

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LINDSEY GREGORY and MEREDITH RARDIN,  
Grievants,**

**v.**

**Docket No. 2018-0179-CONS**

**DIVISION OF JUVENILE SERVICES/  
JAMES H. MORTON JUVENILE CENTER,  
Respondents.**

## **DECISION**

Grievants, Lindsey Gregory and Meredith Rardin, are both employed by Respondent, Division of Juvenile Services at the James H. Morton Juvenile Center ("DJS"). Ms. Gregory is a Correctional Case Manager and Ms. Rardin is a Correctional Counselor 2. Ms. Gregory filed a grievance against Respondent on or about July 28, 2017, at Docket No. 2018-0167-MAPS, stating,

On 27 July 2017, all state employees received an email stating Correctional Officer 1-7 will be receiving a \$1.00 per hour pay increase. I am a Correctional Case Manager and have 11 years in the Corrections Field, with the State of West Virginia. Six of my 11 years of experience, I served as a Correctional Officer. I'm currently a supervisor within my facility and have worked my way up the chain of (see attached page) command within my years of service. ...<sup>1</sup>

Ms. Rardin filed a grievance against Respondent on or about July 31, 2017, at Docket No. 2018-0168-MAPS, stating,

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<sup>1</sup> The remainder of the grievance statement, due to its length, is herein incorporated by reference. It provides details to support Grievant's assertion that she is entitled to the raise that only the Correctional Officer's received.

On 27 July 2017, all state employees received an email stating Correctional Officer 1-7 will be receiving a \$1.00 per hour pay increase. I am a Correctional Counselor 2 and have six years in the Corrections Field ... Since I am not included in the raise, a Correctional Officer 2 will be making \$176 less than my regular pay (CO2 is a pay grade lower than a CC2) I feel that this is unfair, that someone with a year under their belt would be making almost as much money as a six-year veteran...<sup>2</sup>

The relief sought in both grievances is:

I would like to be included in the recent raise for Correctional Officer 1-7, that is scheduled to take effect 02 September 2017.

As these two grievances were essentially the same and requested the same relief, they were consolidated at Docket No. 2018-0179-CONS. A Level 1 conference was held on the consolidated grievances on or about August 3, 2017. This grievance proceeded to Level 2 on October 2, 2017. A Level 3 hearing was subsequently held before the undersigned on November 28, 2017. At the Level 3 hearing, Grievants appeared *pro se* and Celeste Webb Barber, Assistant Attorney General, represented Respondent DJS. At the conclusion of the Level 3 hearing, Respondent agreed to submit a post-hearing argument, which was received on December 28, 2017, upon which date this matter became mature for decision.

### **Synopsis**

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<sup>2</sup> The remainder of the grievance statement, due to its length, is herein incorporated by reference. It provides details to support Grievant's assertion that she is entitled to the raise that only the Correctional Officer's received.

Grievants both work for Respondent, one as a Correctional Case Manager and the other as a Correctional Counselor 2. Grievants assert that they should have received the same raise that Correctional Officers recently received, essentially asserting they were discriminated against because they were excluded from this pay increase. Grievants presented evidence attempting to prove that they are entitled to this raise due to the similarities between their work and the Correctional Officers' work and because they are exposed to some of the same type of risks as the Correctional Officers. The record established that the one dollar per hour raise given to COs in particular was reasonably related to the State correctional system's critical need to attract and retain COs to fill the numerous vacant CO positions within the system. Moreover, a review of the classification specifications for the positions that Grievants occupied plainly showed that the nature of their work differed substantially from the CO's work. Additionally, Respondent DJS did not have the authority to provide this discretionary pay increase to Grievants. In summary, Grievants failed to prove that they were discriminated against when they were excluded from the pay raise that was awarded solely to Correctional Officers, or that Respondent acted arbitrarily or capriciously or abused its discretion in connection with the pay raise that was provided exclusively to the COs.

The following facts are based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant Ms. Gregory is presently a Correctional Case Manager, employed by DJS at the James H. Morton Juvenile Center ("Juvenile Center"). Ms. Gregory has been employed with DJS for approximately eleven (11) years.

2. Grievant Ms. Rardin is presently employed by DJS as a Correctional Counselor 2, also working at the Juvenile Center. She has worked for DJS for approximately six (6) years.

3. Grievants have previously worked as Correctional Officers ("COs") for the State of West Virginia.

4. In their current positions at the Juvenile Center, Grievants interact with the same resident population with whom the COs at the Juvenile Center interact. Grievants must sometimes work alone with members of this population. As a consequence of their work, Grievants are exposed to some of the same physical risks as the Correctional Officers.

5. Correctional Case Managers and Correctional Counselors 2 undergo the same training as Correctional Officers.

6. Correctional Case Managers and Correctional Counselors 2, like Correctional Officers, are "essential employees" of Respondent, meaning that they are required to provide coverage to the facilities in which they work on weekends, holidays, during states of emergency, etc., as a requirement of their positions.

7. Pursuant to the job classification specifications of the Correctional Counselor 2, as described under "Nature of Work," the Correctional Counselor 2, "... performs full-performance level work by providing a variety of counseling and psychological services for the inmate population of the correctional facility. Areas of specialization at assigned facility may include vocational counseling, diagnostic testing and evaluation, substance abuse counseling, and/or guidance for inmates on work release." Under "Examples of Work," *inter alia*, the Correctional Counselor 2 "[m]ay assist

correctional officers and "counsels inmates to facilitate inmates' treatment and identify disturbed and/or potentially suicidal inmates," as well as, "conducts clinical interviews, administers and scores psychological tests and prepares psychological evaluations for committed inmates ...". (Grievants' Exhibit No. 3)

8. Pursuant to the job classification specifications of the Corrections Case Manager, he/she must provide "services to the assigned caseload of inmates living in the unit. The work of the unit involves providing security, inmate counseling, treatment services, developing case histories and recommendations regarding inmate behavior and performance, controlling inmate movement, and acting as role models for the inmates." Under "Examples of Work," the Corrections Case Manager, *inter alia*, "[m]eets with the inmate periodically to discuss the inmate's progress and attitude or any particular problem within the facility or in selecting an appropriate program" and "[g]uides a group of inmates in identifying individual or group problems that may affect behavior and attitudes." services to the assigned caseload of inmates living in the unit. The work of the unit involves providing security ...". (Grievants' Exhibit No. 3)

9. Pursuant to the "Nature of Work" section of the classification specifications for CO 2, the CO 2 performs " ... journey level Correctional Officer work in enforcing rules, regulations and state law necessary for control and management of offenders in the maintenance of public safety. Among his/her "Essential Job Functions," the Correctional Officer, "[c]onducts/assists with offender intake/discharge procedures; observes, monitors and supervises offenders to detect unusual or prohibited behavior and maintains custody and control within the correctional facility," "performs counts at regular, or other, intervals to ensure offender accountability; transports offenders to and from correctional

facilities; searches persons, personal property and areas; instructs and supervises offenders in performing assigned tasks,” and “[h]andles and operates security/communications equipment and/or firearms as directed in a manner which is consistent with policy, procedure and state law and which ensures public safety.”

10. On July 27, 2017, the Cabinet Secretary of the Department of Military Affairs and Public Safety, Mr. Jeff S. Sandy, initiated a one dollar per hour pay increase for agency Correctional Officers because recruiting and retaining COs is a critical issue for state-run corrections facilities, given that over eighty percent (80%) of correctional vacancies, as of July 27, 2017, were for Correctional Officers. (Respondent's Exhibits 1 and 2).

11. This raise was authorized for Correctional Officers only.

12. Mr. Denny Dodson, acting interim DJS Director, expressed his desire to secure a pay raise for all DJS employees, but it is not within his power to provide a discretionary pay raise for all.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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). A preponderance “is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it.” *Petry v. Kanawha County Bd. of Educ.*,

Docket No. 96-20-380 (Mar. 18, 1997). “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. Health and Human Res.*, Docket No 92-HHR-486 (May 17, 1993).

The *pro se* Grievants essentially claim that they are entitled to the same raise that the Correctional Officers received because their work is similar to the work of Correctional Officers and they are exposed to some of the same risks as Correctional Officers. Respondent replies that Cabinet Secretary Sandy’s pay raise initiative was applicable to only Correctional Officer positions. In addition, Respondent introduced evidence showing that only COs were included in the pay raise because recruiting and retaining COs is a critical issue for relevant state-run facilities, given that over eighty percent (80%) of correctional vacancies, as of July 27, 2017, were for Correctional Officers. Respondent correctly asserts that it does not have authority to grant discretionary pay raises to non-uniformed employees such as Grievants, and that the West Virginia Division of Personnel must authorize such raise increases.<sup>3</sup>

Discrimination is defined at WEST VIRGINIA CODE § 6C-2-2(d). All types of discrimination are considered under this definition. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove that:

(a) he or she has been treated differently from one or more similarly-situated employee(s);

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<sup>3</sup> Discretionary pay raises, generally, must be approved by DOP and the Governor. DJS does not have the authority to approve pay raises. In this grievance, DOC did not appear to request a discretionary raise for Grievants from DOP.

(b) the different treatment is not related to the actual job responsibilities of the employees; and

(c) the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). It is unnecessary to analyze Grievants' claims under the West Virginia Human Rights Act as such claims are subsumed by WEST VIRGINIA CODE § 6C-2-2(d). *Black v. Dep't of Transp.*, Docket No. 99-DOH-362 (Jan. 21, 2000); *Clark v. Kanawha County Bd. of Educ.*, Docket No. 99-20-088 (Aug. 19, 1999). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995); *Hendricks v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996).

Grievants introduced evidence showing that, like Correctional Officers at the Juvenile Center, they are subject to some physical risk in working with the juvenile population they serve. For instance, Grievants must respond to some types of emergencies in which they may be in physical jeopardy, and they may even respond to some emergencies before the COs, under certain circumstances. They work alone with some of the juvenile population, which comes with some risk as well. Additionally, i.e., in performing their duties, Grievants must sometimes physically restrain offenders, just as the Correctional Officers must.<sup>4</sup> Finally, Grievants must undergo the same training as Correctional Officers.

"Grievants may compare themselves only to employees in the same classification as each Grievant, which they have not done. "[E]mployees who do not have the same

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<sup>4</sup> One of Grievants recently suffered a broken wrist while in a physical confrontation in the work place.



classifications are not performing 'like assignments and duties' . . . and cannot show they are similarly situated for discrimination and favoritism purposes.['] *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam*), *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.*, Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.*, Docket No. 2013-2251-CONS (July 22, 2014).” *Crockett and May v. Wayne County Bd. of Educ.*, Docket No. 2014-1698-CONS (Feb. 19, 2015).” *Jones, et al., v. WVU*, Docket No. 2016-0225-CONS (Oct. 18, 2017). “More importantly, the Grievance Board has specifically stated that “[i]t is not discriminatory for employees in the same classification to be paid different salaries.” *Thewes and Thompson v. Dep’t of Health and Human Resources/Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003). Pay differences may be “based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interest of the employer. See generally *West Virginia University v. Decker*, [191] W. Va. [567], 447 S.E.2d 259 (1994).” *Largent, supra.*” *Jones, supra.*

The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the Division of Personnel. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were

arbitrary and capricious or an abuse of discretion. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

Grievants offered evidence to highlight the similarities between their work and the CO's work by providing the classification specifications for their (Grievants') positions and the CO 2 position. It is clear to the undersigned that Grievants must confront some of the same risks in their positions that COs face in theirs and that Grievants play a critical role in the efficient and safe operation of the Juvenile Center. Respondent also indicated that they are valued employees. However, upon review of the classification specifications for the Corrections Case Manager, the Correctional Counselor 2 and the Correctional Officer 2, the undersigned finds that the nature and tasks of the CO's work vary substantially from the nature and tasks of Grievants' work. As such, their work is not directly comparable.

Discretionary decisions must be made in a manner that is reasonable and not arbitrary and capricious. See *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). Respondent introduced evidence that as of September 2017, 80% of job vacancies in the correctional system were CO vacancies. Such vacancies clearly present a potential hazard to public safety, as well as to the safety and well-being of those who are held in state correctional/juvenile facilities. This evidence shows that Cabinet Secretary Sandy did not arbitrarily award the raise to COs. Rather, providing a raise to the COs in particular was justified by the urgent need to fill vacant CO positions, for reasons of safety and security. Therefore, the "different treatment" Grievants are complaining of - being excluded from the subject pay raise received by the COs - is not discriminatory, based upon the evidence presented. Rather, the decision to provide the

subject raise exclusively to the COs is rationally related to the fact that the CO's work differs from Grievants' work, as well as to the State's pressing need to fill CO vacancies.  
*Id.*

In consideration of the foregoing, Grievants did not meet their burden of proof to demonstrate that the decision to award the pay raise exclusively to the COs was arbitrary, capricious, an abuse of discretion or discriminatory.

### **CONCLUSIONS OF LAW**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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. Health and Human Res.*, Docket No 92-HHR-486 (May 17, 1993).

2. Discrimination is defined at WEST VIRGINIA CODE § 6C-2-2(d). All types of discrimination are considered under this definition. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove that:

(a) he or she has been treated differently from one or more similarly-situated employee(s);

(b) the different treatment is not related to the actual job responsibilities of the employees; and

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3. “Grievants may compare themselves only to employees in the same classification as each Grievant, which they have not done. “[E]mployees who do not have the same classifications are not performing ‘like assignments and duties’ . . . and cannot show they are similarly situated for discrimination and favoritism purposes.[.]” *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam*), *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.*, Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.*, Docket No. 2013-2251-CONS (July 22, 2014).” *Crockett and May v. Wayne County Bd. of Educ.*, Docket No. 2014-1698-

CONS (Feb. 19, 2015).” *Jones, et al., v. WVU*, Docket No. 2016-0225-CONS (Oct. 18, 2017)

4. “It is not discriminatory for employees in the same classification to be paid different salaries.” *Thewes and Thompson v. Dep’t of Health and Human Resources/Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003). Pay differences may be, “ ... based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interest of the employer. See generally, *West Virginia University v. Decker*, 191 W. Va. 567, 447 S.E.2d 259 (1994),” *Largent v. W.Va. Div. of Health and W.Va. Div. of Personnel* 452 S.E.2d 42, 192 W.Va. 239 (1994).

5. Grievants failed to prove discrimination by Respondent or to otherwise show that they were entitled to a pay increase.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. 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 Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: February 12, 2018**

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**Susan L. Basile**  
**Administrative Law Judge**