WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOHN SHANNON and

STEPHEN HOTT,

Grievants,

v. **Docket No. 99-CORR-383**

Denise M. Spatafore

Administrative Law Judge

DIVISION OF CORRECTIONS/

PRUNTYTOWN CORRECTIONAL CENTER,

Respondent.

DISMISSAL ORDER

This grievance, filed by John Shannon and Stephen Hott in 1999, has been pending at level four an extensive period of time, due to Grievants' desire to monitor the outcome of other, similar grievances, which were pending at the circuit court level. A prehearing phone conference was conducted on February 15, 2007, by Administrative Law Judge Paul Marteney, and parties present included Grievant Shannon, James M. Haviland, Esquire (Grievants' counsel), and Division of Corrections' ("DOC") counsel, Charles Houdyschell. During that conference, it was decided that Respondent would file a Motion to Dismiss, which was received by this Grievance Board on February 21, 2007. Grievants' response to that motion was received on May 3, 2007. Due to the resignation of Judge Marteney, this matter was reassigned to the undersigned on June 28, 2007.

Synopsis

In the seemingly never-ending saga of the raises related to completion of the DOC Officers' Apprenticeship Program, Grievants allege they did not receive a separate 5%raise that other officers did. In this case, Grievant Shannon did, in fact, receive two separate raises for reallocation and completion of the program, and he settled his claim several years ago. Also, the claims of both grievants were deemed untimely, had been previously grieved, and neither Grievant was determined to be eligible for the raises under the criteria set by the Supreme Court in *Pritt v. West Virginia Division of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006).

Findings of Fact

1. Grievant Shannon filed this grievance on August 9, 1999, stating “I am filing under Livesay vs. Division of Corrections (Docket No. 96-CORR-459).” His requested relief was “a 5% pay raise plus back pay retroactive to April 1, 1994.”

2. Grievant Shannon began employment with DOC in June of 1990. He completed the Officers' Apprenticeship Program (“OAP”) on June 18, 1994. By effect of a “Personnel Action Form” dated July 19, 1994, he was reallocated from Correctional Officer 1 (“CO 1") to Correctional Officer 2 (“CO 2"). He received a 5% pay increase at that time, raising his salary from $17,124 to $17,988.

3. On February 23, 1995, Grievant Shannon filed a grievance claiming he “should have been “promoted from CO 1 to CO 2 as of April 1, 1994. I have also completed OJT program on May 31, 1994.” (See footnote 1)

4. Apparently as a result of the 1995 grievance referred to above, another “Personnel Action Form” was issued in March of 1995, reallocating Grievant to CO 2 andraising his salary from $17,124 to $17,988, due to completion of the OAP, effective March 16, 1995. (See footnote 2)

5. On April 21, 1995, Grievant Shannon filed another grievance, alleging “upon completion of OJT program I was not compensated in any way for completion.” He sought “back pay . . . to April 1, 1994.”

6. Grievant's April, 1995, grievance was settled by agreement executed on October 6, 1995, which stated that he would (again!) be reallocated to CO 2, with an adjustment of his salary to $18,264, effective September 1, 1995, and back pay in the amount of $1,233.79 from May 16, 1994, through August 31, 1995. Another Personnel Action Form was issued on August 30, 1995, adjusting

Grievant's salary as discussed in the agreement, stating as its justification "To adjust salary in accordance with Certificate date of completion of apprenticeship program . . . Completion date--June 13, 1994."

7. Grievant Shannon has received two separate salary increases since he completed the OAP in 1994, one for reallocation to CO 2 and a separate one for completion of the OAP.

8. Grievant Stephen Hott was hired by DOC on November 1, 1994, as a CO 1. He completed the OAP on May 23, 1997. Effective July 16, 1997, he was reallocated to CO 2, with a 5% salary increase.

9. Grievant Hott filed a grievance on January 15, 1998, claiming that other officers "completing the OAP have been compensated in form of a 5% pay raise. I havecompleted program and received nothing." As relief, he sought a 5% raise, retroactive to date of completion of the OAP. Apparently, a tentative settlement was reached at level three of that grievance, but it was never executed.

10. Grievant Hott filed the current grievance on March 11, 1999, requesting a 5% pay increase for completion of the OAP "per the Livesay decision."

(As background information and history, the following findings of fact are adopted in their entirety from the Decision issued in *Pritt v. Div. of Corr.*, Docket No. 02-CORR-064R (Feb. 9, 2007) ("Pritt 2")):

11. In 1994, the Division of Personnel ("DOP") implemented a new system whereby all state employees were reclassified. As part of the reclassification, which took effect on April 1, 1994, the previously voluntary OAP was made a mandatory requirement for all correctional officers employed by the Division of Corrections ("DOC").

12. When the 1994 reclassification project was implemented, all then-classified CO 1s who had completed the OAP were reallocated to CO 2. Consistent with DOP's administrative rule, these CO 1s were given salary upgrades to the entry level salary of a CO 2 if their salary was below that level, and no increase at all if their salary was above that level. (See footnote 3) This resulted in some officers receiving a five percent increase and others receiving less or nothing at all.

13. In the 1994 reclassification, officers who had already advanced beyond CO 1 and had completed the OAP or were scheduled to complete it within a few months afterimplementation of the reclassification project were not given any salary increase related to completion of the OAP.

14. After the 1994 reclassifications were implemented, some newly-reclassified CO 2s

complained about receiving no salary increase or an increase of less than five percent. (See footnote 4) To alleviate their dissatisfaction, DOC and DOP awarded an overall five percent increase, retroactive to April 1, 1994, to all officers who complained.

15. In 1995, a group of officers who had already completed or nearly completed the OAP at the time of the 1994 reclassification complained that it was discriminatory for DOC to grant five percent increases to the officers who had complained and not to them. In *Whorton v. Division of Corrections*, Docket No. 96-CORR-078 (June 25, 1996), this Grievance Board determined that DOC's practice was discriminatory, and that, although it was not legally obligated to grant a salary increase beyond what is addressed in DOP's regulations, it could not grant a raise for OAP completion to some officers and not to others. Therefore, the grievants were granted a five percent increase, retroactive to April 1, 1994, or their date of completion of the OAP.

16. The decision in *Whorton* was based upon the determination that DOC had decided to grant discretionary five percent salary increases to officers who had completed the OAP on or about the time of the 1994 reclassification. All of the *Whorton* grievants had attained a rank higher than CO 1 prior to April 1, 1994.

17. Effective April 1, 1998, DOC implemented a policy (then Policy Directive 442) which stated definitively that salary increases after completion of the OAP would only begranted because the employee had been reallocated, per DOP's rule regarding salary increases upon promotion.

18. This Grievance Board's final decision in *Pritt v. Division of Corrections*, Docket No. 02-CORR-064 (Apr. 3, 2003) ("Pritt 1") concluded that [the grievants] had failed to establish discrimination, because there was no factual evidence that any of them were employed by DOC in 1994, had completed the OAP prior to the 1998 policy change, and had failed to receive a separate salary increase. In fact, only two grievants provided factual information regarding their dates of employment, ranks, and dates of completion of the OAP, and there was no evidence submitted regarding the remaining grievants.

19. The Grievance Board's decision in *Pritt* 1, *supra*, was reversed by the Circuit Court of Randolph County. However, that finding was, in turn, reversed by the Supreme Court of Appeals, and the undersigned's original decision was reinstated. However, due to the fact that no evidence was submitted by the numerous grievants regarding their individual situations, the Supreme Court ordered the following:

> To the extent the remaining seventy-eight correctional officers who joined this grievance can establish that they were employed as correctional officers at a rank higher than CO 1 in 1994, that they completed the OAP after it became a mandatory requirement and that they have not received a five- percent salary increase for completion of the OAP, such individuals may be able to establish that they are similarly situated to those receiving such an increase and establish a *prima facie* case of discrimination.

Pritt, 218 W.Va. at ---, 630 S.E.2d at 55.

20. After remand, it was determined in *Pritt 2* that none of the grievants met the criteria established by the Supreme Court in its *Pritt* decision, as per the ruling in *Whorton, supra*, and the grievance was denied. 21. *Livesay v. Division of Corrections*, Docket No. 96-CORR-459 (Nov. 4, 1997), was filed by a group of correctional officers who believed they should have received a 5% increase for completion of the OAP. Although their individual circumstances were not discussed, it was concluded that, pursuant to the ruling in *Whorton, supra*, they had proven discrimination, and the grievance was granted.

Discussion

The instant grievance must be dismissed for several reasons, as will be discussed more fully below.

Timeliness and Res Judicata:

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). 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).

For each of the Grievants in the case, it is obvious that he filed his grievance as the result of dissatisfaction with the outcome when he had previously grieved the same issue. Grievant Shannon filed the same grievance *twice* in 1995 that he filed again in 1999. Similarly, Grievant Hott filed the

same grievance in 1998, a settlement apparently fellthrough, and he then refiled it in 1999. Both Grievants' claims are untimely, in that each knew of his reallocation/completion of the OAP at the time it occurred and the practice of awarding two separate increases, as evidenced by the previous grievances filed on the exact same issues asserted here. These claims are clearly untimely.

Moreover, Grievants' claims have previously been litigated and, in Grievant Shannon's instance, settled and dismissed. The maxim of *res judicata* is a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." *Black's Law Dictionary* 678 (Abridged 5th Ed. 1983). *See Meeks v. Kanawha County Bd. of Educ.*, Docket No. 96-20-095, (Feb. 28, 1997); *Woodall v. W. Va. Dep't of Transp.*, Docket No. 93-DOH-393 (Feb. 2, 1994); *Ramsey v. W. Va. Dep't of Health & Human Serv.*, Docket No. 90-H-478 (July 31, 1991).

In Grievant Shannon's case, he entered into a valid settlement of his claim of separate 5% raises for completion of the OAP and reallocation to CO 2, thus barring his pursuit of the instant grievance on the exact same issues. As to Grievant Hott, he pursued the same claims through level three, an apparent settlement agreement fell through, and he did not elect to pursue the grievance to the next level.

Settlement:

As discussed above, Grievant Shannon executed a settlement agreement, granting him a separate 5% increase for completion of the OAP, in 1995. The law favors andencourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994). This Grievance Board recognizes this principle, and settlement agreements are upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. *Hedrick v. Dep't of Health and Human Res.*, Docket No. 05-HHR-226 (Nov. 8, 2005); *Adkins v. Logan County Bd. of Educ.*, Docket No. 97-23-216 (Sept. 29, 1997); *Vance v. Logan County Bd. of Educ.*, Docket No. 95-23-190 (Mar. 15, 1996). There is no evidence of that here, so Grievant Shannon's claim is also barred for that reason.

Pritt Criteria:

Similarly, and probably most importantly, both Grievants' claims are unsustainable under the criteria set forth by the Supreme Court in *Pritt, supra*. As discussed in *Pritt 2*, “the only 'similarly situated' Grievants would have been employed at a rank higher than CO 1 when the 1994 reclassifications occurred and did not receive a separate salary increase for their completion of the OAP.” Grievants argue that none of the *Pritt* rulings apply here, because their claims are based upon DOC's practice of awarding two salary increases, so their theory relies on “equal pay for equal work,” rather than discrimination.

Grievant's argument simply does not hold water, because each of their grievance statements alleges that other officers received something which they did not, and their grievances were clearly prompted by the relief granted to others in *Whorton* and *Livesay*. Discrimination allegations have as their basis “differences in treatment of employees unless such differences are related to . . . actual job responsibilities,” as set forth in W. Va. Code § 29-6A-2(d). Further, as more fully discussed by the Supreme Court in *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” In turn, in the *Pritt* decision, the Court determined that only those grievants meeting the criteria previously discussed would be similarly situated for purposes of proving discrimination.

Clearly, neither Grievant is similarly situated to the officers in *Whorton*, pursuant to the *Pritt* Supreme Court decision. Neither was employed at a rank higher than CO 1 at the time of the 1994 reclassifications, and Grievant Shott was not even employed by DOC until long after the reclassifications had been completed. In addition, as with many of the Grievants in *Pritt 2*, although not eligible for the raise pursuant to *Pritt*, Grievant Shannon settled his claims and received back pay, barring any additional relief.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. 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).

2. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a

preponderance of the evidence is upon the party asserting thegrievance 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).

3. This grievance was not filed within ten days of the event upon which it was based, so it is untimely.

4. The maxim of *res judicata* is a well-established legal doctrine stating that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties to that proceeding and, as to those same parties, constitutes "an absolute bar to a subsequent action involving the same claim, demand or cause of action." Black's Law Dictionary 678 (Abridged 5th Ed. 1983). *See Meeks v. Kanawha County Bd. of Educ.*, Docket No. 96-20-095, (Feb. 28, 1997); *Woodall v. W. Va. Dep't of Transp.*, Docket No. 93-DOH-393 (Feb. 2, 1994); *Ramsey v. W. Va. Dep't of Health & Human Serv.*, Docket No. 90-H-478 (July 31, 1991).

5. This grievance is barred by the doctrine of *res judicata.*

6. In order to be eligible for two separate pay increases for reallocation to CO 2 and for completion of the Officers' Apprenticeship Program, an employee must establish the following:

a. that he was employed as a correctional officer at a rank higher than CO 1 on April 1, 1994;

b. that he completed the OAP after it became a mandatory requirement; and

c. that he has not received a five percent salary increase for completion of the OAP.

Pritt v. West Virginia Division of Corrections, 218 W. Va. 739, 630 S.E.2d 49 (2006). 7. Grievants do not meet the eligibility criteria for being granted a separate salary increase, pursuant to the reasoning in *Pritt*, *supra*.

For all of the foregoing reasons, Respondent's motion to dismiss is hereby **GRANTED**, and this matter is hereby **DISMISSED** from the dockets of this Grievance Board.

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. *See* W. Va. Code § 29-6A-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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: July 16, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It is assumed that Grievant's references to "OJT" refer to the Officers' Apprenticeship Program, as there is no other formalized training program for correctional officers.

Footnote: 2

Although there is no explanation for why this was done twice, the undersigned can only conclude that some error occurred in the processing of the original form, and Grievant's classification and salary had not changed in 1994.

Footnote: 3

DOP's rule provides that, upon promotion, an employee whose salary falls within the range for the new pay grade shall receive an increase of one increment, which is five percent.

Footnote: 4

These officers were CO 1s prior to the reclassification, and became CO 2s on April 1, 1994, when all employees were reclassified under the new system.