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JOHN G. WARD

v.

DOCKET NO. 91-DPS-369

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

DECISION

Grievant, John G. Ward, is employed by the West Virginia Regional Jail and Correctional Facility Authority (RJA or Respondent) at the Eastern Regional Jail (ERJ) in Martinsburg, West Virginia, and presently holds the rank of Sergeant. Mr. Ward filed this grievance at level one on July 10, 1991, at which time he alleged that the RJA had improperly rescinded the experience increment from his salary at the time of his promotion and that he had been denied a seven percent pay increase granted to other officers who were promoted in March 1991. The Grievant's immediate supervisor at level one and the ERJ Administrator at level two both stated that they lacked the authority to grant the requested relief; the grievance was denied at level three.

The facts of this matter are undisputed.

1. Grievant was first employed at the ERJ on June 15, 1989, at which time he was assigned the rank of Corporal.

2. At the time of his employment Grievant was awarded an experience increment in the amount of eight hundred twenty-five dollars (\$825.00) above the base salary of eighteen thousand five hundred eighty-five dollars (\$18,585.00) for a total salary of nineteen thousand four hundred ten dollars (\$19,410.00) per annum.

3. Grievant applied for and was granted a promotion to Sergeant on September 1, 1989. As a result of that promotion Grievant's compensation was increased only to the base salary for that position. Grievant did not retain the \$825.00 increment above the base salary for his new position and received an increase of only four hundred thirty-five dollars (\$435.00). Two other employees who were promoted to Sergeant simultaneously with Grievant but who had not received an experience increment when first hired received a salary increase of one thousand three hundred and forty dollars (\$1,340.00) upon promotion. Following these promotions all three of these individuals received an annual salary of nineteen thousand eight hundred forty-five dollars (\$19,845.000).

4. Grievant learned that he would not continue to receive the additional \$825.00 increment pay, which he had previously been awarded, because Respondent wanted to keep salaries uniform.

5. RJA Policy 3013, effective December 27, 1988, and controlling at the time of Grievant's promotion to Sergeant, listed "sum certain" base salaries for its employees. The base salary for Sergeant was \$19,845.00 per annum.

6. A second Policy 3013, effective November 14, 1989, replaced the 1988 policy and continued to list base salaries for personnel.

7. The third RJA Policy 3013, effective February 19, 1990, and cancelling Policy 3013 dated November 14, 1989, continued to list base salaries for the staff. The salary for a correctional officer, holding the rank of Sergeant continued to be \$19,845.00 per annum.

8. RJA Policy 3013, effective May 5, 1991, replaced that Policy of February 19, 1990, abolished the "sum certain" base salaries for each classification and provided a pay grade and salary range for each position classification. The policy further stated that "promotional salary increases shall be calculated at seven percent (7%) of existing salary unless otherwise indicated."

9. RJA posted a vacancy announcement dated December 7, 1990, for three positions of Corporal. The stated salary for these positions was not the "sum certain" base salary provided by the Policy then in effect but was the \$18,468.00 - \$30,072.00 salary range which would not become effective until May 6, 1991.

10. Two employees of the RJA who were promoted to Sergeant in March 1991 received a seven percent pay increase.

Grievant asserts that he has been treated in a discriminatory manner because he is the only RJA employee who lost the experience increment upon promotion and because he did not receive a seven percent salary increase awarded to others prior to the change in policy. Grievant submitted the WV-11 Personnel Action forms of numerous co-workers to support his allegation. A review of those documents reveal that at least six uniformed staff employees who have received promotions retained their experience increment. These and other officers promoted between January and March 1991 all received a seven percent increase even though the policy then in effect set "sum certain" base salaries.

Respondent denies that Grievant was treated in a discriminatory manner as a result of its revised compensation policies. Respondent asserts that the experience increment available to a qualified individual at the time he is employed only stays with the salary until the person is promoted to the next position. Accordingly, when Grievant was promoted he was entitled to only the base salary of that classification to which he ascended.

Respondent reiterated that its intent had been to keep salaries uniform; however, following two legislative salary increases in 1990, it found that the enhanced salaries had

elevated the employees' earnings to nearly the base salary of the next higher position, and in some cases, beyond that level. Respondent states that once it perceived that future promotions would result in little or no salary increases for its employees, it again began to develop a new compensation plan in late 1990. At this time Respondent's administrators determined that salary ranges were more desirable than the base or "sum certain" salaries because they offered more flexibility and could better accommodate across the board increases. In early 1991 it became necessary to fill eight positions at the ERJ. Based upon the soon to be adopted compensation plan, promotions granted in February, March and April were processed with a seven percent salary increase.

Respondent asserts that Grievant's promotion strictly adhered to the provisions of Policy 3013 then in effect and that his present salary falls within the range established for Sergeant. Respondent further argues that its early application of the forthcoming compensation policy was a reasonable anticipation of the policy change and was not implemented in an effort to discriminate against Grievant, but instead was an effort to benefit all employees by commencing the utilization of a fairer policy of compensation. Finally, Respondent argues that Grievant has failed to establish that it has engaged in any behavior that was clearly unreasonable, illegal, inappropriate, arbitrary or capricious.

Policy 3013, dated December 27, 1988, and effective both at the time of Grievant's hiring and promotion, addressed the experience increment as follows:

2. A maximum of nine hundred dollars (900.00) may be added to the base salary for uniformed personnel at time of employment, based upon the following formula: For every month of related work experience above and beyond the minimum requirements for the position that an individual can verify at date of hire, an experience increment of twenty-five dollars (\$25.00) may be added to the base salary, up to a maximum of thirty-six months. Part-time employment shall not qualify an applicant for an experience increment.

3. The experience at employment increment addressed in paragraph 2 is policy of the West Virginia Regional Jail and Prison Authority for employment purposes, and is not related to, or a part of the annual increment authorized for all State employees.

There is no statement, explicit or implicit, in this policy to support Respondent's position that the experience increment is temporary in nature, effective only until the employee is promoted. If it was Respondent's intent to offer a limited salary increment it should have been clearly stated so as to put the employees on notice. Respondent did not place any limitation on the increment in the original policy nor has it done so in any of the three subsequent revisions.

Respondent not only lacks support from its own policy for the elimination of Grievant's experience increment, but its subsequent actions are contrary to its treatment of Grievant as well. Specifically, those employees promoted in early 1991 retained their experience increment. This different treatment of employees, who were all promoted

under a policy which established base salaries and was not related to the actual job responsibilities of the employees or agreed to in writing by the employees, constitutes discrimination as defined by W.Va. Code §29-6A-2(d).

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, also 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. The same choices may be applied to the issue regarding the experience increment. Respondent may reinstate Grievant's increment consistent with its treatment of other employees, or rescind the increment retained by those employees who have been promoted. Either alternative may be acceptable since either will assure that the employees are treated the same and thus eliminate the discrimination.

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.

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.

3. Respondent's revocation of Grievant's experience increment at the time of his promotion while allowing other officers to retain the same experience increase at the time of their promotions constitutes 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 increment to reflect the sum-certain base salary set by the policy in effect at the time of their promotion. Respondent is further Ordered to either reinstate Grievant's experience increment effective September 1, 1989, or to revise the salaries of other officers who have retained that increment after a 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