THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

SHARI HATLEY and SARA TRADER,

Grievants,

v. **Docket No. 06-RJA-189**

Denise M. Spatafore

Administrative Law Judge

REGIONAL JAIL AND CORRECTIONAL

FACILITY AUTHORITY/TYGART

VALLEY REGIONAL JAIL,

Respondent.

DECISION

Shari Hatley and Sara Trader ("Grievants") initiated this proceeding on May 12, 2006, alleging entitlement to "equal pay for equal work" in their positions as Correctional Counselors at the Tygart Valley Regional Jail ("TVRJ"). After denials at the lower levels, Grievants appealed to level four on June 1, 2006. A hearing was conducted in Elkins, West Virginia, on September 20, 2006. Grievants were represented by counsel, William Nestor, and Respondent was represented by counsel, Chad Cardinal. The parties declined to submit written arguments, so this matter became mature for consideration at the conclusion of the level four hearing.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed at the TVRJ as Correctional Counselors. 2. Grievant Hatley

began her employment at TVRJ on May 1, 2005, at a starting salary of $23,800. Prior to being placed at TVRJ, while earning her bachelor's degree, she worked at another regional jail for three summers. Ms. Hatley spent one summer working as a counseling intern and two summers as a booking clerk. Booking clerks assist correctional officers with setting up basic information and supplies for incoming inmates.

3. Grievant Trader started at the TVRJ on June 1, 2005, at a salary of $23,800. Prior to that time, she worked for a county jail as a dispatcher for five years, and she also has a bachelor's degree.

4. Correctional Counselors are in pay grade 11, which has a salary range of $21,768 to $32,184.

5. Correctional Counselors have been hired at higher starting salaries than Grievants', due to recruitment and retention issues at certain facilities and in particular areas of the state.

6. Alicia Bryant was hired on March 1, 2006, as a Correctional Counselor at the Eastern Regional Jail ("ERJ"), located in Martinsburg, West Virginia, at a salary of $24,200. ERJ has the highest turnover of all the jails, due to its competition with the Washington, D.C., job market, along with the higher cost of living in that area.

7. Jamie Hall was hired to work at the North Central Regional Jail at a starting salary of $23,900. Ms. Hall had a bachelor's degree and a two-year business certificate, along with experience working as a supervisor at Glenville State College.

8. Wilson Van Adkins was hired as a Correctional Counselor at the Southwest Regional Jail on February 1, 2006, at a salary of $25,300. Mr. Adkins has almost twenty years of experience in corrections, both as correctional officer and as a counselor. He hadoriginally become a Counselor in 1998, but left the state for another job in 2001, and then returned this year. Mr. Adkins was one of the original employees of the Southwest Regional Jail when it opened in 1998.

9. Approximately three days prior to filing this grievance, Grievants discovered that the above-named individuals had been hired at salaries higher than theirs.

Discussion

As a preliminary issue, Respondent contends that this grievance is untimely, in that Grievants accepted their salaries at the time of their initial employment and were obligated to file any grievance regarding that salary within ten days. (See footnote 1) Where the employer seeks to have a grievance

dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. (See footnote 2) W. Va. Code § 29-6A-4 contains the same discovery rule found in the education grievance procedure, which has been interpreted to mean that, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts givingrise to the grievance." (See footnote 3) It is undisputed in this case that Grievants had no dispute with their salaries until they discovered that other new Correctional Counselors had been hired at higher starting salaries. Respondent has failed to introduce any evidence disputing Grievants' discovery of this information just prior to their grievance filing, so it has failed to establish the grievance is untimely.

In non-disciplinary matters, Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. (See footnote 4) Grievants argue that it is improper for newly-hired Correctional Counselors to be paid higher starting salaries than theirs. Although not articulated as such, this claim is tantamount to an allegation of salary discrimination. "'Discrimination' means 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." (See footnote 5) In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" (See footnote 6) In order to establish a claim of discrimination, an employee must establish a *prima facie* case. The grievant must show by a preponderance of the evidence: (See footnote 7)

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Grievants have strenuously argued that the differences in starting salaries violates the "equal pay

for equal work" principle. The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. (See footnote 8) 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. (See footnote 9) It is not discriminatory for employees in the same classification to be paid different salaries. (See footnote 10)

Additionally, 128 W. Va. C. St. R. 62, § 19.4 states any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .". As noted by the West Virginia Supreme Court of Appeals, pay differences may be "based on market forces, education, experience, recommendations, qualifications,meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." (See footnote 11)

In this case, Respondent has clearly established justification for higher starting salaries at some Regional Jail facilities, due to recruitment and retention difficulties and cost of living issues, along with individual employees' education and experience. Therefore, Grievants are not similarly situated to those employees. Grievants are being paid within the salary range assigned to their classification and, in fact, both received a starting salary at more than the base level, due to their individual education and experience. Accordingly, Grievants have failed to establish by a preponderance of the evidence that they are entitled to higher salaries because of the events cited in this grievance.

The following conclusions of law support this decision.

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." If proven, anuntimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch, supra*.

2. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." W. Va. Code § 29-6A-4(a).

3. Grievants filed their claim within ten days of discovering the grievable event, i.e. that other employees in their classification were hired at higher salaries.

4. In non-disciplinary matters Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

5. The concept of "equal pay for equal work" is embraced by W. Va. Code § 29- 6-10. *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); *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 Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). 6. It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't of Health and Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

7. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra; Jenkins v. Dep't of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003).

8. Respondent has established permissible justifications for paying some Correctional Counselors higher starting salaries than Grievants', due to market forces, education, qualifications, and experience.

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.

Date: October 18, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

See W. Va. Code § 29-6A-4(a).

Footnote: 2

Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Footnote: 3

Syl Pt. 1, Spahr v. Preston Co. Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Footnote: 4

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 5

W. Va. Code § 29-6A-2(d).

Footnote: 6

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

Footnote: 7

White, supra; Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 8

See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Footnote: 9

Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Footnote: 10

Thewes & Thompson v. Dep't of Health and Human Res./Pinecrest Hosp., Docket No. 02-HHR-366 (Sept. 18, 2003).

Footnote: 11

Largent, supra; Jenkins v. Dep't of Environmental Protection/Office of Mining and Reclamation, Docket No. 03-DEP-154 (Sept. 12, 2003).