THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MICHELLE PERRY, et al.,

Grievants,

v. DOCKET NO. 07-DJS-343

WEST VIRGINIA DIVISION OF

JUVENILE SERVICES and WEST

VIRGINIA DIVISION OF

PERSONNEL,

Respondents.

DECISION

There are nine Grievants in this matter and they are all employed as Correctional Officers by the West Virginia Division of Juvenile Services ("DJS"). (See footnote 1) Grievants are employed at different juvenile detention facilities throughout the state. On June 28, 2007, each Grievant filed a level one grievance form alleging that they were not properly reallocated to Correctional Officer II ("CO 2") after one year of service as a Correctional Officer I ("CO 1"). Grievants allege that they are entitled to the reallocation by DJS Policy Directive 4.10. As a remedy each Grievant seeks to have his/her position retroactively reallocated to the classification of CO 2, as of the one year anniversary date of employment as a CO 1. (See footnote 2) Additionally, each Grievant seeks to be paid the differencebetween his/her pay as a CO 1 and a CO 2 from their anniversary date of being hired as a CO 1 to the date he/she was reallocated to a CO 2, plus interest.

The grievances were denied at the lower levels. The hearing officers all found that they did not have authority to resolve the grievances. All Grievants appealed to level four before the Public Employees Grievance Board. The Division of Personnel ("DOP") was joined as a party because the grievances deal with classification and reallocation. Upon the motion of the DJS all the grievances were consolidated into this single action. (See footnote 3)

On October 29, 2008, a telephone conference was held at the Charleston, West Virginia Office of the Grievance Board, with the representatives of all the parties participating from their respective offices. At that time, the parties jointly submitted a set of stipulations and asked that the grievances be decided based upon the record below and the stipulations of the parties. This action became mature at that time.

Synopsis

There are three requirements for moving from the CO 1 classification to the CO 2 classification: completion of one year of service as a CO 1, completion of forty hours of approved in service training and completion of the Division of Juvenile Services Academy. By the time all Grievants had completed their one year of service they had all completed their forty hours in service requirement, and had been ready and available to complete the Service Academy requirement. Through no fault of the Grievants, the DJS failed toschedule dates for Grievants to attend the Academy during their first year of service. Grievants allege that they should not be denied an advancement in their classification because the DJS failed to give them the opportunity to meet the requirements for reallocation. They ask that their grievances be granted pursuant to the authority of the Grievance Board Administrative Law Judges to grant “fair and equitable” relief. Given the specific facts of this set of grievances they are granted.

Findings of Fact

The following findings of fact are based upon the stipulations of the parties.

1. Grievants are nine correctional officers employed by DJS, assigned to various juvenile detention facilities around the state. They were all initially hired in the CO 1 classification.

2. In order to advance from the CO 1 classification to the CO 2 classification a correctional officer must complete three requirements:

1 *

One year as a CO 1,

2 *

40 hours of approved in service credit, and,

3 *

Attending the Division of Juvenile Services Academy. (See footnote 4)

3. On the date that each Grievant had completed one year of service for DJS as a CO 1, each Grievant had also completed at least 40 hours of in service training and had been available for attendance at the Service Academy.

4. DJS did not schedule the nine Grievants to attend the Academy until after their one year anniversary as a CO 1 had passed. The failure to schedule the Grievantsto attend the Academy within that time period was not the fault of the Grievants but an oversight on the part of the DJS.

5. As a result of the oversight, the Grievants were not able to be reallocated to the CO 2 classification and receive the related pay increase at the completion of one year of employment as a CO 1.

6. Grievants have all subsequently attended the Service Academy and their positions have been reallocated to CO 2. They seek to have their reallocation and the accompanying pay increases retroactively applied to the date they each completed one year of service as a CO 1.

7. Had Grievant's positions been reallocated at the completion of one year of employment in the positions of CO1, they would have received additional monies as follows. These amounts do not include interest.

1 *

Vicki Gobel Molina $ 237.50

2 *

William Woody $ 237.50

3 *

Juanita Clark $ 522.50

4 *

Jon Anderson $ 427.50

5 *

Jeremy Mitchell $ 133.50

6 *

Michelle Perry $ 142.50

7 *

Marjorie Rock $ 142.50

8 *

Idris Shaffer $ 142.50

9 *

James Sloan $ 133.50

10 *

Jeremy Plybon $ 142.50

11 *

Matthew Tomblin $ 142.50

Discussion

These grievances do not involve disciplinary matters so Grievants have the burden of proving their grievances by a preponderance of the evidence. *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). The facts in this case are stipulated so there is no factual dispute.

Grievants did everything within their control to complete all the requirements to be reallocated to the classification of CO 2 on the date that each of them had served as a CO 1 for one year. The parties agree that the only reason that Grievants did not attend the required Academy was that DJS did not schedule a time for them to attend during Grievants' first year of employment. Grievants could not attend the Academy on their own without being scheduled to attend by the DJS. DJS and DOP

make it clear in the stipulations of the parties, that they do not believe that they have the authority under their respective rules to correct this oversight. They point to the authority of the Grievance Board to grant relief which is fair and equitable, set out in W. Va. Code § 29-6A-5(d) (See footnote 5), as a way to remedy the oversight that led to the Grievants not being upgraded to CO 2s on the anniversary date of their employment as correctional officers with the DJS. This Board has exercised its authority to grant relief to grievants in instances where it was apparent from the facts of the particular case that employees were being denied a benefit or were being punished, through no fault of their own. *See Cook et al. v. Dep't of Transp. / Div. of Motor Vehicles,* Docket No. 06-DMV-131 (Dec. 7, 2006); (employees did not receive a promised raise after receiving cross training, because of an alleged rule change); *Swanson v. Div. of Motor Vehicles,* Docket No. 06-DMV-065, (July 31, 2006); (employee was charged sick leave even though it was the workplace that made her ill); and *Nadler v. W. Va. Univ.*, Docket No. 05-HE-455 (June 22, 2006); (an employee received a reprimand that was based solely on speculation). This is a similar case. All parties agree that Grievants would have been reallocated to the CO 2 classification except for the failure of DJS to schedule attendance at the Academy for them. Under normal circumstances CO1s are scheduled to attend the Academy within their first year of employment and this attendance is not an obstacle to their reallocation on their anniversary date. It is fundamentally unfair for these Grievants to be denied the reallocation to CO 2 after one year of serving as a CO 1, when they have done everything in their power to meet the conditions on the reallocation.

W. Va. Code § 29-6A-5 states, "That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole." Because Grievants did everything in their power to qualify for the reallocation to CO 2 after one year of serving as a CO 1, it is appropriate that they be made whole for the oversight of the DJS for failing to schedule them to attend the Academy within that period of time. They can be made whole by the following: a) retroactively reallocating their positions to the CO 2 classification as of the date that each Grievant hadworked for DJS for one year as a CO 1; and, b) paying them, for the period starting on their employment anniversary date to the date they were actually reallocated to the CO 2 classification, the difference between the pay they received as a CO 1 and what they would have received as a CO 2, plus interest. The grievances are granted in order to provide the Grievants with that relief.

Conclusions of Law

1 1. This grievance does not involve a disciplinary matter so Grievants have the burden of proving their grievance by a preponderance of the evidence. *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2 2. Grievants met their burden of showing through stipulation of facts that they had done everything available to them to meet the criteria for allocation to CO 2 on the anniversary date of their employment as a correctional officer. The only thing that kept them from being reallocated to the CO 2 classification was the oversight of the DJS.

3. W. Va. Code § 29-6A-5(b) allows an Administrative Law Judge to “provide relief as is determined fair and equitable.” *Nadler v. W. Va. Univ.,* Docket No. 05-HE-455 (June 22, 2006).

Accordingly, the grievance is GRANTED. The Respondents are ordered to retroactively reallocate each Grievant to the CO 2 classification as of the date when each Grievant had been employed as a CO 1 by the DJS for one year. The Respondents are further ordered to pay each Grievant, for the period starting on their employment anniversary date to the date they were actually reallocated to the CO 2 classification, the difference between the pay they received as a CO 1 and the pay they would have received as a CO 2. Finally, the Respondents are ordered to pay to each Grievant appropriate statutory interest on the back pay award.

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 (*See Footnote 2)*. Neither the West Virginia Public 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: November 7, 2008

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WILLIAM B. MCGINLEY

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The Grievants' names are: Vicki Gobel Molina, William Woody, Juanita Clark, Jon Anderson, Jeremy Mitchell, Michelle Perry, Marjorie Rock, Idris Shaffer, James Sloan, Jeremy Plybon and Matthew Tomblin.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decidedunder the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

Grievants are represented by Elaine A. Harris, CWA International Representative,
DSJ is represented by Stephen R. Compton, Esquire and DOP is represented by Karen O'Sullivan Thornton, Esquire. 2

Footnote: 4

See Juvenile Services Policy Directive 4.10 and DOP Classification and Compensation Plan, Correctional Officer 2 Classification.

Footnote: 5

W. Va. Code § 29-6A-5(b) provided in pertinent part the following:
"Hearing examiners may provide relief as is determined fair and equitable in accordance with the rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole." This statute has been repealed, but it is still controlling authority in this case. See Footnote 2 herein.