MICHAEL LIVESAY, et al.,

Grievants,

v. **Docket No. 96-CORR-459**

WEST VIRGINIA DIVISION OF CORRECTIONS/
and WEST VIRGINIA DIVISION OF PERSONNEL, (See footnote 1)

Respondent.

DECISION

Grievants, Michael Livesay, Laura Gallo, Ethel Saunders, Ervie Mayne, John Ryan, Douglas Stevens, Haywood Wittman II, and William O. Shaw, (See footnote 2) filed grievances against Respondent, West Virginia Division of Corrections (Corrections), alleging discrimination because they did not receive a 5% salary increase for completing the Officer Apprenticeship Program (OAP) as other employees of Respondent have received in the past. As relief, Grievants seek a 5% salary increase retroactive to the date each Grievant successfully completed the OAP.

Grievants were denied relief at the lower levels of the grievance procedure. A Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on January 8, 1997. The case became mature for decision on April 10, 1997, with receipt of Grievant's reply post-hearing submission. The undersigned was notified that the tape recordings of the Level III hearing were lost or not properly recorded. The parties agreed to have the case decided on the evidence produced at the Level IV evidentiary hearing. Therefore, the following findings of fact were derived from the evidence produced at Level IV.

FINDINGS OF FACT

1. Grievants are employed by Corrections as Correctional Officer Is (CO Is), have completed the OAP, and have not been given the 5% salary increase for completing the program in question.

2. Mr. Gary Shaw has twenty-five years of experience with Respondent. He was a CO III, Captain, before reclassification by Personnel in April 1994. After reclassification, he became a CO VII, Major. In 1996, he was granted a 5% salary increase for completing the OAP, retroactive to the

date he completed the program.

3. Mr. John Brown, Captain, completed the OAP in November 1995, and received a 5% salary increase for completing the program, after requesting the increase, from the date he completed the OAP.

4. Mr. Ronald Baisi was a CO I before reclassification, and a CO IV after reclassification. He completed the OAP in April 1994, and received a 5% salary increase for completing the program.

5. Mr. Edward McCally was a CO I before reclassification, and a CO IV after reclassification in 1994. He received a 5% salary increase for completing the OAP.

6. Ms. Stephanie V. Barthelemy was reclassified from a CO Ito a CO II because of a change in duties. She was not enrolled in the OAP at the time of her reclassification.

7. Grievant Livesay was a CO I before reclassification, and a CO II after reclassification in 1994. He was reclassified as a CO II because of a change in duties.

DISCUSSION

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 the burden of proof in a discrimination charge "may at least initially be met by a prima facie showing of discrimination." This is accomplished when grievants establish they were singled out by their employer from like employees for treatment which adversely affected them, and that such differences in treatment were unrelated to job requirements "and were not agreed to by the grievants 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.]

In the instant case, four different witnesses credibly testified that they had received a 5% salary increase for successfully completing the OAP, while Grievants did not receive a salary increase for successfully completing the same program. Thus, Grievants established a prima facie case of discrimination. As a legitimate non-discriminatory reason, Respondents asserted that the OAP is required to be completed by all CO Is, and upon completion of the program a CO I is automatically

reclassified to a CO II. Respondent's assertion does not withstand scrutiny. It has been established that classification is based on which class specification “best fit[s]” the job duties performed. See Ferrell v. Bureau of Employment Programs, Docket No. 93-BEP-449 (July 29, 1994); Simmons v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The Grievance Board has cited the above two cases in deciding dozens of cases.

The class specification for CO II does not state that merely upon completion of the OAP every CO I will be reclassified to a CO II. The class specifications for a CO II describe a different set of job duties performed. Moreover, in the instant case, Grievants proved by a preponderance of the evidence that Grievant Livesay was reclassified from a CO I to a CO II because of a change in duties, not because he successfully completed the OAP.

Grievants also proved by a preponderance of the evidence that not every CO I becomes a CO II because of completion of the OAP. Ms. Barthelemy became a CO II because of years of service, and was not even enrolled in the OAP. Similarly, in George v. W. Va. Div. of Corrections, Docket No. 97-CORR-023 (Sept. 24, 1997), Mr. Joseph P. Kisner testified he was a CO II, that Corrections had not issued him a certification for completing the OAP, and that he had notreceived the 5% salary increase because Corrections lost the documentation supporting his successful completion of the OAP.

In George, the grievant, Thomas George, was a CO I, and the issue concerned only whether he had completed the OAP and back pay for completing the program earlier than what Corrections had documented. In that case, the grievant had not been promoted to CO II, even though, according to records maintained by Corrections, he had completed the OAP at least four months prior to the Level IV hearing.

Therefore, Respondent's alleged non-discriminatory reason, that CO Is are reclassified only because of successful completion of the OAP, does not conform to the testimony in this case or in George. Respondent's reason is pretextual.

Moreover, this is not the first grievance in which the Grievance Board has addressed discrimination and the 5% salary increase related to successful completion of the OAP. In Whorton v. W. Va. Div. of Corrections, Docket No. 96-CORR-078 (June 25, 1996), grievants alleged they had not received a 5% salary increase for completing the OAP. In that case, the Grievance Board found that grievants had:

> 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, [Corrections] 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 CO [I] moving to CO [II]), and in the other case, for merit raise purposes (officers above CO [I] level). However, [Correction's] reason for the disparate treatment of the officers in question was pretextual in nature. SeeBarber 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 [Corrections] had no legal duty to grant the complaining, newly-reallocated CO [II]s a higher salary increase than that required by [Personnel] 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, [Corrections] 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, [Corrections] chose to grant a salary increase. The underlying reason for each salary increase was because the officers had completed OAP.

Emphasis added.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. In nondisciplinary matters a grievant must prove all of the allegations constituting his grievance by a preponderance of the evidence. Crow v. W. Va. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 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 canrebut 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 discrimin- ation, which Respondents failed to rebut because their reason 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).

5. Grievants proved by a preponderance of the evidence that Respondents discriminated against them by failing to increase their salary by 5% upon successful completion of the OAP.

6. Given that back pay damages essentially are wages which Grievants would have received, and that the goal is to place the prevailing party (Grievants) in the same position they would have been, had they not been deprived of the sum owed them and would have benefitted from the full use of the money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, the grievance is **GRANTED**, Respondent Division ofCorrections is **ORDERED** to provide Grievants with a 5% salary increase retroactive to the date of each Grievant's successful completion of the OAP, plus interest. It is also **ORDERED** that Grievants be awarded all other benefits they would have received consistent with this decision.

Any party 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.

Dated: November 4, 1997 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The West Virginia Division of Personnel (Personnel) was made a party at Level IV.

Footnote: 2

Grievant Shaw's grievance against Respondent, Docket No. 96- CORR-454, was consolidated with the above-styled grievance by Order dated December 17, 1996.