

**DELMUS R. GRAHAM, JR., et al.,**

**Grievants,**

**v.**

**Docket No. 00-CORR-124**

**DIVISION OF CORRECTIONS/  
HUTTONSVILLE CORRECTIONAL  
CENTER,**

**Respondent.**

### **DECISION**

Delmus Graham and James Carr (“Grievants”) initiated their grievances on March 15, 2000, alleging that they had been discriminated against, because other correctional officers who transferred into unit management received a 5% pay increase. They seek a 5% pay raise, with attorney fees and interest. The grievances were denied at level one, and, upon appeal to level two, they were denied on March 20, 2000. These grievances were consolidated at level three, and a hearing was held on March 29, 2000, followed by a decision denying the grievance dated April 4, 2000. Grievants appealed to level four on April 13, 2000. A conference call was held on May 3, 2000, at which time the submission of the matter for a decision based upon the lower level record was discussed. [\(See footnote 1\)](#) By Order dated May 12, 2000, the undersigned notified the parties that this matter would be submitted on the record if no objection were received by May 19, 2000, and that any fact/law proposals should be filed by May 31, 2000. Neither party responded to that Order. This matter became mature for consideration on July 7, 2000, upon receipt of the complete lower level record. [\(See footnote 2\)](#)

The following findings of fact are made from a preponderance of the evidence of record.

### **Findings of Fact**

1. Grievants are employed by Respondent West Virginia Division of Corrections (“DOC”) at

Huttonsville Correctional Center.

2. Effective March 1, 2000, Grievants' positions as Correctional Officer IIs were reallocated to Correctional Counselor Is ("CCI").
3. Correctional Officer II and Correctional Counselor I are both in Pay Grade 10.
4. Grievants received no salary increase when their positions were reallocated.
5. Grievant's new positions as CCIs were part of the Unit Management Section at Huttonsville Correctional Center.
6. The Unit Management Section was created in 1996 as part of a reorganization of the facility.
7. At the time of the creation of the Unit Management Section, Correctional Officers who transferred into the new unit received a 5% "incentive" pay increase for transferring, even if they were moving to a different class title in the same pay grade.
8. Prior to accepting their new positions, Grievants were advised by Huttonsville Correctional Center officials that they would not receive a salary increase upon moving into their new positions.

### **Discussion**

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). They contend that they have been subjected to discrimination, because the employees who transferred to Unit Management in 1996 received 5% pay raises for making the transfer. DOC contends that it is inappropriate for Grievants to compare themselves to employees who received the raises four years ago under different circumstances. Respondent argues that it was not discriminatory for Grievants, who applied for and accepted positions as CCIs this year, to not receive a 5% increase, because they are not similarly situated to those employees who received the raises as an incentive for transferring into the new unit. DOC further contends that Grievants were not entitled to any salary increase for making a "lateral transfer", per the regulations of the Division of Personnel ("DOP").

DOP's Administrative Rule, § 3.54, defines "lateral class change" as "[t]he movement of any employee from one class to another class in the same pay grade." The same Rule provides in § 5.7 that "[a]ny employee who receives a lateral class change shall be paid the same salary received prior to the change." Pursuant to the provisions of the Rule, Grievants were not entitled to a pay increase, because they moved from one class to another class within the same pay grade. Nevertheless,

Grievants contend that it was discriminatory for DOC to refuse to give them the pay increase granted to other employees who laterally transferred in 1996 and 1997. Grievants cite the Grievance Board's recent decision in Channel v. Div. of Corrections, Docket No. 99-CORR-244 (Dec. 8, 1999), in which it was held that it was a discriminatory practice for DOC to grant 5% pay increases to employees who laterally transferred to Unit Management without giving the same increase to employees who transferred into positions in higher pay grades when transferring to the new unit. While the grievants in Channell had received salary increases simply because they moved into higher paying positions, because of DOC's granting of raises to lateral transfers, who were not entitled to them under DOP's Rule, the grievants were awarded an additional 5% increase. The only employee to whom Grievants in the instant case have specifically compared themselves is Troy McCauley, who transferred into Unit Management when the unit was initially created. He received a 5% increase even though his position was reallocated to a position in the same pay grade, per the former warden's decision to "reward" employees who transferred into the new unit.

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, et al. 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. Grievants may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

The undersigned finds that Grievants have failed to establish a prima facie case of discrimination,

because they are not “similarly situated” to the employees who transferred into Unit Management when it was created. The pay increases granted to the employees who initially transferred into the unit were offered by former Warden Duncil in order to attract employees in an effort to staff the new unit. That situation no longer exists. Grievants applied for and accepted vacant positions in Unit Management, knowing in advance that they would not receive pay increases, because they were lateral transfers. Warden Duncil has long since left Huttonsville Correctional Center, and the initial staffing of the Unit Management Section has been accomplished for some time. Accordingly, it is not discriminatory for DOC to follow DOP's Rule when current employees laterally transfer to Unit Management.

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

### **Conclusions of Law**

1. In non-disciplinary matters, 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).
2. When a state employee moves from one class to another class in the same pay grade, he shall be paid the same salary received prior to the change. Division of Personnel Administrative Rule, §§ 3.54 and 5.7.
3. 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).

4. Because Grievants transferred into existing positions in Unit Management, they are not

similarly situated to employees who transferred into Unit Management when the unit was created as part its initial staffing and received incentive pay increases for making the transfer.

5. Grievants have failed to establish a prima facie case of discrimination.

Accordingly, this 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, 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: July 17, 2000** \_\_\_\_\_

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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[Footnote: 1](#)

*Grievants represented themselves throughout this proceeding, and Respondent was represented by counsel, Leslie K. Tyree.*

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[Footnote: 2](#)

*The lower level documents had been mailed to the Grievance Board on April 24, 2000. However, this record did not contain a transcript of the level three hearing, which was not provided to the undersigned until July 7, 2000.*