JOSEPH SHIPLEY,

Grievant,

v. **Docket No. 02-CORR-393**

DIVISION OF CORRECTIONS/
HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

DECISION

Joseph Shipley ("Grievant") initiated this grievance on October 25, 2002, alleging entitlement to a 5% raise for completion of the Officer Apprenticeship Program ("OAP"). The grievance was denied at level one on October 30, 2002, and Grievant appealed to level two on October 31, 2002. It was denied at that level on November 8, 2002. In lieu of a level three hearing, Grievant requested that the hearing evaluator render a decision based upon the evidence introduced in a related grievance, Cecil Pritt, et al v. Division of Corrections. The grievance was denied in a written level three decision dated November 22, 2002. Grievant appealed to level four on December 2, 2002. Pursuant to agreement of the parties, this grievance was placed in abeyance, pending the outcome of Pritt, et al., v. Division of Corrections, Docket No. 02-CORR-064 (April 3, 2003). Thereafter, a hearing in this grievance was held in Elkins, West Virginia, on June 23, 2003. Grievant was represented by co-worker Cecil Pritt, and Respondent was represented by Assistant Attorney General Charles Houdyschell. The parties elected to incorporate the entire record from Pritt, supra, into the record for this grievance, without the addition of any new evidence. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 10, 2003. The following findings of fact which were made in Pritt, supra, are hereby adopted in the instant grievance.

Findings of Fact

1. In 1994, all state employees were reclassified, including correctional officers, pursuant to a

classification system developed by the Division of Personnel ("DOP").

2. 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.

3. 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 1) This resulted in some officers receiving a five percent increase and others receiving less or nothing at all.

4. 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.

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

6. 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 addressed in 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.

7. 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.

8. 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.

9. 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 inclassifications 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.

The following additional findings of fact are made, based upon the arguments raised by Grievant:

12. John Riffle was employed by DOC as a correctional officer in 1994 during the reclassification project. He did not enroll in the OAP until sometime after 1994, and he received a 5% salary increase for completing the program in May of 1998.

13. Grievant introduced no evidence regarding his date of initial employment or date of completion of the OAP.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

Grievant contends that, if two separate raises have ever been provided for completion of the OAP and for reallocation to CO II, then that practice must continue. He relies upon the evidence introduced in Pritt, supra, and provided no additional evidence, although he knew that the grievance was denied in that case. Grievant did not even provide information regarding his own reallocation and/or completion of the OAP. The Grievance Board adheres to the doctrine of *stare decisis* *(See footnote 2)* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). Certainly, in this instance, there is no reason whatsoever for altering the conclusions reached in Pritt, supra, based upon the exact same evidence. Accordingly, the

following discussion from that decision is provided:

> 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 must complete 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.
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> . . . [E]mployees 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 3) 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.

Similarly, in the instant case, Grievant has provided no additional evidence which would provide any potential basis for altering the conclusions reached in Pritt, supra, let alone pertinent information regarding his own situation. Accordingly, Grievant is entitled to no relief.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his 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.

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.

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).

5. Grievant submitted no evidence which would establish a prima facie case of discrimination.

6. The Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974).

7. Grievant provided no basis for altering the conclusions reached in Pritt, et al., v. Division of Corrections, Docket No. 02-CORR-064 (April 3, 2003), regarding the same factual issue presented in the instant grievance.

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: August 20, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

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: 2

Latin for "to abide by" or "to adhere to" decided cases.

Footnote: 3

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