

STEPHANIE BARTHELEMY and

DAVID ROGERS,

Grievants,

v.

Docket Nos. 98-CORR486R/487R

DIVISION OF CORRECTIONS,

Respondent.

DECISION

This matter is before the Grievance Board on remand from the West Virginia Supreme Court of Appeals (Barthelemy and Rogers v. W. Va. Div. of Corr./Pruntytown Correctional Center, Slip Opinion No. 26901 (July 12, 2000)), reversing an Order of the Circuit Court of Taylor County which upheld a level four determination that the grievance had not been timely filed, and directing the Grievance Board to conduct an evidentiary hearing on the merits of the case. [\(See footnote 1\)](#) By letter dated August 3, 2000, the undersigned inquired as to how Grievants' counsel, Basil Legg, Jr., and Respondent's counsel, Charles Houdyschell, Jr., wished to proceed. It was noted that a hearing on the merits was conducted on January 22, 1999, and that both parties had submitted proposed findings of fact and conclusions of law shortly thereafter; thus, a decision could be rendered on the already complete record. However, both parties were given the opportunity to request an additional hearing or to file additional documents to supplement the record. Counsel were requested to notify the Grievance Board by August 11, 2000, should they wish to supplement the record. No response was received, and counsel were subsequently notified by letter dated August 16, 2000, that a decision would be issued based upon the record.

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant Stephanie Barthelemy was first employed by Respondent as a Correctional Officer I at Pruntytown Correctional Center on October 15, 1989.
2. Grievant David Rogers was first employed by Respondent as a Correctional Officer I at Pruntytown Correctional Center on January 2, 1976.

3. Beginning in 1994, Respondent required that all new CO-I employees complete the Officers Apprenticeship Program (OAP) as a condition of continuing employment. The OAP consists of a minimum of 4,000 hours of specified on-the-job training subjects and 400 hours of related studies approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training. Correctional Officers are required to complete the program within two years after entering into the agreement or upon the date of employment whichever occurs later. Not all of Respondent's employees, including Grievants, had completed the OAP in 1994.

4. Grievants were both promoted to Correctional Officer II in 1995, following the implementation of Respondent's new classification system on or about April 1, 1994. They both received a five percent salary increase as a result of the promotion. 5. Respondent's new classification system requires that a CO-I successfully complete the OAP prior to promotion to CO-II. Grievants were not subject to this requirement due to their length of service.

6. Grievant Barthelemy completed the Officers Apprenticeship Program requirements on March 29, 1998. Grievant Rogers completed the OAP on May 1, 1998. Processing was completed and Grievants' certification date was July 10, 1998.

7. Respondent's Policy 442, effective April 1, 1998, provides that upon issuance of a Certificate of Completion of Apprenticeship, the process to reallocate the journeyman Correctional Officer I to the classification of Correctional Officer II shall be initiated, in accordance with Section 4.07 of the West Virginia Division of Personnel Administrative Rule, "and each incumbent shall be compensated as specified in Section 5.05 of such rule. Additional pay or promotion shall not be effective until compliance with the following:

1. Proof of completion of Apprenticeship Program (Certificate) [and],
2. Submission and final approval of a West Virginia Personnel Action Form WV-11."

8. Grievants each received a memorandum dated July 10, 1998, from T.D. Melton Coordinator of Apprentices at the West Virginia Corrections Academy, stating:

Congratulations! On behalf of the Corrections Academy and the Division of Corrections, I would like to commend you on your successful completion of the Correctional Officer Apprenticeship Program. You are now certified as a Journeyman Correctional Officer through the United States Department of Labor.

Please be advised that if you are currently a CO-I, you are eligible to be reclassified as a CO-II, if

all other requirements are met. Payroll personnel from your facility will be notified of the change in your status on the above date. Please be advised that the necessary processing to complete your upgrade to CO-II may take from 30 to 60 days. If you have any questions regarding your status after that period of time, feel free to contact the Academy or your facility business office for an update.

9. Prior to April 1, 1998, Respondent had awarded five percent salary increases to some officers upon completion of the OAP, but not to others. Findings of discrimination were made in prior level four grievance decisions based upon the erratic awards.

10. There is no evidence that any Correctional Officer has received salary increases for both reclassification and completion of the OAP since April 1, 1998.

11. Grievants did not receive a five percent salary increase upon completion of the OAP.

Discussion

Because 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 W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996), Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Hundley v. Div. of Corrections, Docket No. 98-CORR-218 (Sept. 2, 1998). Grievants argue that Respondents award of a five percent salary increase to other Correctional Officers upon completion of the OAP, but not to them, clearly results in discrimination. Respondent denies that it engaged in discrimination, and asserts that Grievants were properly awarded a five percent salary increase upon their promotion to CO-II in 1995, and that Policy Directive 442 does not provide for a separate increase upon completion of the OAP.

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." Employees seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) by demonstrating the following:

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

(b)that she has, to her detriment, been treated by her 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Initially, Respondent engaged in a very uneven practice regarding salary increases which were tied to completion of the OAP. In two earlier grievances, employees who were denied the same increases awarded to other Correctional Officers at the completion of the OAP prevailed. Livesay v. Div. of Corrections, Docket No. 96-CORR-459 (Nov. 4, 1997); Whorton v. Div. of Corrections, Docket No. 95 -CORR-070 (July 12, 1995). Certainly, employees who are subject to personnel processing under the same policy must be treated identically. Casto v. Dep't of Pub. Safety/Regional Jail Auth., Docket No. 91-DPS/RJA-350 (July 2, 1992). However, those claims were granted prior to Respondent's adoption of Policy 442, which specifically provides that upon completion of the OAP and the subsequent promotion, one, five percent salary increase shall be processed. Because Grievants completed the OAP after the adoption of Policy 442, they are not similarly situated to employees who were reviewed without the guidance of the Policy. See Bunch v. W. Va. Div. of Corrections, Docket No. 92-CORR-484 (Aug. 10, 1993). Therefore, Grievants have not established a prima facie case of discrimination.

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

Conclusions of Law

1. Because 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 W. Va. Educ. &

State Employees Grievance Bd., 156 C.S.R. 1 §4.19 (1996), Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. 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.”

3. Employees seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) by demonstrating the following:

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

(b)that she has, to her detriment, been treated by her 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Because Grievants completed the OAP after adoption of Policy 442, which specifically addresses the salary increase and promotion, they are not similarly situated to other employees who received salary increases prior to the effective date of Policy 442, and have failed to establish a prima facie case of discrimination.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 14, 2000 _____

Sue Keller

Senior Administrative Law Judge

[Footnote: 1](#)

Grievants Barthelemy and Rogers were part of a consolidated decision involving fifty-six Correctional Officers assigned to Huttonsville Correctional Center and Pruntytown Correctional Center. Gragg, et al., v. Div. of Corr., Docket No. 98-CORR-330 (Mar. 26, 1999), All grievances were found to have been untimely filed, and all were appealed. Grievants Barthelemy and Rogers proceeded separately due to the requirement set forth in W. Va. Code §29-6A-7(n) that appeals may be filed in the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred.