

RICHARD HADDIX and WESLEY LINN,

Grievants,

v. Docket No. 99-CORR-395

DIVISION OF CORRECTIONS/

HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

DECISION

Richard Haddix and Wesley Linn (Grievants), employed by the Division of Corrections (DOC) at Huttonsville Correctional Center (HCC), filed grievances on July 28, 1999, and July 29, 1999, respectively, arguing that they should have received a 5% incentive pay increase when they moved into "Unit Management" in 1996. Both grievances were denied at all lower levels. Grievants filed their level four appeals on September 16, 1999, and their grievances were consolidated for hearing and decision. This matter was placed in abeyance at the request of the parties, until a decision was issued in a grievance involving identical issues, Channell, v. Division of Corrections, Docket No. 99-CORR-244 (Dec. 8, 1999). On January 11, 2000, the parties requested that a decision be issued based upon the record developed below. This grievance became mature for consideration upon receipt of the transcript of the level three hearing, on February 3, 2000. ([See footnote 1](#))

The following findings of fact are made based upon the evidence of record.

Findings of Fact

1. In July of 1996, a new Unit Management section was created at HCC. Thirty HCC employees transferred into Unit Management.
2. Grievant Haddix transferred into Unit Management on November 1, 1996, and was reallocated from Correctional Officer I (COI), pay grade 8, to Corrections Case Manager (CCM), pay grade 11. Upon reallocation, his salary was raised from \$18,120 to \$21,768, the minimum salary for

pay grade 11.

3. Grievant Linn also transferred into Unit Management on November 1, 1996, and was reallocated from COI, pay grade 8, to Correctional Counselor II (CCII), pay grade 10. Upon reallocation, his salary was raised from \$18,120 to \$20,472, the minimum salary for pay grade 10.

4. Brian Edmond, Ben Gobeli, Troy McCauley, and Randall Brake all transferred to Unit Management in 1997, and their positions were reallocated. These were lateral class changes, as they remained in the same pay grade. Each of them received a 5% increase in pay, as Warden William Duncil directed that everyone who transferred into Unit Management should receive a pay increase of at least 5%.

5. When Mr. Brake transferred out of Unit Management, he voluntarily gave up the 5% pay increase he had received upon his transfer into Unit Management.

6. The salary increases received by Grievants were based upon the Division of Personnel's (DOP) Administrative Rule governing salary increases upon reallocation, and were a result of the changes in pay grades.

7. The pay increases received by employees who transferred into Unit Management by lateral class change were incentive pay increases given as a reward or bonus to employees for choosing to transfer into Unit Management.

Discussion

A preliminary issue to be discussed in this grievance is timeliness, although it is unclear whether DOC is asserting this defense at level four. The grievance was denied at both levels two and three, due to the finding that Grievants had not initiated their grievances within ten days of the occurrence of the events upon which they were based or the discovery of that event, pursuant to W. Va. Code § 29-6A-3(a). However, no evidence regarding this issue was introduced at the level three hearing, and DOC did not submit a brief at level four. Nevertheless, the timeliness issue will be addressed.

Untimely filing is an affirmative defense, and the burden of proof is on the employer to prove it by a preponderance of the evidence. Craig v. Dep't of Health and Human Resources, Docket No. 98-HHR-334 (June 24, 1999); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). In addition, the same statute requires the employer to raise the issue of timeliness at or before the level two conference. Because the record is devoid of evidence on this issue,

Respondent has failed to prove by a preponderance of the evidence that this grievance was untimely filed.

The instant case presents exactly the same issues which were addressed in Channell, supra. As in that case, Grievants here contend that it was discriminatory for DOC to grant a 5% incentive increase to employees who laterally transferred into Unit Management, while Grievants only received the salary increase required by DOP's Administrative Rule upon reallocation. Grievants believe they should have received this same incentive pay in addition to the raises they received when they accepted positions in higher pay grades. DOC contends that Grievants received all the salary increase to which they were entitled.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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." A grievant alleging discrimination must establish a prima facie case by demonstrating:

- (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
- (b) that he has, to his detriment, been treated by his 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 a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievants' salary increases were accomplished in accordance with DOP's Administrative Rule, § 5.4, which provides that "[w]hen a position is reallocated to a different class, the salary of the incumbent shall be adjusted in accordance with salary regulations for promotion, demotion and lateral class change." The salary of an employee who is promoted into a position in a higher pay grade, and

whose salary is within the pay range for the new pay grade, is adjusted by either 5% per pay grade, to a maximum of 15%, or to the minimum salary of the new pay grade, whichever is greater. If the salary of the promoted employee is at the minimum rate of the old pay grade, his salary is increased to the minimum level of the new pay grade. DOP Administrative Rule at § 5.5. In accordance with these provisions, Grievants were both increased to the minimum salary for their new pay grades.

DOP's Administrative Rule further provides at § 3.54 that a lateral class change is "[t]he movement of any employee from one class to another class in the same pay grade." In addition, § 5.7 of the same Rule states that "[a]ny employee who receives a lateral class change shall be paid the same salary received prior to the change."

As was concluded by the administrative law judge in Channell, *supra*, Mr. Edmond, Mr. Gobeli, Mr. McCauley, and Mr. Brake were not entitled to a pay increase upon a lateral class change. Grievants did not receive the same 5% increase simply for transferring into Unit Management, which was not related to actual job duties, and they are similarly situated to all employees who transferred into Unit Management. Accordingly, they have made a prima facie case of discrimination. DOC has failed to demonstrate a legitimate, nonpretextual reason for the difference in treatment. Therefore, Grievants are entitled to a 5% salary increase for transferring into Unit Management, in addition to the raises they received upon reallocation. ([See footnote 2](#))

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Craig v. Dep't of Health and Human Resources, Docket No. 98-HHR-334 (June 24, 1999); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).
2. Respondent introduced no evidence as to the untimely filing of this grievance, so it has failed to prove by a preponderance of the evidence that this grievance was not timely filed.
3. Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).
4. A grievant alleging discrimination must establish a prima facie case by demonstrating:

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

(b) that he has, to his detriment, been treated by his 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, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievants proved they were similarly situated in a pertinent way to other employees who were treated differently from Grievants, in that the other employees received an incentive pay increase upon transferring into Unit Management, which Grievants did not, and then later received pay increases upon promotion for changing pay grades, all to Grievants' detriment; and that these differences were unrelated to actual job responsibilities and were not agreed to by Grievants. Concl. of Law 5, Channell, et al., v. Division of Corrections, Docket No. 99-CORR-244 (Dec. 8, 1999).

6. Respondents did not demonstrate a legitimate, nondiscriminatory reason for the difference in treatment.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to increase Grievants' salaries by 5% over the amount each was earning on November 1, 1996, and to pay them all back pay to which they are entitled, plus interest, retroactive to November 1, 1996.

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, and 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: February 25, 2000

DENISE M. SPATAFORE
Administrative Law Judge

[Footnote: 1](#)

Grievants represented themselves, and DOC was represented by counsel, Leslie K. Tyree. Although notified of this proceeding, the Division of Personnel chose not to participate.

[Footnote: 2](#)

Because no timeliness defense was asserted by Respondent, Grievants' back pay will not be limited. See Butler v. W. Va. Dep't of Transp., Docket No. 99-DOH-084 (May 13, 1999); Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket Nos. 91-ABCC- 052/169 (Sept. 27, 1991). DOC did not raise any other arguments regarding the limitation of back pay, so it is not necessary to discuss that issue in this case.