

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JAMES DONALD PRINCE,**  
**Grievant,**

**v.**

**Docket No. 2018-0583-MAPS**

**REGIONAL JAIL AND CORRECTIONAL  
FACILITY AUTHORITY/SOUTHERN  
REGIONAL JAIL,<sup>1</sup>  
Respondent.**

## **DECISION**

Grievant, James Prince, is employed by Respondent, Regional Jail and Correction Facility Authority ("RJ&CFA") and assigned to the Southern Regional Jail ("Jail") as a Building Maintenance Supervisor 1. Mr. Prince filed a level one grievance form dated October 16, 2017, alleging:

The Division of Corrections implemented a raise to all uniform staff; \$1.00 per hour. Maintenance employee(s) are required to work in the same secured area(s) within the jail.

As relief, Grievant seeks, "to be awarded the same hourly increment raise of \$1.00 per hour."

A Level One hearing was held on November 6, 2017, and a decision denying the grievance was issued on November 17, 2017. Grievant appealed to Level Two on December 12, 2017 and a mediation was conducted on February 20, 2018. Grievant appealed to Level Three on March 6, 2018.

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<sup>1</sup> This agency is now a part of the Division of Correction and Rehabilitation.

A Level Three hearing was conducted in Beckley, West Virginia, on July 10, 2018. Grievant appeared *pro se*<sup>2</sup> and Respondent was represented by Briana J. Marino, Assistant Attorney General. The matter became mature for decision on August 8, 2018, upon receipt of the last Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant alleges that he is entitled to the same one dollar per hour pay increase which was given to correctional officers (“CO”) which was implemented by the Division of Corrections (“DOC”) on July 28, 2017. Grievant presented evidence attempting to prove that he is entitled to this raise because he is exposed to some of the same type of risks as the Correctional Officers, and that he sometimes fills in at security posts in CO jobs when insufficient security staff is available. The record established that the one dollar per hour raise given only to COs 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. Grievant is in the classification of Building Maintenance Supervisor 1 and therefore not entitled to the retention and recruitment raise.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, James Prince, is employed by the RJ&CFA as a Building Maintenance Supervisor 1 at the Southern Regional Jail. He has been in that position for

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<sup>2</sup> “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

approximately seven years. Prior to taking that position, Grievant had served in the Jail as a CO 1, CO 2, and CO 3. He has worked at the Jail for a total of twenty-three years.

2. Grievant's duties as a Building Maintenance Supervisor are related to ensuring that the basic Jail infrastructure is operating properly. He addresses plumbing and electrical problems, as well as any repairs which must be made to the actual building structures.

3. The work Grievant performs often requires him to be present on the floor of the Jail where the inmates are located. On occasion, he is required to make repairs in an inmate's cell. Grievant regularly has tools in his possession which could be used as weapons if an inmate was able to acquire one of them.

4. Inmates are routinely placed on lockdown or moved to specified areas when maintenance workers are present, to keep them away from the maintenance area.

5. Grievant is not required to control or supervise inmates, but occasionally helps when the facility is short-handed. Additionally, Grievant occasionally volunteers to work a security post when there are not enough officers available.<sup>3</sup> Non-uniform staff may only work a security post in the regional jails voluntarily.<sup>4</sup>

6. Division of Corrections Director of Field Operations, Donnie Ames, issued a memorandum outlining a Governor's executive order issued in December 2017, which allows non-uniformed employees to volunteer to work overtime in security control posts. This work cannot be done during the employee's regular work schedule and the

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<sup>3</sup> Grievant can perform these duties because of his extensive experience as a CO.

<sup>4</sup> Testimony of J.T. Binion, RJ&CFA Chief of Operations.

assignment cannot interfere with the employee's normal duties. Grievant's Exhibit 1. Grievant volunteered for overtime security post seventeen times.<sup>5</sup>

7. By Letter dated July 6, 2017, Jeff Sandy, Cabinet Secretary for the Department of Military Affairs and Public Safety (DMAPS), requested that the Division of Personnel ("DOP") present a proposal to the State Personnel Board ("SPB") to allow DMAPS to increase the minimum starting salary for COs and increase the salaries for existing COs by one dollar per hour. The reason for the request was to recruit and retain COs. The agency demonstrated that there was a severe shortage of COs. There were 700 vacancies across all the jail and correctional facilities. The shortage was to the point of creating critical security concerns. The data did not support that the agency was suffering a recruitment and retention problem in the non-uniform classifications.<sup>6</sup> Respondent Exhibit 2.

8. The Director of DOP, notified Cabinet Secretary Sandy, by letter dated July 28, 2017, that the State Personnel Board had approved the DMAPS proposal to increase the salary of all COs by \$1.00 per hour. The State Personnel Board action (SPB #2750) did not approve an increase for any other positions classifications. Respondent Exhibit 3.

9. Building Maintenance Supervisors are responsible for directing "the upkeep and management of buildings for a small institution or state facility" Respondent Exhibit

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<sup>5</sup> Testimony of Grievant.

<sup>6</sup> Non-uniform employees include; Counselors, Office Assistants, Billing Clerks, Maintenance Workers, Human Resource Specialists, and other employees not directly involved in the custody and control of inmates. Grievant Exhibit 1.

5.<sup>7</sup> They are not responsible for the care, custody, or control of the inmates as are the COs.

### **Discussion**

This grievance does not involve a disciplinary matter. Accordingly, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant alleges that he is subjected to the same risks as Correctional Officers when he is performing his maintenance duties inside the Jail. He argues that those risks are heightened because he is always in possession of tools which can be used as weapons by inmates if they manage to get them. Grievant also argues that he is actually performing CO work by voluntarily manning security posts when there are insufficient COs available to properly fill those positions on a particular shift. Grievant does not fill these posts during his regular shift, only as voluntary overtime. Grievant believes because he is subject to similar risks and occasionally performs CO duties at security posts, he should receive the one dollar per hour raise which was given to all COs pursuant to SPB #2750.

The issue of “similar risk” was addressed by the Grievance Board in the case of *Gregory v. Div. of Juvenile Ser.*, Docket No. 2018-0179-CONS (Feb. 12, 2018). In that case,

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<sup>7</sup> The *nature of work* section of the DOP classification specifications for the Building Maintenance Supervisor 1 classification.

a Corrections Case Manager and a Corrections Counselor argued that they were entitled to the same pay increase because they were often subject to the same peril as COs when they were performing their non-uniform duties. The Administrative Law Judge wrote:

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.

The same is true in this case. It cannot be disputed that correctional institutions are inherently dangerous places to work. All employees working in those facilities are subject to some level of peril and must be constantly vigilant. Correctional officers are the only employees specifically charged with the custody and control of the inmates which heightens their exposure to danger because they have more close contact with the inmates. However, the salary increase was not given because of the risks involved with CO duties. Rather the raise was given to address a recruitment and retention problem in the Correctional Officer classification only. The State Personnel Board only authorized the payment of the wage enhancement to employees holding positions in that classification. Respondent is without authority to extend that raise to people working in other classifications at the Jail. *Gregory v. Div. of Juvenile Ser., supra*.

While Grievant does not specifically use the words, it is apparent that he believes that it is discrimination for Respondent to give an hourly pay increase to COs and not to him when he also performs duties inside the Jail. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly

situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (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.

*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).

In this case, Grievant is not similarly situated with the employees who received the raise. The salary enhancement went to COs only. It was only given to them because Respondent had a serious retention and recruitment problem in that classification. There is no evidence that a similar problem exists in Grievant's classification.

Grievant's next argument is that he actually works security posts as a CO and is therefore entitled to be paid the one dollar per hour raise that was given to all of the other COs. The problem with this argument is that all Grievant's work at security posts is done voluntarily. None of the CO work is done during Grievant's regularly scheduled hours when he is performing his maintenance work.

It is significant that Grievant only performs CO duties outside of his regular work schedule and voluntarily. The Grievance Board has consistently held, that the performance of additional duties outside of one's classification, on an as-needed basis, does not result in a misclassification. See, *Dooley v. W. Va. Dept. of Health and Human*

*Resources*, Docket No. 90-H-498 (Mar. 19, 1991); *Broadbuss v. W. Va. Div. of Human Serv.*, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Sword v. Bureau of Employment Programs*, Docket No. 97-BEP-434 (Mar. 19, 1998). In this case, Grievant is performing CO duties on an occasional basis but never as part of his regular job. It is commendable that Grievant is taking this overtime work to help address the very issue which served as the basis for the raise; a severe shortage of COs. However, these occasional overtime shifts do not change his predominate duties and require that Grievant receive the raise authorized solely for correctional officers. Grievant did not prove by a preponderance of the evidence that he is entitled to the one dollar per hour pay increase given to correctional officers. Accordingly, the grievance is **DENIED**.

### **Conclusions of Law**

1. This grievance does not involve a disciplinary matter. Accordingly, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The State Personnel Board only authorized the payment of the wage enhancement to employees holding positions in that classification. Respondent is without authority to extend that raise to people working in other classifications at the Jail. *Gregory v. Div. of Juvenile Ser.*, Docket No. 2018-0179-CONS (Feb. 12, 2018).



3. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d).

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(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.

*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).

5. Grievant did not prove by a preponderance of the evidence that he was subject to discrimination as that term is defined in W. VA. CODE § 6C-2-2 (d).

6. Performance of additional duties outside of one's classification, on an as-needed basis, does not result in a misclassification. See, *Dooley v. W. Va. Dept. of Health and Human Resources*, Docket No. 90-H-498 (Mar. 19, 1991); *Broadbuss v. W. Va. Div. of Human Serv.*, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Sword v. Bureau of Employment Programs*, Docket No. 97-BEP-434 (Mar. 19, 1998).

7. Grievant did not prove by a preponderance of the evidence that he is entitled to the one dollar per hour pay increase given to correctional officers.

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* 156 C.S.R. 1 § 6.20 (2018).

**DATE: September 18, 2018.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**