JOHN DRAKE, CHARLES SHELTON,

SANDRA TIGHE, WILLIAM HALE,

SHERRY CLATWORTHY, and

WILLIAM KERNS,

Grievants,

v.

Docket No. 04-CORR-420

DIVISION OF CORRECTIONS/

NORTHERN CORRECTIONAL

CENTER and DIVISION OF

PERSONNEL,

Respondents.

DECISION

The grievants, John Drake, Charles Shelton, Sandra Tighe, William Hale, Sherry Clatworthy, and William Kerns (collectively "Grievants") are all employed by the Division of Corrections ("DOC") as Corrections Hearing Officers. Grievants are claiming discrimination because DOC sought, and received, permission to use a special plan of implementation in connection with changes to the Business Managers position in DOC, but did not pursue a similar implementation plan when the former Correctional Magistrate positions were reclassified as Corrections Hearing Officers. Because this grievance involves changes to the classification scheme and the application of Division of

Personnel ("Personnel") rules, Personnel has been included as a necessary party. For relief, Grievants seek a 15% pay increase from the date of their reclassification.

The hearing examiners lacked the authority to grant the underlying grievances at Levels I and II. At Level III, Charles Shelton, Sandra Tighe, William Hale, SherryClatworthy and William Kerns elected to join a Level IV appeal filed by John Drake. Before the grievances were consolidated, a Level III hearing had already been held on November 15, 2004, in Drake's grievance. The transcript of that hearing is included as part of the record at Level IV.

A Level IV hearing was held on February 1, 2005. Grievants, who were present in person, were represented by Grievant Shelton. DOC was represented by John Boothroyd, Assistant Attorney General. Personnel was represented by Lowell Basford. Proposed findings of fact and conclusions of law were submitted by all parties on or before March 4, 2005, at which time this grievance matured for decision.

This is not a disciplinary grievance. Therefore, Grievants bear the burden of proving their allegation of discrimination by a preponderance of the evidence. As discussed more fully below, Grievants were unable to meet this burden and, consequently, this grievance must be denied.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievants have worked for DOC for various periods of time. Each was formerly classified as a "Correctional Magistrate."

2 2. In July 2003, at DOC's instigation, the State Personnel Board reclassified the position of Correctional Magistrate to "Corrections Hearing Officer." Upon reclassification, the position moved from a pay grade 11 to a pay grade 14.

3 3. Pay grade 11 has a range of $22,476 through $38,400.

4 4. Pay grade 14 has a range of $25,452 through $47,088.

5 5. Any of Grievants whose salary was less than the minimum for pay grade 14 was moved up to a special hiring rate of $26,508.00 when the reclassification took effect. Those Grievants whose salary was above the minimum special hiring rate of $26,508.00 did not receive any increase in pay as a result of the reclassification.

6 6. With respect to reclassifying the Correctional Magistrate position, DOC “identified a need to upgrade the skills and competencies of employees involved in conducting administrative hearings for inmates at the state correctional facilities.” The records developed during those administrative hearings are subject to review by circuit courts, the Supreme Court of Appeals of West Virginia, and federal courts. As a consequence, DOC wanted to “achieve a more professional level of work in this regard.” Grievant's Exhibit 3 at Level III.

7 7. The purposes identified by DOC for reclassifying the Correctional Magistrate position were to increase the minimum qualifications needed for the position, expand the pool of potential applicants, and put them on a par with positions such as Corrections Unit Manager and Captain, both of which have levels of responsibility comparable to that of a Correctional Magistrate. Grievants' Exhibit 2 at Level IV.

8 8. DOC also obtained a change in pay grade for the newly created classification of Corrections Hearing Officer. This was needed because the pay grade for the Correctional Magistrate classification did not “adequately address the authority and responsibility inherent to the position. The proposed pay grade would address this inadequacy and provide an administrative career track[.]” Grievants' Exhibit 2 at Level IV.

9 9. Further, the proposed change in pay grade would bring salaries for Correctional Hearing Officers into greater alignment with salaries being offered for similar positions in the contiguous states of Ohio and Kentucky. Grievants' Exhibit 2 at Level IV.

10 10. In correspondence to Commissioner Rubenstein, dated November 14, 2003, Grievant Drake postulated that the reclassification, plus the higher pay grade, would “assist in job retention as well as recruitment of highly qualified, experienced employees for vacant positions in the future.” Grievant's Exhibit 5 at Level III.

11 11. In response to Grievant Drake's correspondence, Commissioner Rubenstein rejected Grievant Drake's suggestion that the reclassification of the Correctional Magistrate position should fall within the ambit of Personnel Rule 5.4(f)(2)(c). Grievant's Exhibit 6 at Level III. In circumstances where this rule is applied, the employer receives permission to set aside the normal rules about how salaries are adjusted when a reclassification takes effect. In this case, Grievants wanted DOC to obtain authority to award each of them a 15% increase in salary from the date the reclassification of their positions was implemented.

12 12. Commissioner Rubenstein informed Grievant Drake that DOC's “goal was to upgrade the position in terms of pay grade and to increase the experience requirements . . .. We wanted to elevate the position equal to that of a Captain or Unit Manager within the various correctional facilities. This goal was accomplished.” Grievant's Exhibit 6 at Level III.

13 13. Commissioner Rubenstein also explained that DOC had not invoked the provisions of Personnel Rule 5.4(f)(2)(c) with respect to the reclassification of theCorrectional Magistrates “because of budgetary considerations.” Grievant's Exhibit 6 at Level III.

14 14. In August 2004, DOC asked Personnel to establish “Corrections Business Manager” as a new classification to reflect the fact that the business functions in correctional institutions had grown increasingly complex. Whereas a bookkeeping background would previously suffice, applicants now need to have training and experience in professional accounting practices. A pay grade increase was needed to adequately compensate employees in those positions for the increase in the complexity of their duties.

15 15. The Equal Pay Commission, which was created by the Legislature to study gender-based pay inequities, (See footnote 1) reported that the Business Manager classification suffered on-going pay inequities.

16 16. In addition, DOC had concerns that some employees in the Business Manager positions were nearing retirement. DOC hoped that an increase in pay grade might entice some of the potential retirees to continue to work for another three years so that they could maximize their retirement benefits.

17 17. Before being reclassified, some vacancies for Business Manager positions had to be posted multiple times before they could be filled. (See footnote 2)

18 18. The Personnel Board approved DOC's request to create a new classification titled “Corrections Business Manager” at pay grade 15. Upon reclassification of the incumbents in the Business Manager positions to the new Corrections Business Managerclassification, the salaries of the incumbents were increased by 15% pay or raised to $32,488, whichever was greater.

19 19. The problems addressed by creation of the Corrections Business Manager classification, and the concomitant pay grade and salary changes, were 1) severe recruitment and retention problems with the Business Manager positions, 2) significant increases in the complexity of the budgeting and accounting work resulting from growth in inmate capacity, as well as the expansion

of educational and rehabilitative programs, and 3) excessively low entry level salaries (25% below other states) and average salaries (40% below other states) for these positions, as compared to salaries in the other states included in the Southeastern States Salary Survey. Grievant's Exhibit 2 at Level III (Proposal Number 2276).

20 20. Personnel conducted audits that verified the increased complexity of the work for which the Business Managers were responsible. Grievant's Exhibit 2 at Level III (Proposal Number 2276).

21 21. The Business Managers were “responsible for the management of accounting, budgeting, inventory, payroll and purchasing activities for institutions with as many as 350 employees and an annual budget of over $20 million. This is a highly responsible job in a decentralized setting and involves the supervision of multiple support units.” Grievant's Exhibit 2 at Level III (July 26, 2004 correspondence from Commissioner Rubenstein to Chairman Stump).

Discussion

Grievants claim that DOC discriminated against them by invoking the provisions of Personnel Rule 5.4(f)(2)(c) when the Business Manager position was reclassified toCorrections Business Managers but not when the Correctional Magistrate position was reclassified to Corrections Hearing Officer. Personnel Rule 5.4(f)(2)(c) provides that the Personnel “Board, by formal action, may approve or modify a plan of application on reclassification . . . based on documented recruitment and/or retention difficulties or consideration of equal treatment in terms of pay for reclassified employees.”

The normal rules are that, upon reclassification, there is no change in salary for an incumbent whose salary is above the new, applicable minimum or whose salary is above the new, applicable maximum. After reclassification, salaries that were below the minimum are raised to meet the minimum, whereas salaries that fall within the range for the applicable pay grade remain the same.

To invoke the provisions of Rule 5.4(f)(2)(c) to alter the normal rules for implementing a reclassification, an employer must establish that the position in question has suffered from “documented recruitment and/or retention difficulties” or that there are equal pay issues. DOC documented, to the Personnel Board's satisfaction, that Rule 5.4(f)(2)(c) was applicable to the reclassification of the Business Manager position due to recruitment and retention problems. Grievants do not take issue with the application of Rule 5.4(f)(2)(c) to the reclassification of the Business Manager position. (See footnote 3) Closing Statements at 1. Grievants claim that they were

victims of discrimination because DOC applied this rule to “the reclassification of the Business Managers and not to thereclassification of the Correctional Magistrates **when both reclassifications were done for the same reason**.” Closing Statements at 1 (emphasis added).

Discrimination is defined 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.” W. Va. Code § 29-6A-2(d). This same definition is found in the statutes relating to education employees. W. Va. Code § 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that “[t]he crux of such claims is that the complainant was treated differently than **similarly situated** employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added). Therefore, the initial question that must be resolved is whether Grievants established that they are similarly situated to those employees who were formerly classified as Business Managers.

As noted above, Grievants have asserted that both they and the Business Managers were reclassified for the same reasons. Specifically, Grievants argue that “the original intent of the reclassification [of the Correctional Magistrate position] was to increase the pay in order to retain individuals in the Correctional Magistrate position.” Closing Statements as 1. DOC does not concur. Nor do the documents submitted to the Personnel Board in connection with the reclassification of the Correctional Magistrate position support Grievants' contention on this point.

The goal of reclassifying Correctional Magistrates was to attract better-qualified applicants. It was, of course, necessary to raise the salary to help meet this goal. For instance, until the reclassification took effect, there would not have been any incentive foran experienced corrections officer who had reached the rank of captain to apply for a Correctional Magistrate vacancy. Taking such a position would have required the hypothetical captain to take a lower salary. After reclassification, a captain could apply for a Corrections Hearing Officer opening without facing the financial harm of moving to a lower pay grade.

Certainly one of the benefits of the reclassification is that former Correctional Magistrates either received a raise or have the potential to receive a higher salary as a Corrections Hearing Officer, due to the higher maximum salary available at pay grade 14. This may well cause incumbents to remain. It was not, however, the impetus for reclassifying the Correctional Magistrates. By contrast, retention of the incumbent Business Managers was one of the primary factors that motivated DOC to ask for

their reclassification to Corrections Business Managers.

The documents submitted to the Personnel Board demonstrate that the reclassifications were not for the same reasons. DOC had problems with recruitment and retention of Business Managers. These positions are critical to the on-going operation of the correctional facilities. Their duties had become increasingly complex, yet the Business Managers were horribly underpaid according to the information contained in the Southeastern States Salary Survey. Grievants failed to establish that DOC's request for reclassification to Corrections Hearing Officer was related to recruitment problems or retention problems. Nor did Grievants establish that such problems existed with respect to the Correctional Magistrate positions.

Basically, Grievants are attempting to second-guess the DOC's decision not to seek a special plan of implementation, pursuant to Personnel Rule 5.4(f)(2)(c), in connectionwith the reclassification of their positions. However, Grievants have failed to establish facts that would bring their positions within the ambit of Personnel Rule 5.4(f)(2)(c). In this respect they are not similarly situated to the employees who, prior to their reclassification, were Business Managers. DOC did not discriminate against Grievants when DOC did not ask the Personnel Board to apply a rule that is inapplicable to Grievants.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievants bear the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievants must prove their allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). “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 Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. The Personnel Board,

> by formal action, may approve or modify a plan of application on reclassification other than those described in subparagraphs 5.4.(f)2.a. and 5.4.(f)2.b. of this rule based on documented recruitment and/or retention difficulties or consideration of equal treatment in terms of pay for reclassified employees.

W. VA. CODE ST. R. § 143-1-5.4(f)(2)(c)(2003).

4 4. Discrimination is defined 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.” W. Va. Code § 29-6A-2(d).

5 5. The crux of a discrimination claim “is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

6 6. Grievants failed to prove that they were similarly situated to the Business Managers who were reclassified as Corrections Business Managers. They were not reclassified for the same reasons.

7 7. Unlike the Business Manager classification, there were no recruitment or retention problems with the Correctional Magistrate positions such that the provisions Personnel Rule 5.4(f)(2)(c) would apply and allow deviation from the normal rules governing salary adjustments upon reclassification.

8 8. In light of the fact that Grievants could not demonstrate that they were similarly situated to the employees with whom Grievants attempted to compare themselves, Grievants are unable to prove that they have suffered discrimination, as defined above.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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:

April 29, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

W. Va. Code § 21-5E-6.

Footnote: 2

Even with the changes that accompanied reclassification, it took DOC approximately six months to fill a Corrections Business Manager slot.

Footnote: 3

References to Grievants's post-hearing submission, which is titled "Closing Statements of Grievants Docket No. 04-CORR-420," shall appear as "Closing Statements at __."