THOMAS GEORGE and JEFF RIDER,

Grievants,

v. **Docket No. 03-CORR-239**

DIVISION OF CORRECTIONS/

HUTTONSVILLE CORRECTIONAL CENTER, and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Thomas George and Jeff Rider ("Grievants"), employed by the Division of Corrections ("DOC") at the Huttonsville Correctional Center, filed individual level one grievances in June 2003, seeking credit for prior work experience in county sheriff's departments. For relief, Grievants request their sick and annual leave accrued while a deputy sheriff be transferred to their current position, plus years of service credited for annual increment pay, back pay, and interest. The requested relief could not be granted at level one or level two. The grievances were consolidated for hearing at level three, and following an evidentiary hearing, were denied. Appeal to level four was made on August 11, 2003, and the grievance was held in abeyance while Grievant Rider was on military duty in Iraq.

A level four hearing was conducted on July 14, 2005, in the Grievance Board's Elkins office. Grievants represented themselves, DOC was represented by John Boothroyd, Esq., and the Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Assistant Attorney General. The grievance became mature for decision upon receipt of final post-hearing submissions on August 31, 2005.

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

Findings of Fact

1. Grievant George has been employed as a Correctional Officer II, and Grievant Rider as a Lieutenant, at the Huttonsville Correctional Center ("HCC") at all times pertinent to this grievance.

2. Grievant Rider was employed by HCC from April 1, 1988 through January 5, 1991. When he returned to HCC in September 1995, Grievant Rider was given credit for nine years and six days of

employment with the Randolph County sheriff's department.

3. In June 2003, Grievant Rider learned that the credit for his employment in the sheriff's department had been rescinded.

4. Grievant George has never been credited for his work at the Barbour County sheriff's department, with the exception that the “years of service” in that position are considered for retirement purposes for both Grievants.

Discussion

Grievants argue that they are entitled to transfer experience credit because as employees of the sheriffs' departments, they were state employees, and because an employee at the Department of Public Safety was allowed to retain credit earned at a county jail. DOC and DOP assert that Grievants may not transfer prior experience for leave and salary purposes because employees of sheriffs' departments are not employed under the state Civil Service System. Further, they deny that any discrimination has occurred relevant to the cited employee.

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 (2004); 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). In support of their position, Grievants rely upon the following definitions included in W. Va. Code § 5-10C-3 (See footnote 1) :

(3)“Employee” means any person, whether appointed, elected, or under contract, providing services for a public employer, for which compensation is paid and who is a member of the applicable retirement system.

* * *

(6) "Participating public employer" means the state of West Virginia, any board, commission, department, institution or spending unit, and shall include any agency with full-time employees, created by rule of the supreme court of appeals, which for the purpose of this article shall be

considered a department of state government, and county boards of education with respect to teachers employed by them; any political subdivision in the state which has elected to cover its employees, as defined in this article, under the West Virginia public employees retirement system; any political subdivision in the state which has elected to cover its employees, as defined in this article, under the deputy sheriff retirement system; and any political subdivision in this state which issubject to the provisions of article twenty-two, chapter eight of this code.

(7) "Political subdivision" means the state of West Virginia, a county, city or town in the state; a school corporation or corporate unit; any separate corporation or instrumentality established by one or more counties, cities or towns, as permitted by law; any corporation or instrumentality supported in most part by counties, cities or towns; any public corporation charged by law with the performance of a governmental function and whose jurisdiction is coextensive with one or more counties, cities or towns, any agency or organization established by, or approved by the division of health for the provision of community health or mental retardation services, and which is supported in part by state, county or municipal funds.

(8) "Retirement system" means, as appropriate: The West Virginia public employees retirement system created in article ten, chapter five of this code; the West Virginia department of public safety death, disability and retirement fund created in sections twenty-six through thirty-eight, article two, chapter fifteen of this code; the West Virginia deputy sheriff retirement system created in article fourteen-d, chapter seven of this code; the state teachers retirement system created in article seven-a, chapter eighteen of this code; the West Virginia board of regents retirement plans created in section fourteen-a, article seven-a, chapter eighteen and section four-a, article twenty-three, chapter eighteen of this code; the judges' retirement system created in article nine, chapter fifty-one of this code; or the firemen's or policemen's pension and relief fund created in section sixteen, article twenty-two, chapter eight of this code.

Grievants entered into evidence documents confirming their participation in the Public Employees Retirement System, and a letter from Mike Mullins, a member of the Randolph County Deputy Sheriff's Civil Service Commission, stating that the commission is authorized and governed by statute. Grievants also cite the level four decision in the matter of Henry v. Department of Transportation/Division of Highways, Docket No. 04-DOH-228 (Mar. 3, 2005), in which an employee was permitted to transfer leave time accrued at the Private Industry Counsel to a new position at the

Division of Highways.

___Respondents argue that with the sole exception of county health departments, county employees may not transfer years of experience from county employers for salary or leave purposes. The Henry decision is distinguished by Respondents as the employer in that matter had erroneously been viewed as a private contractor, and grievant had been awarded credit for state employment he had properly earned. Respondents submit Childers v. Department of Tax & Revenue and the Division of Personnel, Docket No. 01- T&R-142 (July 17, 2002), is controlling in this situation. Respondents also rely on the W. Va. Code § 5-5-1 definition of "eligible employee" as (See footnote 2):

(1) Any regular full-time employee of the state or any spending unit of the state who is eligible for membership in any state retirement system of the state of West Virginia or other retirement plan authorized by the state: *Provided,* That the mandatory salary increase required by this article shall not apply to any faculty employee at state institutions of higher education, or any employee of the state whose compensation is fixed by statute or by statutory schedule other than employees described in this section. Clerks, deputy clerks and magistrate assistants of magistrate courts are eligible for the incremental salary increases provided in this article with the increases to be allowable in addition to the maximum salaries and compensation for the employee offices under the magistrate court system statutes of article one, chapter fifty of the code. This article may not be construed to mandate an increase in the salary of any elected or appointed officer of the state; or

(2) Any classified employee as defined in section two, article nine, chapter eighteen-b of this code who is an employee of astate institution of higher education or of the higher education policy commission;

* * * (b) "Years of service" means full years of totaled service as an employee of the state of West Virginia; and

(c) "Spending unit" means any state office, department, agency, board, commission, institution, bureau or other designated body authorized to hire employees.

The evidence simply does not support Grievants' claim. W. Va. Code § 5-10C-3 defines "employee" for the purpose of the state retirement system. Grievants participated in the state employees retirement system as deputy sheriffs, as specifically provided by statute. However, a more general definition for employee, is that in Code § 5-5-1. This statute was addressed in Childers, a

case very similar to the present one. Ms. Childers was employed as a Deputy Circuit Clerk, and requested that her accrued time in that capacity be transferred to her subsequent position at Tax & Revenue, for purposes of annual increment pay and annual leave.

In Childers, it was held that the grievant could not transfer her years of service for her annual increment, established in Code § 5-5-2, because the definition of “eligible employee” in Code § 5-5-1, limits the benefit to include the time an individual is employed by the State of West Virginia, or any spending unit thereof. Grievant did not offer any evidence that the office of the Circuit Clerk was a “spending unit” of the State of West Virginia. The transfer of annual and sick leave were also denied because there was no evidence that she was a classified employee under the state merit system covered by Personnel's Rules. Grievants in the present case were employees of the county civil service commission as evidenced by the letter from Mr. Mullins, and W. Va. Code 7-14-7, which provides in part:

The civil service commission in each such county shall make rules and regulations providing for both competitive and medical examinations for the position of deputy sheriff in each such county subject to the provisions of this article, for appointments to the position of deputy sheriff and for promotions and for such other matters as are necessary to carry out the purposes of this article.

Grievants do not allege that they were part of the state classified service while employed as deputy sheriffs, or that the sheriffs offices were a “spending unit” of the State. Therefore, the county employment may not be transferred to their present state positions for purposes of increment pay, annual or sick leave.

Grievants next allege that another employee was allowed to transfer his prior experience at a county jail to his present state position, resulting in discrimination. 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."

To establish a case of discrimination a grievant must show:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). Jim Wells, Assistant Director of Employee Relations at DOP, testified at level four that the individual in question had been allowed to transfer his prior experience earned at a county jail to a state position. The circumstances involved the closure of the county jail and the opening of a regional jail, at which time all leave balances of the displaced employees were transferred by Executive Order. Grievants were not similarly situated since their positions were not eliminated.

Finally, Grievant George submitted a settlement agreement regarding a complaint filed with the Equal Employment Opportunity Commission ("EEOC"). The document states that the complaining party shall not suffer discrimination or retaliation of any kind as a result of filing the charge. Because the evidence does not support a finding that the denial of credit was made after the settlement agreement in August 2000, no further consideration of this issue is required.

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 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 (2004); Howellv. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. "Eligible employees of the State of West Virginia are entitled to an incremental salary supplement by W. Va. Code § 5-5-2, based on their 'years of service' as that term is defined in W. Va. Code § 5-5-1. 'Years of service' includes the time an employee is employed by the State of West Virginia, but not time the employee is employed by a county . . . . " Childers v. Department of Tax & Revenue and the Division of Personnel, Docket No. 01-T&R-142 (July 17, 2002).

___3. Employees of a county sheriffs department are employees of the county commission and the elected county officials. W. Va. Code 7-14-7.

___4. For purposes of article five, chapter five of the West Virginia Code, Grievants were not employees of the State of West Virginia, "or any spending unit thereof," when they were employed as county deputy sheriffs, and their service in that position cannot be counted as "years of service" for the purpose of determining the amount of their increment pay. Cook v. Dep't of Health and Human

Resources, et al., Docket No. 00-HHR-352 (June 29, 2001).

5. Personnel's Rules on annual and sick leave are applicable to employment with a county entity which is a member of the state merit system. W. Va. Dep't of Admin. v. W. Va. Dep't of Health and Human Resources, 192 W. Va. 202, 451 S.E.2d 768 (1994), Childers, supra. 6. Because Grievants did not demonstrate that the county sheriffs departments were a member of the state merit system, or that they were classified employees covered by Personnel's Rules, leave earned during their county employment cannot be transferred,or the time used in determining the rate at which they accrue annual or sick leave. 7. 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."

8. To establish a case of discrimination a grievant must show:

(a) that he or she has been treated differently from one or more similarly- situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). 9. Grievants failed to establish that Respondents engaged in discrimination because they were not similarly situated to another employee whose leave was transferred by Executive Order.

10. Respondents did not violate an EEOC settlement agreement, or deny Grievant George the county credit in retaliation for a claim filed against HCC.

Accordingly, this grievance is **DENIED**. Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any 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 itsAdministrative 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: SEPTEMBER 22, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Article 10C addresses government employees retirement plans. There is no dispute that the time earned in the sheriff's departments will be credited to Grievants for retirement purposes.

Footnote: 2 *Article 5 addresses a salary increase for state employees.*