary until he arrived at orientation. It was unexplained how Grievant knew he was to attend orientation if he did not receive this letter.

Footnote: 5

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).

Footnote: 6

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).