CECIL PRITT, et al.,

Grievants,

v. **Docket No. 02-CORR-064**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL
CENTER,

Respondent.

DECISION

This proceeding began as two separate grievances. On January 21, 2002, twenty- three correctional officers employed at the Huttonsville Correctional Center ("HCC") filed a grievance claiming entitlement to pay increases associated with the Officers Apprenticeship Program ("OAP"). After denials at levels one and two, additional grievants were added at levels three and four, and a level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on October 11, 2002. (See footnote 1) Grievants were represented by counsel, Thomas M. Regan, and Respondent was represented by counsel, Heather Connolly.

A similar grievance was filed at level one by Joseph Daniels on July 22, 2002. After proceeding through the lower levels of the grievance procedure, the grievance was heard at level four in the Elkins office on November 20, 2002. At that hearing, Grievant Daniels was represented by Grievant Cecil Pritt, and Respondent was represented by counsel, Charles Houdyschell, Jr. Subsequently, the parties contacted the undersigned and requested that these grievances be consolidated, which was effected by Order dated February 7, 2003. In the same Order, the agreed upon briefing schedule was set forth, with a deadline of March 5, 2003, for the parties' final submissions. Fact/law proposals were submitted by Respondent on December 5 and December 11, 2002, and by Grievant Pritt (in relation to the Daniels grievance) on December 9, 2002. No proposals were submitted on behalf of the grievants in the Pritt grievance. Therefore, this matter became mature for consideration on March 5, 2003, the agreed-upon deadline for the parties' submissions.

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

Findings of Fact

1. Grievants are employed as correctional officers at HCC. (See footnote 2)

2. In 1994, all state employees were reclassified, including correctional officers, pursuant to a classification system developed by the Division of Personnel ("DOP").

3. As part of the 1994 reclassification, the previously voluntary OAP was made a requirement of all correctional officers employed by DOC. All newly hired officers must enroll in the program, and it must be completed within two years of enrollment. (See footnote 3) 4. When the 1994 reclassification project was implemented, all then-classified CO Is who had completed the OAP were reallocated to CO II. Consistent with DOP's administrative rule, these CO Is were given salary upgrades to the entry level salary of a CO II if their salary was below that level, and no increase at all if their salary was above that level. (See footnote 4) This resulted in some officers receiving a five percent increase and others receiving less or nothing at all.

5. In the 1994 reclassification, officers who had already advanced beyond CO I and had completed the OAP or were scheduled to complete it within a few months after implementation of the reclassification project were not given any salary increase related to completion of the OAP.

6. After the 1994 reclassifications were implemented, some newly-reclassified CO IIs complained about receiving no salary increase or an increase of less than five percent. To alleviate their dissatisfaction, DOC and DOP awarded an overall five percent increase, retroactive to April 1, 1994, to all officers who complained.

7. In 1995, a group of officers who had already completed or nearly completed the OAP at the time of the 1994 reclassification complained that it was discriminatory for DOC to grant five percent increases to the officers who had complained and not to them. In Whorton v. West Virginia Division of Corrections, Docket No. 96-CORR-078 (June 25, 1996), this Grievance Board determined that DOC's practice was discriminatory, and that, although it was not legally obligated to grant a salary increase beyond what is addressedin DOP's regulations, it could not grant a raise for OAP completion to some officers and not to others. Therefore, the grievants were granted a five percent increase, retroactive to April 1, 1994, or their date of completion of the OAP.

8. The decision in Whorton was based upon the determination that DOC had decided to grant

discretionary five percent salary increases to officers who had completed the OAP on or about the time of the 1994 reclassification.

9. Effective April 1, 1998, DOC implemented a policy (then Policy Directive 442) which stated definitively that salary increases after completion of the OAP would only be granted because the employee had been reallocated, per DOP's rule regarding salary increases upon promotion.

10. Troy McCauley, Jr., Donald Higgins, Joseph Kisner, Charles Collett, Diana Miller, John Murphy, James Gragg, Jeffrey Roy and Verl Simmons are correctional officers who were employed by DOC in 1994, but did not receive a salary increase upon reclassification. They subsequently completed the OAP and, pursuant to Whorton, were given a five percent increase for completion of the program. These employees were in classifications higher than CO I in 1994, and completed the OAP after it became a mandatory requirement.

11. Officers who have been hired and completed the OAP since the implementation of DOC's policy regarding reallocation have not received a separate salary increase just for completion of the OAP.

12. Grievant Pritt was hired by DOC sometime after 1994. He completed the OAP on June 23, 1998, and was reallocated to CO II on September 16, 1998. He received a five percent salary increase upon reallocation. 13. Grievant Daniels began employment with DOC in April of 2000. He completed the OAP on May 23, 2002, and was reallocated to CO II on June 15, 2002, with the attendant five percent salary increase.

Discussion

As 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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievants contend that DOC continues its practice of awarding two separate salary increases after completion of the OAP; one increase for completing the program and another for reallocation to CO II. They point to the examples of Mr. McCauley and others who have received an increase in recent years only for completion of the OAP. Respondent counters that each and every employee whom Grievants have identified were employed by DOC in 1994 and did not receive a raise during the

reclassification project. Therefore, DOC was merely complying with the edicts set forth in Whorton, supra, that these officers should receive a separate raise for completion of the OAP, pursuant to Respondent's practice in 1994 and after with regard to such raises.

Grievants' contentions are tantamount to a claim of discrimination, which is defined by 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." In order to establish a claim of discrimination, an employee must establish a prima facie case by a preponderance of the evidence. In order to meetthis 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. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievants establish 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. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Respondent's current policy governing the OAP is Policy Directive 145, which provides that the certificate of completion of the program will serve as the basis for reallocation of the officer to the appropriate classification. There is no mention in the policy of a separate raise for completion of the program in and of itself. Rather, an employee is entitled to a salary increase in compliance with DOP Administrative Rule §§ 4.7 and 5.5, which provide for salary increases upon reallocation to a position in a higher pay grade. “Reallocation” is a substantial change in the duties and responsibilities assigned to a position, requiring that the position be reclassified. Within DOC's system, CO Is (See footnote 5) mustcomplete initial training and the OAP prior to being eligible for reallocation, at which

point they become fully qualified to perform the job duties of a CO II.

Only Grievants Pritt and Daniels have provided the factual information pertinent to their employment, which information establishes that both were hired after 1994 and completed the OAP after adoption of the pertinent policy addressing reallocation after completion of the program. While there are numerous Grievants included in this grievance, no information has been provided regarding their dates of hire, dates of completion of the OAP, or salary increases. As set forth above, employees who received two separate salary increases only did so because of Respondent's discriminatory practice after the initial 1994 reclassifications. Individuals who were not employed by DOC in 1994 and have completed the OAP since 1998 are not entitled to any salary increase other than the five percent provided for by DOP. Nevertheless, although some Grievants may have been employed in 1994 and did not receive Whorton-related increases, that information has not been placed into evidence, so no entitlement to relief has been proven. (See footnote 6) Without such evidence, Grievants have not established that they are similarly situated to any employees who received two salary increases, so they have not made a prima facie case of discrimination.

The following conclusions of law support the decision reached.

Conclusions of Law

___1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

___2. Correctional officers employed by DOC during the 1994 statewide reclassification subsequently received a five percent salary increase for completion of the Officers Apprenticeship Program, due to complaints from officers who did not receive a salary increase as a result of the reclassification. See Whorton v. W. Va. Div. of Corrections, Docket No. 96-CORR-078 (June 25, 1996); Livesay v. Div. of Corrections, Docket No. 96-CORR-459 (Nov. 4, 1997); Barthelemy/Rogers v. Div. of Corrections, Docket No. 98-CORR-486R/487R (Sept. 14, 2000).

3. Pursuant to the Division of Personnel's Administrative Rule and DOC policy, a correctional officer is entitled to a five percent salary increase upon reallocation to a higher pay grade, but not for completion of the Officers Apprenticeship Program.

4. In order to establish a claim of discrimination as defined by W. Va. Code § 29-6A-2(d) , an employee must establish a prima facie case 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.

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5. The evidence submitted by Grievants fails 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: April 3, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

A default claim had been filed in this grievance, which was denied by the undersigned in an Order dated June 7, 2002.

Footnote: 2

The exact ranks of all Grievants is not specified in the record.

Footnote: 3

There has been much dispute over and several policies addressing the OAP requirement. Recently, it was determined by this Grievance Board that, for new officers who have only a high school education and do not possess the requisite four years of specified experience, completion of the OAP is a prerequisite to reallocation to a rank higher than CO I. For officers who have four years of law enforcement experience or a specified number of college credit hours in a particular area, the OAP must be completed within two years of appointment, but is not required prior to reallocation. See Siler v. Div. of Corrections, Docket No. 02-CORR-044 (Mar. 27, 2003).

Footnote: 4

DOP's rule provides that, upon promotion, an employee whose salary falls within the range for the new pay grade shall receive an increase of one increment, which is five percent.

Footnote: 5

As set forth above, this requirement only applies to CO Is with only a high school education or equivalent who have none of the applicable experience or education required of a CO II.

Footnote: 6

Moreover, any such claim by an individual employed by DOC since 1994 would certainly be untimely.