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RONALD B. CASTO

v.

DOCKET NO. 91-DPS/RJA/350

**WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY/
WEST VIRGINIA REGIONAL JAIL and
CORRECTIONAL FACILITY AUTHORITY**

DECISION

Grievant, Ronald B. Casto, is employed by the West Virginia Regional Jail and Correctional Facility Authority (RJA or Respondent) at the Eastern Regional Jail in Martinsburg. Mr. Casto filed this grievance at level one on July 22, 1991, at which time he alleged that he had not been given a \$1,325.00 pay increase on December 20, 1990, when he was promoted from Correctional Officer I to Correctional Officer II. Grievant stated that he had been advised prior to accepting employment with the RJA that he would receive the stated salary increase along with the promotion if he successfully completed one year of probationary employment. Grievant continued that, effective December 20, 1990, he was promoted to Correctional Officer II but that he did not receive any increase in salary. The administrators at both

levels one and two responded that they lacked the authority to grant the requested relief; the grievance was denied at level three. The grievance was advanced to level four by appeal dated August 7, 1991, and with the submission of proposed findings of fact and conclusions of law the case is mature for decision.

The facts of this matter are uncontroverted and may be stated as follows:

1. Grievant was employed by the RJA on December 20, 1989, as a Correctional Officer I at the base salary of \$16,000.00 per year.

2. Grievant's salary was set in compliance with RJA Policy 3013, effective November 11, 1989, which set forth base salaries for all personnel. Those salaries for the uniformed staff were as follows:

Correctional Officer-Captain	\$22,365.00 per annum
Correctional Officer-Lieutenant	\$21,105.00 per annum
Correctional Officer-Sergeant	\$19,845.00 per annum
Correctional Officer-Corporal	\$18,585.00 per annum
Correctional Officer-II	\$17,325.00 per annum
Correctional Officer-I	\$16,000.00 per annum

3. In January 1990 the West Virginia State Legislature authorized a 5% across-the-board raise for all state employees. In August 1990 the Legislature authorized a \$1008.00 across-the-board raise for all state employees.

4. The cumulative effect of the two legislative raises increased the salaries of some employees at the ERJ to near

or above the base salary of the next higher position. Employees who were promoted after the two salary increases received little or no additional compensation when reassigned to the base salary classification of the new position.

5. Grievant was promoted to the position of Correctional Officer II on December 20, 1990. Because the two legislative increases had elevated his salary beyond the base salary established by RJA Policy 3013, he received no salary increase at the time of his promotion.

6. In response to this situation the RJA revised its Policy 3013 effective May 6, 1991. This revision made a complete change in Respondent's compensation plan from the sum-certain base salary to an assigned salary range for each position.

7. Between January and April 1991, eight uniformed employees promoted by the RJA received a standard seven percent pay increase, as provided by the revised Policy 3013 which became effective May 6, 1991.

8. Grievant's present salary falls within the range established for a Correctional Officer II.

Grievant argues that Respondent acted improperly when it implemented the pay range compensation plan prior to the effective date of the revised Policy 3013, that the award of a seven percent salary increase to some employees who were promoted between January and April 1991 was contrary to the policy then in effect, and that the arbitrary application of

compensation plans resulted in different treatment of employees who were all promoted under the same agency policy.

Respondent asserts that Grievant's promotion was processed properly, that the compensation policy which it promulgated in May 1991 is not discriminatory on its face, and that the early application of the forthcoming policy between January and April 1991 was a reasonable anticipation of the policy change. Respondent further asserts that the early application was the revised plan and was not done in an effort to discriminate against Grievant but rather was an attempt to benefit all employees by commencing the utilization of a fairer policy of compensation. Respondent argues that Grievant has failed to prove that he was a victim of discrimination or that Respondent has engaged in any action which is clearly unreasonable, illegal, inappropriate, arbitrary or capricious.

W.Va. Code §29-6A-2(d) defines discrimination 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." The award of a seven percent salary increase to some employees and little or no increase to others, all of whom were promoted under an existing policy which set a sum-certain salary schedule, constitutes discrimination as defined by the grievance statute.

It appears that Respondent's motive in granting the seven percent increase to several employees prior to its adoption of the revised policy was not intentionally discriminatory but was an attempt to award those employees the benefit of the the soon to be implemented, revised salary schedule. However, this does not constitute a legitimate, non-discriminatory or work-related reason for the RJA's action which resulted in a failure to treat all employees who were subject to promotion under the same policy uniformly.

Although Respondent has clearly engaged in discrimination as defined by W.Va. Code §29-6A-2(d), a remedy for this matter is not easily discerned. It would appear that at least two methods of correcting the situation are available to Respondent. The RJA could rescind the percentage increases granted to those employees who were promoted prior to May 1991 and replace them with the sum-certain salaries set by the policy then in effect.¹ Respondent's second option is to award Grievant the same seven percent salary increase granted to those employees promoted in early 1991. Either alternative may be acceptable since either will assure that the employees are treated the same and thus eliminate the discrimination.

¹Some authority may be found for this choice in Robbins v. McDowell Co. Bd. of Educ. 411 S.E.2d 466 (W.Va. 1991); however, the present case may be easily distinguished by the RJA should it choose to follow the second alternative.

In addition to the foregoing, it is appropriate to make the following specific conclusions of law.

Conclusions of Law

1. Discrimination is any difference in the treatment of employees unless those differences are related to their actual job responsibilities or are agreed to by the employees in writing. W.Va. Code §29-6A-2(d).

2. Respondent's failure to treat uniformly all employees who were promoted while the Policy 3013 provision which established base salaries was in effect resulted in discrimination.

Accordingly, the grievance is **GRANTED** to the extent that the RJA is Ordered to revise the promotional salary increases granted prior to May 6, 1991, and to either grant Grievant a seven percent increase consistent with those individuals promoted in early 1991 or revise the salaries of those employees who received a percentage increase to reflect the sum-certain salary set by the policy in effect at the time of their promotion.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED

July 2, 1992

Sue Keller

SUE KELLER
SENIOR ADMINISTRATIVE
LAW JUDGE