THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

CECIL PRITT, et al.,

Grievants,

v. **Docket No. 02-CORR-064R**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

DECISION

This matter has been remanded to this Grievance Board for further proceedings in accordance with the Supreme Court's decision in *Pritt v. West Virginia Division of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006). Pursuant to that decision, the parties agreed that this matter could be submitted for a decision based on agreed-upon documentary evidence submitted by the parties, along with written fact/law proposals. The documents were received by the undersigned on August 28, 2006. Thereafter, the parties agreed to submit their fact/law proposals by October 18, 2006. After Respondent filed its submission, Grievants' counsel requested an extension of time in which to submit their proposals. With no objection from Respondent, Grievants were given until January 19, 2007, to file their proposals, but no such submission was ever received by the undersigned. Accordingly, this matter became mature for consideration on January 19, 2007, the deadline for Grievants' submission. (See footnote 1)

Synopsis

On remand from the Supreme Court of Appeals, 78 grievants were allowed the opportunity to demonstrate that they were entitled to a five percent salary increase for completion of the Officer Apprenticeship Program ("OAP"), in accordance with this Grievance Board's previous ruling in *Whorton v. Division of Corrections*, Docket No. 96- CORR-078 (June 25, 1996). Per the Court's ruling, Grievants were to prove that they were employed as correctional officers at a rank higher than CO 1 (Correctional Officer 1) in 1994, and did not receive a salary increase for completing theOAP. None of the grievants have established that these facts apply to them, so they are not entitled to any additional salary increase.

The following findings of fact include the material facts which have been proven by the evidence submitted by the parties, along with the procedural history of this matter.

Findings of Fact

1. 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").

2. 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 2) This resulted in some officers receiving a five percent increase and others receiving less or nothing at all.

3. 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 after implementation of the reclassification project were not given any salary increase related to completion of the OAP.

4. 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 3) To alleviate their dissatisfaction, DOC and DOP awarded an overall five percent increase, retroactive to April 1, 1994, to all officers who complained.

5. 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*, *supra*, 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. 6. 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.

7. 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 be granted because the employee had been reallocated, per DOP's rule regarding salary increases upon promotion.

8. The instant grievance began in 2002 when numerous correctional officers (See footnote 4) employed at Huttonsville Correctional Center claimed that they also should receive a separate salary increase, simply as a result of completing the OAP, in additional to any raise they may have received at the time of reallocation to a higher rank.

9. In the original grievance, Grievants compared themselves to nine other correctional officers who received a five percent raise after completing the OAP, pursuant to *Whorton*, *supra*. These employees were all classified as at least CO 2s or higher *before* April 1, 1994, and did not receive a salary increase when they were reclassified. Each of them completed the OAP after it became a mandatory requirement in 1994.

10. This Grievance Board's final decision in *Pritt v. Division of Corrections*, Docket No. 02-CORR-064 (Apr. 3, 2003) concluded that 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 toreceive 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.

11. The Grievance Board's decision in *Pritt*, *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.

12. After this case was remanded to the Grievance Board for further proceedings, consistent with the requirements set forth above, Respondent provided to Grievant's counsel and the undersigned information regarding each Grievants' dates of employment, salary and rank history, date of completion of the OAP, and other pertinent information.

13. Grievant's counsel provided the following list of Grievants who contend that they are eligible for the salary increase as set forth in the Supreme Court's decision:

Grover Rosencrance Jeffrey Booth John K. Miller Thomas Wratchford, Sr. Lena M. Scott Thomas Chenoweth Steve Channell	John L. Moore Brenda Gragg Randall Brake Michael Currence
Sharon Armstrong Gary Wileman William Boyles Jeff Roy Raymond Poe Glen Johnson, Jr. Glen Johnson, Sr.	Richard Stasny Michael Howes Joe Kisner Adam Smith

14. Grievants Booth, Armstrong, Wileman, Stasny, and Smith were not employed by DOC in any capacity on April 1, 1994.

15. Grievants Wratchford, Scott, Chenoweth, Moore, Boyles, Roy, and Howes were employed at the rank of CO 1 both before and after the 1994 reclassification was implemented.

16. Grievants Gragg and Glen Johnson, Jr., were reclassified to the rank of CO 2 on April 1, 1994, and received at least a seven percent salary increase upon reallocation.

17. Grievants Miller, Channel, Brake, and Poe were classified as CO 1s prior to the reclassification project, and they were reallocated to higher-ranking positions on April 1, 1994, without receiving any increase in salary. However, each of these grievants executed a "Settlement Agreement" in 1996, granting them back pay to April 1, 1994, "in accordance with [*Whorton*] granting the appropriate backpay from April, 1994 to the date that the five percent increase was granted due to the completion of the [OAP]."

18. Grievant Currence was reclassified from CO 1 to CO 3 on April 1, 1994, and his salary was increased to the minimum for the new classification. In 1996, he executed a "Settlement Agreement" granting him an additional five percent increase and back pay to April 1, 1994, pursuant to *Whorton*, for completion of the OAP.

19. Grievant Rosencrance was reclassified from CO 2 to CO 4 on April 1, 1994, and received a salary increase to the minimum for his new classification. In 1996, heexecuted a "Settlement Agreement" granting him an additional five percent increase and back pay to April 1, 1994, pursuant to *Whorton*, for completion of the OAP.

20. Grievant Glenn Johnson Sr. was reclassified from CO 2 to CO 4 on April 1, 1994, with no attendant salary increase. In 1996, he executed a "Settlement Agreement" granting him a five percent increase and back pay to April 1, 1994, pursuant to *Whorton*, for completion of the OAP.

21. Grievant Kisner was reclassified from CO 1 to CO 2 on April 1, 1994, with no attendant salary increase. He completed the OAP in January of 1997, but did not receive a certificate of completion until several months later. Mr. Kisner filed a grievance, which was settled in December of 1997, whereby he was given a five percent salary increase with back pay to the date he completed the OAP, "in accordance with Whorton[.]"

22. All Grievants who were reclassified to higher ranks on April 1, 1994, and have received back pay pursuant to *Whorton* had either completed the OAP prior to 1994 or completed it after it became a mandatory requirement.

Discussion

The specific instructions from the Supreme Court in this case were for this Grievance Board to

make “a determination as to whether the remaining 78 grievants are similarly situated to those receiving a five percent salary increase for completion of the OAP.” *Pritt*, 218 W.Va. at ---, 630 S.E.2d at 55. Of course, this direction was conditioned upon the very specific requirements the Court set forth in its decision, in that the only “similarly situated” Grievants would have been employed at a rank higher than CO 1 whenthe 1994 reclassifications occurred and did not receive a separate salary increase for their completion of the OAP.

Before discussing the specific evidence in this case, it would be edifying to briefly review the applicable legal standards. In non-disciplinary matters, a grievant must prove all the allegations constituting 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, 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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

The basis for the Supreme Court's direction that Grievants' be evaluated as to whether they are similarly situated to certain other individuals is due to the legal standard for proving discrimination under the grievance statutes. W. Va. Code § 29-6A-2(d) defines discrimination 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." 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[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

A grievant must establish a case of discrimination by showing:(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.

White, *supra*; *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

A review of the documentation submitted clearly reveals that only two of the 22 Grievants on counsel's “eligible” list meet even one of the criteria set forth in the Supreme Court's decision. Pursuant to the Court's directive that Grievants must establish that they were employed at a rank higher than CO 1 prior to the 1994 reclassifications, (See footnote 5) which was the situation for all of the individuals involved in *Whorton*, only Grievants Rosencrance and Johnson, Sr., meet that criterion. However, both of those individuals executed settlement agreements granting them a five percent increase with back pay to April 1, 1994, specifically citing *Whorton* as the basis for the increase.

The law favors and encourages 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 unlessit 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).

Since Grievants have submitted no legal argument in this case, the undersigned has no basis for finding or even suspecting that they contend that their settlement agreements were unfair or illegal in some manner. Moreover, in consideration of the standards set forth in the Supreme Court's decision, the only Grievants who could have been eligible for the OAP raise have now received it, with back pay to the appropriate date of April 1, 1994. Grievants would be entitled to no additional relief beyond what they received pursuant to those settlements.

As to the remaining twenty Grievants, none are even eligible for consideration for the *Whorton* raise. As set forth in the above findings, they were either not employed at all in 1994 or were only employed as CO 1s at the time of the reclassifications. In addition, many of them, although not eligible for the raise pursuant to the Supreme Court's criteria, have settled their claims and received back pay to April 1, 1994. Therefore, they are not entitled to any additional relief here.

The following conclusions of law support this Decision.

Conclusions of Law

1. In non-disciplinary matters, a grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Procedural Rules of theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, 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).

2. A grievant must establish a case of discrimination, pursuant to W. Va. Code § 29-6A-2(d), by showing:

(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.

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

3. Grievants have failed to establish that they were similarly situated to other employees who received a salary increase for completion of the Officers Apprenticeship Program, as directed by the Supreme Court in *Pritt v. West Virginia Division of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006).

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 thegrievance 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. 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: February 9, 2007 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants were represented by counsel, Kelly R. Reed, and the Division of Corrections was represented by John H. Boothroyd, Assistant Attorney General.

Footnote: 2

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: 3

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.

Footnote: 4

By the time the grievance reached level four, there were approximately 80 named grievants.

Footnote: 5

Construing the Supreme Court's decision together with the facts and reasoning set forth in Whorton, supra, it is clear that the Court meant for eligible grievants to have already been at a rank higher than CO 1 on April 1, 1994, before the reclassifications took effect, as was the situation for the Whorton grievants.