EARL LILLY

v. Docket No. 96-DPS-314

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY

DECISION

The grievant, Earl Lilly, is employed by the West Virginia Department of Public Safety (DPS) as an Electronic Technician II assigned to its Beckley detachment. He filed a grievance at Level I, on June 6, 1996, protesting the agency's failure to award him a merit raise, and complaining of certain inequities between his and other Electronic Technicians' salaries. The grievance was denied at the lower levels, and appeal to Level IV was made July 24, 1996. At the undersigned's direction, counsel for the grievant filed a November 12, 1996 statement clarifying his claims. A hearing was held December 20, 1996, and the parties submitted proposed findings of fact and conclusions of law by January 22, 1997.

Background

There is little if any dispute over the facts of the case. Despite that DPS employees are “classified exempt,” the agency adheres to a classification plan developed by the West Virginia Division of Personnel (Personnel) in 1993, in which most, if not all, of its positions were classified, i.e., Personnel determined what the duties of a particular position were, and then assigned it a job description and salary range. (See footnote 1) It appears that DPS also abides by Personnel regulations whichprovide, at least in most cases, for pay increases when an employee is promoted or a significant change in duties requires that his or her position be placed in a classification with a different job description and a higher salary range.

While Personnel's regulations define the factors to be considered when awarding pay increases which are based on a comparative assessment of job performance, they do not require state agencies to grant such increases. DPS civilian employees, including the grievant, have received small “across-the-board” pay increases awarded by the Legislature, and similar raises which were initiated by the agency and characterized as “merit-based.” Neither was related to employee performance appraisals except to the extent that there may have been some minimum rating

requirement for the latter.

Personnel's regulations also permit an agency to award a new hire a salary which is higher than the established entry-level pay for a particular position, but within its designated salary range. The agency must generally show that the minimum salary level is not competitive with the private sector or other state agencies and/or that an applicant's prior work history and education make him more qualified for the position than one with entry-level credentials. The employee who is hired at the lower entry salary, and receives no or insignificant pay increases, may have higher-paid co- workers, despite that they are all in the same classification, and perform the same or very similar duties. Because the salary ranges established for positions in a classification series, e.g., Electronic Technician I, II and III, overlap, a new-hire may have a higher salary than the more senior employee, even though he holds a lower position in the series. The grievant's Electronic Technician II salaryis lower than Tom Courtney's Electronic Technician I salary.

DPS suspended its yearly personnel evaluations of civilian employees shortly after it adopted Personnel's classification plan. Officials apparently concluded that since the agency had no process for rewarding employees who met or exceeded standards, there were no reasons, at least no pay-related ones, for evaluating performance. A committee appointed to develop a policy for merit-based raises has made little progress.

It is not clear whether DPS had an extensive classification and pay plan for civilian positions before Personnel's plan was adopted in April 1994, but the record reflects that the agency used a Radio Technician, Assistant Radio Technician, Chief Radio Technician job series which was supplanted by the current Electronics Technician I, II, and III series. The grievant was hired as a Radio Technician in 1980, and promoted to Chief Radio Technician in 1983. There is no dispute that Personnel's specifications for the new Electronic Technician II position constitute the best fit for his duties. There also is no dispute that while he and other Electronic Technicians are paid different salaries, all are paid within the salary ranges established by Personnel for their respective positions.

Despite that, by all accounts, the grievant's service has been exemplary, he has never received a raise which was based on an assessment, comparative or otherwise, of his work performance. Citing his contributions to the agency, and the difference between his salary and that of certain other Electronic Technicians, he has written his superiors over the years requesting consideration for one. Most responded that they were appreciative, but indicated that there was no process in place for

such raises. His last request was rejected in July 1995.

On June 3, 1996, the grievant read an article which was published in the Charleston Gazetteon May 7, 1996, in which Columnist Fanny Seiler revealed that DPS had awarded raises to Comptroller Philip Divita ($40,956.00 to $43,008.00), Director of Data Processing Shirley Schneider ($34,164.00 to $35,868.00), and Personnel Director Marsha Beasley ($30,000.00 to $31,000.00), all of whom were employed in DPS' central office in Charleston. There was no mention in the article of reasons for the raises. As noted, the grievance was filed June 6, 1996.

Major General Joseph Skaff, Secretary for Military Affairs and Public Safety, approved the raises after receiving the following March 28, 1996 request from DPS' Superintendent, Colonel Thomas Kirk:

Each of these employees holds a highly responsible position within the State Police organization--positions which would normally be under the command of a uniformed member with the rank of at least First Lieutenant. Without exception, these individuals, day in and day out, put forth a tremendous effort to assure that their respective offices are run in an efficient and professional manner. Their workload and responsibilities routinely require them to work many hours of overtime at both home and office for which they receive no additional compensation. Excluding myself, they are the only employees out of our 948 employee agency who do not receive overtime in one form or another.

I realize you recognize the need to provide monetary rewards to all employees who produce exceptional work. Although we are currently developing a plan for an overall agency merit raise program (subject to fund availability), I believe that it is imperative that we immediately provide salary adjustments for these three highly valuable employees as a means of compensating them for their extra duty hours.

The record confirms that the three employees occupy positions considered exempt from federal and state overtime pay requirements, and that they are consistently required to work beyond normal hours. There does not appear to be any dispute that General Skaff granted the request because he agreed with Colonel Kirk's reasoning.

Argument

Citing Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W.Va. 1994), the grievant asserts that DPS had a burden in the case to show that the continuing disparities in his and other Electronic Technicians' salaries were based on “some specifically identifiable criteria that are reasonable and advance the interest of the employer,” and did not meet it. He characterizes the disparities as favoritism. The grievant characterizes the raises given the central office employees as “merit-based,” and asserts that it was also favoritism to deny him the same consideration.

DPS denies that the central office employees received merit raises and asserts that even if they did, favoritism implies ill-motive, and the grievant failed to show it. The agency also contends that because the grievant had complete salary information for all Electronic Technician salaries in July 1995, but did not file until June 1996, any claim based on disparities in those salaries was not timely.

Findings and Conclusions

The differences in Electronic Technician salaries that the grievant complains of are continuing. While certain equitable principles may limit the relief on a claim based on an ongoing practice, W.Va. Code §29-6A-4(a) provides that such claims are timely if filed within ten days of the last occurrence of such practice. See, Lohr v. Divison of Corrections, Docket No. 89-CORR-107 (Aug. 25, 1989). Since there has been no “break” in the disparities in issue here, the complaint could be brought at any time, and still meet the statutory requirements.

It is doubtful that Largent, a case which examined differences in salaries for human services employees with civil service coverage, is controlling in a case where the employees are classifiedexempt. Notice is taken that Personnel generally does not consider its classification and pay plans for classified exempt agencies as having the same legal effect as plans for classified service agencies. Nevertheless, it could be said that by adhering to Personnel's job specifications, salary ranges, and regulations pertaining to promotion and classification matters, DPS has bound itself to abide by the holdings in Largent. In any event, the grievant has proven no violation of any of the principles announced in the case.

Largent essentially holds that it is permissible under Personnel's regulations and otherwise nondiscriminatory to pay classified employees different salaries within the ranges established for their positions unless the difference is based on grounds other than “market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other

specifically identifiable criteria that are reasonable and that advance the interests of the employer." As noted, all DPS Electronic Technician salaries are within the ranges established for the classfication series by Personnel. After a close review of the record, the undersigned finds that the differences in those salaries are attributable to the legitimate factors cited. It is a fair characterization of the evidence to say that for DPS, availability of funds for salary increases has been a serious problem for a considerable period, and even though the agency has never been required by law to adhere to a classification and pay plan for civilian employees, it has maintained sufficient parity among the salaries assigned to similar positions. Since a preponderance of the evidence establishes that the differences between the grievant's salary and other Electronic Technician salaries were based on reasons which fully comport with Largent, there was no favoritism shown.

Moreover, the undersigned agrees with DPS that the definition of favoritism found in W. Va.Code §29-6A-2(h), must include some ill-motive on the part of the employer. Unless the employee's right to grieve his "unfair treatment. . .as demonstrated by preferential, exceptional or advantageous treatment of another or other employees" is limited to those instances where the employer is acting on some unfounded dislike of one or more employees, and in favor of others with whom he is more closely affiliated, all differences in treatment, no matter how insignificant, would be actionable. It seems reasonable to interpret the statute as prohibiting cronyism in the work place, and imposing a duty on the employee to present some evidence that the preferential treatment was prompted by improper motive. See, Kelly v. Nicholas County Bd. of Educ., Docket No. 96-34-059 (Aug. 11, 1997). The grievant presented no such evidence on either of his favoritism claims.

DPS' assertion that the raises given the three civilian central office employees were not merit-based is specious. While it is clear from Colonel Kirk's recommendation letter that he wanted Major General Skaff to raise the salaries assigned to positions which required additional hours without additional pay, it is also clear that he was seeking to reward the past performance of the employees holding them. Summarized, the evidence reflects that DPS, using a small surplus of personnel funds, which were typically not available, elected to grant raises to three valuable employees whose salaries were not commensurate with their workloads. The agency apparently anticipated that other valuable employees would ask for the same consideration. Given that employees had been consistently advised that DPS policy did not even provide an avenue for consideration, the grievant's dissatisfaction is understandable.

The undersigned concludes that while it was a significant deviation from past practice for DPS to consider any employee for a merit raise, and it was inherently arbitrary to give consideration to only three of its civilian employees, the agency did not engage in favoritism as that term is definedin W.Va. Code §29-6A-2(h) and discussed herein. Absent a showing that the central office employees received the raises for reasons other than those given, or that the rejection of the grievant's July 1995 request for a similar raise was based on reasons other than the agency's continuous shortage of funds, the undersigned cannot conclude that he is entitled to relief. A classified-exempt agency's decision to give three deserving employees raises with a small suprlus of funds, despite that it may create poor morale among other worthy employees, in and of itself, is not a sufficient legal basis for directing DPS to afford the grievant the same treatment.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Raleigh and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither with 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 officeof the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: August 22, 1997

Footnote: 1 *W.Va. Code §29-6-10(1) makes Personnel responsible "[f]or the preparation, maintenance and revision of a position classification plan for all positions in the classified service and a position classification plan for all positions in the classified-exempt service, basedupon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class."*