GARLAND T. SALMONS, ET AL., .

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Grievants, .

.

v. . Docket No. 94-DOH-555

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WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION/DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a grievance by Garland T. Salmons, Paul V. Christian, Gwen E. Conley, Donald Bryant, Jay C. Johnson, Odell Scites and Robert A. Meade (Grievants) against the West Virginia Department of Transportation, Division of Highways (DOH), alleging discrimination in violation of W. Va. Code § 29-6A-2(d) in regard to merit raises given to DOH employees in District Ten, but not to similarly situated employees in District Two. This grievance was filed on December 1, 1993, and processed to Level III without resolution, due to the inability of Grievants' supervisors to grant the relief requested. A Level III hearing was held on July 8, 1994. On August 29, 1994, DOH Commissioner Fred VanKirk denied the grievance at Level III. Thereafter, Grievants appealed to this Grievance Board where a Level IV hearing was conducted on November 10, 1994. This matter became mature for decision on December 5, 1994, upon receipt of post-hearing submissions as agreed at the hearing.

As the facts necessary for resolution of this grievance are not in dispute, the following Findings of Fact are in order:

FINDINGS OF FACT

1. Grievants are employed in DOH District Two, which includes Logan County.

2. In late 1987 to early 1988 the construction workload in District Ten slacked off while the workload in District Two was increasing, primarily due to road construction on Corridor G.

3. DOH determined that 15 employees in various classifications from District Ten were needed in District Two to augment local DOH personnel working on Corridor G in Logan County. (See footnote 1)

3. Although sufficient personnel had volunteered for similar duties outside their home districts on prior occasions, insufficient District Ten personnel volunteered for this assignment.

4. After discussing various alternatives, including involuntary assignment, DOH management elected to offer permanent two-step "merit increases" to District Ten employees volunteering to work in District Two for the duration of the project.

5. Grievants performed similar duties alongside District Ten employees working on Corridor G construction in District Two without receiving temporary or permanent merit raises.

6. Prior to 1987-88 one or more Grievants had been assigned to work on long-term construction projects in other DOH districts without receiving either a temporary or permanent merit increase.

DISCUSSION

In order to prevail in a grievance of this nature, Grievants must prove the allegations in their complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Previous litigation regarding pay equity issues has established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W. Va. 1994); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Roach v. W. Va. Dept. of Transp., Docket No. 94-DOH-232 (Nov. 29, 1994).

Grievants contend that their treatment by DOH constitutes discrimination prohibited under W. Va. Code § 29-6A-2(d). (See footnote 2) Discrimination is defined therein 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." W. Va. Code § 29-6A-2(d). This Grievance Board has determined that a grievant, seeking toestablish a prima facie case (See footnote 3) of discrimination under § 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

Applying this prima facie analysis to the facts presented here, Grievants have demonstrated that they performed similar duties working on the same construction project as other DOH employees who received merit raises. Moreover, Grievants have been treated differently from those other employees to their detriment in that they did not receive merit raises for working on the same project. However, Grievants' evidence fails to establish that Grievants and the DOH employees who received merit raises are "similarly situated" within the meaning of § 29-6A-2(d) in that Grievants were not working out of their home district on a long-term project. (See footnote 4) Therefore, Grievants have failed to establish a prima facie case of discrimination under § 29-6A-2(d).

Even assuming Grievants are similarly situated in a manner sufficient to establish a prima facie case, DOH articulated legitimate, non-discriminatory reasons adequate to sustain its actions. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). DOH explained that the merit increases at issue were awarded as an incentive to obtain sufficient qualified volunteers from District Ten to meet the employer's requirements in District Two. The District Engineer for District Ten, Bruce Leedy, opined that his employees perceived Corridor G as a "hardship" assignment since they were working away from home in a relatively isolated location. Although DOH recognized that such employees could be involuntarily assigned to these duties, it was determined that obtaining volunteers was preferable, as involuntary assignments would likely be detrimental to

the morale of the affected employees.

Clearly, adequate consideration was not given to the impact of this decision on the morale of District Two employees who would be working alongside their District Ten counterparts, performing similar work, often for less money. Nonetheless, DOH had arational basis for its decision, particularly since it had no other effective method within its discretion to encourage volunteers to work outside their home district on a long-term basis. While the undersigned might not have reached the same conclusion in the circumstances, that does not mean that the decision to award merit raises was either arbitrary or capricious. Likewise, there is no evidence the rationale for this decision was merely a pretext for discrimination against Grievants. See Burdine, supra at 256; Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342, 352 (W. Va. 1983).

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In order to prevail, Grievants must prove the allegations in their complaint by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

3. Grievants did not establish a prima facie case of discrimination under W. Va. Code § 29-6A-

2(d) in that they failed to demonstrate that they are similarly situated to employees from District Ten who worked outside their home district on a long-term construction project. See Runyon v. W. Va. Dept. of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

4. If, for the sake of argument, Grievants did establish a prima facie case of discrimination in regard to the award of "merit raises" to certain District Ten employees, DOH established legitimate, non-discriminatory reasons for its actions based upon a desire to obtain volunteers for what was perceived as a hardship assignment. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Accordingly, this grievance is **DENIED**.

Any party 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 andprovide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: March 20, 1995

Footnote: 1Testimony at Level IV by Bruce Leedy, District Engineer for DOH District Ten, indicated that DOH had a "surplus" of employees in his district following completion of such major projects as the West Virginia Turnpike.

Footnote: 2Grievants did not claim that the merit raises extended to District 10 employees were in violation of any rules or regulations of the Division of Highways or Division of Personnel regulating such pay. See, e.g., Roberts v. W. Va. Dept. of Admin., Docket No. 94-DOP-182 (Dec. 1, 1994).

Footnote: 3A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 4While Grievants were permitted to commute from their homes to work on Corridor G on a daily basis, District Ten employees were permitted to return home only on weekends and, at least in some circumstances, Wednesdays. Thus, Grievants and the District Ten employees who received additional compensation had different "job responsibilities" as contemplated by § 29-6A-2(d).