JERRY MILLER, et al.,

Grievants,

Docket No. 98-CORR-329

DIVISION OF CORRECTIONS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Jerry Miller, Bryson Cutright, and James Bolliger ("Grievants"), employed by the Division of Corrections ("Respondent") at Pruntytown Correctional Center ("PCC"), filed level one grievances on June 15, 1998, in which they alleged their compensation did not reflect the work they performed, including the duties of Correctional Officer. For relief, Grievants requested a salary increase, and back pay with interest. The grievances were denied at all lower levels, and appeal to level four was made on August 31, 1998. A level four hearing was delayed to allow Grievants the opportunity to secure legal counsel. After counsel determined that she could not represent Grievants due to a conflict of interest, Grievants again obtained representation, and the grievance was placed in abeyance pending resolution of a related action in the Kanawha County Circuit Court. Grievants' counsel then withdrew from the case, and finding representation for a third time was necessary. A level four hearing was eventually conducted in the Grievance Board's Westover office on January 6, 2004. Grievants were represented by Patricia H. Stiller, Esq., DOC was represented by Charles Houdyschell, Assistant Attorney General, and the Division of Personnel (DOP) was represented by Assistant Director Lowell T. Basford. Unfortunately, Ms. Stiller passed away shortly after the hearing. Grievants then retained Ms. Stiller's associate, Molly Superfesky, Esq., as counsel. The grievance became maturefor decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before June 11, 2004.

The following facts are derived from a preponderance of the evidence made part of the record at levels three and four.

Findings of Fact

1. Grievant Miller has been employed by PCC since 1994, and presently holds the classification of Buildings and Grounds Manager, pay grade 15. Prior to September 1, 2000, Grievant Miller held the classification of Buildings Maintenance Supervisor 2, pay grade 11.

2. Grievant Bolliger was employed by PCC from 1988 until November 2003. Prior to September 2000, Grievant Bolliger held the classification of Building Equipment Mechanic, pay grade 8. After September 2000, he held the title of Facilities/Equipment Maintenance Technician, pay grade 9.

3. Grievant Cutright has been regularly employed by PCC since 1993, and currently holds the classification of Facilities/Equipment Maintenance Technician, pay grade 9. Prior to September 2000, Grievant Cutright was classified as a Building Equipment Mechanic, pay grade 8.

4. In 1996, DOC was granted Legislative approval to provide a $2,004.00 salary increase to employees whose primary function involved direct contact with inmates within the correctional facilities. DOP approved DOC's FY 1997 budget request which included the special pay differential to facilitate the recruitment and retention of employees classified as Correctional Officers, Correctional Counselors, Correctional Case Managers, Correctional Program Manager I, Corrections Program Specialist, Corrections ProgramSupervisors, and Correctional Magistrates. All other employees of DOC received a $300.00 salary increase.

5. DOC provides Grievants the option of selecting inmates to assist them in their duties. Grievants are not required to keep any particular inmate and can send them back if they do not work out.

6. Grievants are not trained correctional officers, are not expected to pursue and capture escaping inmates, and are not permitted to carry firearms or restraints, or otherwise perform the functions of a correctional officer.

7. Grievants complete a variety of duties, including but not limited to, replacing roofs, soffit and fascia, and gutters, working on motors, servicing equipment and vehicles, repairing sewer lines, toilets, and other plumbing responsibilities, welding, pouring concrete, and electrical repairs.

8. Some similarly classified employees at St. Marys Correctional Center earn approximately $6,000.00 more annually than Grievants.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances 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); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v.W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievants allege that DOC has twice acted in a discriminatory manner. First was the failure to include them in the $2,000.00 salary increase, when they are responsible for inmates assigned to assist them. The second claim arises from the fact that similarly classified employees at other institutions earn a considerably higher salary. Respondents deny that Grievants have suffered discrimination in either claim.

Discrimination is defined in 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." to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), grievants must demonstrate the following:
(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 grievant 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 the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employmentdecision. Smith,

supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievants may show the offered reasons are pretextual. Id.

1996 salary increase

Grievants have met their burden of proof and established a prima facie case of discrimination regarding this claim. They were similarly situated to those employees who received the increase as they are employed by DOC, and they were, to their detriment, only granted minor salary increases. However, DOC and DOP provided a legitimate, non-discriminatory reason for the difference in treatment, i. e., there was difficulty in recruitment and retention in those classifications which included "correctional" in their titles. Grievants are not correctional officers, and are not responsible for inmate security. While Grievants do work with inmates, they are not responsible for escapes, and do not carry firearms. If they feel uncomfortable with an inmate, they may refuse his assistance.

Grievants do not allege they are misclassified, or that the primary function of their jobs is anything other than maintenance work. Further, the Grievance Board has held that the granting of a pay differential in order to address recruitment and retention problems which are limited to a specific group of employees in a specific program is within DOP's discretion and authority. Overbay v. Div. of Corr. and Div. of Personnel, Docket No. 96-CORR-248 (June 17, 1998); Pishner v. W. Va. Dep't of Health and Human Res., Docket No. 97-HHR-478 (May 21, 1998); Travis v. W. Va. Dep't of Health and Human Res., Docket No. 96-HHR-518 (Jan. 12, 1998). Grievants do not allege the reason for the difference in treatment was pretextual.

Salary disparity Grievants have established a prima facie case of discrimination by showing that similarly-classified employees of the DOC earn considerable higher salaries. Respondents assert that the difference in salaries may be attributed to a number of factors, including varying starting salaries, legislative increases, merit increases, and time in service. Grievants do not dispute this non-discriminatory reason for the difference in salaries, nor do they allege the reason is pretextual.

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. As this grievance does not involve a disciplinary matter, Grievants have the burden of

proving their grievances 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); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Discrimination is defined in 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."

3. To establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), grievants must demonstrate the following:

(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 grievant in writing.

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5. Grievants established prima facie cases of discrimination regarding both the 1996 salary increase and the salary disparity; however, Respondents offered legitimate, non-discriminatory reasons for both claims, and Grievants did not show the reasons to be pretextual.

Accordingly, the grievance is DENIED.

Any party 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). Neitherthe 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 28, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE