

JAMES WHORTON, et al.

v. Docket No. 96-CORR-078

WEST VIRGINIA DIVISION OF CORRECTIONS

DECISION

Grievant and other similarly-affected correctional officers filed a grievance against their employer, the West Virginia Division of Corrections (CORR), essentially complaining that they never received a salary increase after completing an officer training program while more recently-hired officers were granted a salary increase for completing the program. CORR denied wrongdoing. Following adverse decisions at the lower grievance levels, Grievants appealed to level four and eventually requested a decision based on the record adduced below. The case became mature for decision on May 30, 1996, the designated last day for CORR to file fact/law proposals. [\(See footnote 1\)](#) Based on all matters of record, the following findings of fact are made. [\(See footnote 2\)](#)

Findings of Fact

1. Grievant Whorton, initially hired by CORR in 1990, had attained the rank of Sergeant and was classified as a Correctional Officer IV (CO4) by April 1994. The remaining Grievants in this case were also ranked higher than Correctional Officer I (CO1) at that time.
2. From 1986 through 1992, George Trent, currently the warden at the Mount Olive Correctional Center, served as CORR's Director of Training.
3. While Director of Training, Warden Trent, assisted by state and federal officials, developed an Officer Apprenticeship Program (OAP) to train CORR's correctional officers. Basically, correctional officers in the various state correctional facilities were encouraged to participate voluntarily in the OAP for career advancement and other purposes.
4. The West Virginia Division of Personnel's (DOP) reclassification plan for CORR became effective on April 1, 1994.
5. Under the reclassification, positions in the correctional officer series were restructured, in part, to enhance training requirements. Among other things, a newly-hired CO1 is required to enroll in

OAP and finish the program in two years. Upon completing OAP, the CO1 is promoted to Correctional Officer II (CO2) with an attendant five percent salary increase. [\(See footnote 3\)](#) 6. For purposes of implementing the reclassification project on April 1, 1994, any then-current CO1 staff who had completed OAP were reclassified or "reallocated" as CO2s. Consistent with DOP's reclassification procedures, CO1s reclassified in this manner were given salary upgrades to the entry level salary of a CO2 if their salary was below that level, and no increase at all if their salary was above that level.

7. Officers such as the Grievants in this case, who had already advanced beyond CO1 and had either completed OAP prior to April 1, 1994, or were scheduled to complete it within a few months after April 1, 1994, were not given any specific salary consideration in the reclassification process relative to their OAP training.

8. Due to dissatisfaction among some CO1s who were reclassified as CO2s on April 1, 1994, with no salary increase or with a less than five percent salary increase, CORR and DOP determined that, in the interest of fairness, all of the newly-reclassified CO2s who complained about this matter would receive a salary adjustment equalling an overall five percent increase, with back pay retroactive to April 1, 1994. Grievants learned of this event.

9. Grievants, who had voluntarily enrolled in and had either completed or nearly completed OAP at a time when no salary increase had been mandated, expressed dissatisfaction because the newly-reclassified CO2s were given a full five percent raise based on OAP training, while they received nothing.

10. After considering Grievants' complaints about the CO1s who received a full five percent salary increase because they had completed OAP, CORR awarded Grievants a prospective five percent merit increase, effective September 1, 1995, in recognition of the fact that Grievants had also completed OAP.

Discussion

Grievants characterize CORR's actions in this matter as discriminatory and an "unfair labor practice" against them. They also contend that, when he introduced OAP, Warden Trent had told the correctional officers they would not receive promotions or salary advancements unless they enrolled in and completed OAP, and that he promised a salary increase upon the completion of the program. Grievants seek back pay, that is, a five percent salary increase retroactive to either April 1, 1994, for

those who completed OAP prior to that time, or to the precise date after April 1, 1994 when they completed the program. They expressed the view that, because CORR gave them a salary increase effective September 1, 1995, CORR has acknowledged it "wronged" them. Therefore, Grievants reason, CORR should be compelled to award them back pay also.

CORR's position in this matter is that, while OAP was approved in 1991, officer participation was voluntary, and there was no funding to provide raises upon completion of the program. This did not change until the Legislature made OAP mandatory and funded the program, effective April 1, 1994. CORR also maintains that, when Warden Trent initiated OAP, he encouraged officers to participate so they could enhance their opportunities for promotion and career advancement, but he never promised any officers that a raise would be forthcoming when they finished the program. Even if Warden Trent had promised the officers a raise when they finished the program, CORR argues, he was not authorized or empowered to effect any salary increase. As justification for its actions with regard to the retroactive payments made to the newly-classified CO2s, CORR states those increases were based on promotion principles, not merit raise principles which governed the increases granted to Grievants. [\(See footnote 4\)](#) Thus, CORR argues, different treatment of the two groups was not unlawful. CORR opines that, because it was never legally bound to grant the Grievants a merit increase in September 1995, or at any other time, it was not legally bound to give them a merit increase retroactive to April 1, 1994.

Unfortunately for Grievants, the outcome in this case does not turn on whether or not Warden Trent promised officers a raise when they completed OAP at the time the program was voluntary instead of mandatory. Simply put, Warden Trent was not authorized to effect such a salary increase. Thus, CORR is not legally obligated to honor any ultra vires promise allegedly made by Warden Trent in this regard. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991); Rose v. Nichols County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

Grievants' discrimination allegation is another matter. Discrimination is defined in W.Va. Code §29-6A-2(d) 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."

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989), instructs that a grievant's burden of proof in a discrimination charge "may at least initially be met by a prima facie showing of discrimination." This is accomplished when the grievant establishes he was singled out by

his employer from among other like employees for treatment which adversely affected him, and that such differences in treatment were unrelated to job requirements "and were not agreed to by the grievant in writing." According to the holding in Steele:

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. [Cite omitted.]

Grievants established a prima facie case of discrimination as two groups of employees were given salary increases for the same reason, for completing training, but one group received the increase retroactively. In turn, CORR offered a business reason for the difference in the treatment of the two groups of officers, in that five percent raises in one case were for reallocation purposes (officers who were a CO1 moving to CO2), and in the other case, for merit raise purposes (officers above CO1 level). However, CORR's reason for the disparate treatment of the officers in question was pretextual in nature. See Barber v. W.Va. Div. of Highways, Docket No. 94-DOH-267 (Feb. 28, 1995); Phillips v. W.Va. Dept. of Tax and Revenue, Docket No. 91-T-289 (Jan. 15, 1992).

It is clear from the record that CORR had no legal duty to grant the complaining, newly-reallocated CO2s a higher salary increase than that required by DOP regulations for reallocation, let alone to make the increase retroactive to April 1, 1994. However, it chose to give those officers such an increase. Likewise, CORR had no duty to grant Grievants any kind of salary increase, for merit purposes or any other reason, effective (prospectively) September 1, 1995. Here again, CORR chose to grant a salary increase. The underlying reason for each salary increase was because the officers had completed OAP.

Once CORR decided to be "fair" to the CO1s who were reallocated to CO2s and give them a retroactive salary increase because they completed OAP training, it had to be equally "fair" to Grievants when it decided to grant them a salary increase because they had completed OAP training, regardless of how it labeled these discretionary increases or administratively effected them. CORR elevates form over substance when it attempts to justify its actions by relying on the fact that different mechanical processes were utilized in implementing the raises for the two groups of employees. Regardless of the process used to effect the raises for the two groups, the raises were given because the officers had completed OAP, on or about the time of the reclassification on April 1,

1994, and for no other reason. Therefore, CORR's stated reason for the disparate treatment was pretextual.

In addition to the foregoing findings and conclusions, the following formal conclusions of law are appropriate.

Conclusions of Law

1. Grievants must prove all of the allegations constituting their grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).
2. Under W.Va. Code §29-6A-2(d), an employer engages in unlawful discrimination when it treats similarly-situated employees differently, "unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."
3. "If a grievant successfully proves a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext." Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).
4. Grievants established a prima facie case of discrimination, which Respondent rebutted, but Respondent's reasons were pretextual in nature. See Barber v. W.Va. Div. of Highways, Docket No. 94-DOH- 267 (Feb. 28, 1995); Phillips v. W.Va. Dept. of Tax and Revenue, Docket No. 91-T-289 (Jan. 15, 1992).

Accordingly, the grievance is **GRANTED**, and Respondent Division of Corrections is Ordered to pay Grievants the appropriate back pay, that is, the difference between the salary they earned from April 1, 1994 (or when they completed OAP) and that they received as a result of the five percent increase of September 1, 1995.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: June 25, 1996 NEDRA KOVAL

Administrative Law Judge

[Footnote: 1](#)

The other grievants in this action are Richard Lohr, William Arnold, Edward Littell, Larry Spencer, James Greathouse, Joan Parker, Robert J. Hill, Richard Littell, Ralph Morris, and Ronald O'Neil.

[Footnote: 2](#)

The record contains the transcript and exhibits of the January 4, 1996 level three hearing, as well as additional documentation and written argument submitted by Grievant Whorton, on or about April 8, 1996, with CORR's assent. CORR did not file any brief or fact/law proposals.

[Footnote: 3](#)

Apparently, since April 1, 1994, all newly-appointed correctional officers, from CO1 through at least CO7, must complete OAP. Obviously, this requirement compels even a seasoned correctional officer, including one who served in another state or who is otherwise qualified to be hired at a rank higher than CO1, to complete training unique to West Virginia's correctional system.

[Footnote: 4](#)

Of record is a written "Position Statement" tendered by DOP's Assistant Director of Classification and Compensation, Lowell D. Basford, and admitted at the January 4, 1996 level three hearing. Mr. Basford stated that increases were granted to CO2s during CORR's reclassification process, not because the CO1s had completed a training program, but because they had been "reallocated," or moved from CO1 to CO2. He stated there are no DOP regulations "to grant a salary adjustment simply because an employee completes the [OAP]." See EX 1. This statement is not quite correct, for it appears that an "entry level" CO1 who completes the program does automatically advance to CO2 status, with a five percent raise. See EX 4. It does not appear, though, that newly-hired officers initially placed in a rank higher than CO1 who then complete the mandatory OAP are given an automatic salary increase.