JACK FERRELL, et al.,

Grievants,

v.

DOCKET NO. 94-CORR-1062

WEST VIRGINIA DIVISION OF CORRECTIONS/

WEST VIRGINIA PENITENTIARY,

Respondent.

D E C I S I O N

Grievants, Jack Ferrell, Greg Abbott, William Amick, David Ballard, Neil Clendenin, Ed Cline, Jason Davis, William Gray, Andrea Hairston (Francisco), Carlos Hensley, Carl Shellings, and Michael Smith, filed this grievance on or about July 23, 1994, alleging:

> Warden George Trent informed Academy staff, who informed students that they would be reimbursed for travel expenses. When they sought travel they were denied. Two of the 34 members of the 84th State Basic class were paid travel expenses. Now we seek reimbursement.

Following adverse decisions at the lower levels, Grievants appealed to level four on November 14, 1994. Following several continuances for good cause, the case was held in abeyance pending settlement negotiations. Unable to reach a settlement, the parties came for a level four hearing before the Grievance Board on October 7, 1997. Following receipt of additional documentation from the Grievants' representative, this matter became mature for decision on October 27, 1997.

SUMMARY OF EVIDENCE

Level Three Exhibits

Ex. 1 -

Vacancy Announcement

Level Four Exhibits

G. Ex. 1 -

May 5, 1994 Memorandum from Kathryn Lucas regarding 84th State Basic Corrections Class

G. Ex. 2 -

August 2, 1994 Memorandum from Kathy Lucas to Scott Patterson

G. Ex. 3 -

Travel Expense Account Settlement Forms

G. Ex. 4 -

Grievance Decision Level III Hearing, dated October 20, 1994

G. Ex. 5 -

Revised State of West Virginia Travel Regulations, effective July 1, 1996

Testimony

Grievant Jack Ferrell testified in his own behalf and in behalf of all Grievants. Tammy Bober appeared as Respondent's representative at level three. (See footnote 1) Respondent presented no testimony at level four.

ISSUE

The issue to be decided is whether Grievants have proven by a preponderance of the evidence that they are entitled to travel expense reimbursement for attendance at Respondent's 84th State Basic Corrections Class in May 1994.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. In or about May 1994, Grievants applied for Correctional Officer I positions at Mt. Olive Correctional Complex, in answer to an advertisement in the newspaper. 2. The official vacancy announcement indicates that the official headquarters for the initial six weeks of employment would be the West Virginia Corrections Academy, West Liberty State College, until the Mt. Olive Correctional Complex was operational. It further provides that "upon completion of Academy training, officers will be headquartered at the West Virginia Penitentiary in Moundsville for on-the-job training until opening of Mt. Olive Correctional Complex." LIII Ex. 1. (See footnote 2)

3. Grievants never saw the official vacancy announcement.

4. Grievants were hired by the West Virginia Division of Corrections ("Respondent") in May 1994 as Correctional Officer Is.

5. Grievants were scheduled by Respondent to attend the 84th State Basic Corrections Class from May 22 to July 1, 1994, at the West Virginia Corrections Academy at West Liberty State College in Ohio County, West Virginia. LIV G. Ex. 1.

6. Grievants attended the six-week training course at West Liberty State College. They were provided board and lodging Monday through Thursday, but would return to their residences Friday through Sunday.

7. During one of the training sessions at the Academy, when Glen Long of the Academy staff and Warden George Trent were present, the students asked about travel pay from the Academy to their homes on the weekends. The students were advised by the Warden to submit travel vouchers to the Personnel Department at Moundsville when they finished training. LIV G. Ex. 2. 8. Upon completion of Academy training, Grievants submitted their travel vouchers to Personnel. LIV G. Ex. 3. (See footnote 3) The travel vouchers were not accepted by the Personnel Department in Moundsville, and Grievants were advised to file a grievance. LIV G. Ex. 2.

9. There is no dispute that, had Mt. Olive been open for business before the academy training, the Grievants would have been entitled to travel reimbursement, because the academy would have also been a temporary assignment for them.

10. Two members of the 84th State Basic Corrections Class were reimbursed for travel expenses. Those two employees were Correctional Officers at Denmar Correctional Facility,

attending the Academy on temporary assignment. LIV G. Ex. 4.

11. Grievant Ferrell traveled a total of 2,952 miles to and from Chesapeake, West Virginia, and the academy, for a total of $841.32, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

12. Grievant Amick traveled a total of 2,352 miles to and from Mt. Nebo, West Virginia, and the academy, for a total of $670.32, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

13. Grievant Abbott traveled a total of 2,664 miles to and from Mt. Carbon, West Virginia, and the academy, for a total of $759.24, using a multiplier of .285 cents per mile. LIV G. Ex. 3. 14. Grievant Shellings traveled a total of 2,640 miles to and from Boomer, West Virginia, and the academy, for a total of $752.40, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

15. Grievant Davis traveled a total of 2,940 miles to and from Beckley, West Virginia, and the academy, for a total of $837.90, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

16. Grievant Clendenin traveled a total of 3,500 miles to and from Auto, West Virginia, and the academy, for a total of $997.50, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

17. Grievant Smith traveled a total of 2,124 miles to and from Powelton, West Virginia, and the academy, for a total of $605.34, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

18. Grievant Ballard traveled a total of 2,400 miles to and from Beckley, West Virginia, and the academy, for a total of $684.00, using a multiplier of .285 cents per mile. LIV G. Ex. 3.

19. Grievants Cline, Gray, Francisco, and Hensley, did not submit travel vouchers into evidence.

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DISCUSSION

In a non-disciplinary grievance, it is incumbent upon Grievants to prove their case by a preponderance of the evidence. Grievants claim they are entitled to travel reimbursement for attendance at the state basic training academy, and that they were discriminated against because two other officers were granted travel reimbursement to the academy. 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 order to establish a claim of discrimination, an employee must establish a prima facie

case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(a)

that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

First, a review of the level one, two and three decisions indicates that Respondent offered no testimony or evidence at any of those levels, except for the attendance of Tammy Bober at level three, wherein the level three decision indicates she offered “very little in support of the institution's defense, but mainly referred to the previous responses issued by Level I and II respondent.” LIV G. Ex. 4. The only evidence relied upon by the hearing evaluators at those levels was the Vacany Announcement (LIII Ex. 1), which ismore fully explained in Finding of Fact No. 2. The Respondent relies on that document to support its contention that the Grievants were officially headquartered at West Liberty State College during their 6-week basic training, and thus, were not eligible to receive travel reimbursement. Respondent further contends the two officers from the Denmar Correctional Facility who did receive travel reimbursement did so because the Denmar facility was their official headquarters and thus, they were on temporary assignment to the academy.

The State of West Virginia Travel Regulations provide little guidance on this issue, including

whether an employee is to be reimbursed for temporary assignments. LIV G. Ex. 5. Likewise, the West Virginia Division of Personnel Administrative Rules and Regulations are silent as to travel reimbursement.

Since the only evidence relied upon by the Respondent to support its denial of travel reimbursement to the Grievants is the Vacancy Announcement, I am limited to a review of that document in analyzing the merits of this grievance.

Respondent contends that the two Correctional Officers from the Denmar Correctional Facility were on temporary assignment at West Liberty, and that Denmar was their headquarters. I find this reasoning to be a distinction without a difference with respect to Grievants. There is no dispute that Grievants were hired for the express purpose of serving as Correctional Officers at the Mt. Olive Penitentiary, and indeed, that is where the Grievants are working now. It is only because the facility was not yet open for operations that the vacancy announcement indicated the new employees would be headquartered at West Liberty, and then Moundsville. There is no dispute that, had Mt. Olive been open for business before the academy training, the Grievants would have been entitled to travelreimbursement, because the academy would have also been a temporary assignment for them.

This is a case of basic fairness in dealing with employees. Grievants interviewed and accepted employment for Mt. Olive. Grievants were never told they would not be reimbursed for travel between Fayette County and Ohio County; indeed, the Warden advised them to submit travel vouchers when questioned about reimbursement, thus leading them to believe they would be reimbursed. Grievants completed their basic training, similarly to the two Denmar employees, and returned to another base of operations following completion of the training. West Liberty was not their official headquarters; it was a temporary assignment for which they are entitled to travel reimbursement.

CONCLUSION OF LAW

1. Grievants have proven by a preponderance of the evidence that they were entitled to travel reimbursement from Fayette County to West Liberty State College in Ohio County, West Virginia.
2. Grievants have proven by a preponderance of the evidence that denial of their travel vouchers was discriminatory in that Respondent granted travel reimbursement to two other Correctional Officers attending West Liberty State College basic training.

Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to compensate

Grievants in the amounts submitted on their travel vouchers as LIV G Ex. 3, and more fully described in Findings of Fact Nos. 10-18. Although Grievants Cline, Gray, Francisco, and Hensley did not submit travel vouchers into evidence, they have proventhey are entitled to reimbursement and are hereby **DIRECTED** to submit travel vouchers for payment to the Respondent for travel to and from the academy at West Liberty State College between May 23 and July 1, 1994.

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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ

Administrative Law Judge

Dated: December 29, 1997

Footnote: 1 No transcript of the lower level hearings was submitted by either party. The only reference to Ms. Bober's testimony is in the level three decision, which states "[t]he WVP representative, Ms. Bober, added very little in support of the institutions defense, but mainly referred to the previous responses issued by Level I and II respondent." LIV G. Ex. 4.

Footnote: 2 The West Virginia Pentitentiary at Moundsville, West Virginia, was closed in 1994, and the staff and inmates were relocated to the Mt. Olive Correctional Complex in Fayette County, West Virginia.

Footnote: 3 Grievants Ferrell and Amick submitted travel vouchers as G. Ex. 3 at the level four hearing. At my request, Grievants Abbott, Shellings, Davis, Clendenin, Smith and Ballard submitted their travel expenses through their representative following the close of the hearing, which are hereby incorporated into LIV G. Ex. 3.