IRA DADISMAN,

Grievant,

v. DOCKET NO. 97-RS-290

DIVISION OF REHABILITATION SERVICES and

DIVISION OF PERSONNEL,

Respondents.

DECISION

This grievance was filed by Grievant Ira Dadisman against Respondent Division of Rehabilitation Services on or about March 28, 1996, alleging he should have received a pay raise when his position was reallocated from a Rehabilitation Counselor Trainee to a Rehabilitation Counselor in February 1996, and that he was "being discriminated against because of reprisal, age, race, sex, religion, politics, and national origin." (See footnote 1) He sought as relief that Jim Quarles stop discriminating against him and to be made whole. (See footnote 2) The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant was employed by the Division of Rehabilitation Services ("DRS") as a Disability Evaluation Specialist, Pay Grade 11, in the Disability Determination Section, when he accepted a nondisciplinary demotion to Rehabilitation Counselor Trainee, Pay Grade 10, on February 15, 1995. His salary did not change with the demotion. Level III, Employer Exhibit 1.

2. After attaining the requisite one year of experience as a Counselor Trainee, Grievant's position was reallocated to a Rehabilitation Counselor, Pay Grade 11, on February 15, 1996. His salary was not changed. Level III, Employer Exhibit 1.

3. Grievant expected he would receive a salary increase when his position was reallocated to Rehabilitation Counselor, because other employees who had taken a demotion to Rehabilitation Counselor Trainee, had told him they had received a salary increase when they were later placed in a

Rehabilitation Counselor position. Level IV testimony of Grievant.

4. Under the Division of Personnel's regulations in effect until June 1, 1995, persons who were demoted to a lower pay grade without a salary decrease, were given the same salary increase as any other employee would receive upon promotion or reallocation, when they were promoted or their position reallocated to the pay grade they had previously been in. Level III transcript, p. 27. 5. On June 1, 1995, regulations promulgated by the Division of Personnel became effective which preclude employees from receiving a salary increase upon promotion or reallocation of their positions to a higher pay grade, if they were previously demoted from that same pay grade without a decrease in salary. Personnel's Pay Plan, effective May 1, 1994, also contains this provision. Level III transcript, pp. 16-17.

Discussion

Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant's argument focused on when the regulations at issue became effective, arguing that since they did not become effective until June 1, 1995, they could not be applied to him, as he had accepted the demotion to Counselor Trainee prior to that date, and he therefore should have received a pay increase upon the reallocation of his position to Rehabilitation Counselor. Grievant also made a strong argument that Personnel's Pay Plan, a policy implemented May 1, 1994, which contained the same provision which would preclude persons such as Grievant from receiving a pay raise, could not be applied to him because it was not a regulation and could not supersede the regulations in effect. This argument, however, need not be addressed, as the new regulations applied to Grievant's situation, and precluded the pay raise. It is not the date Grievant moved to the position of Counselor Trainee, which is determinative, but the date he moved to the position of Rehabilitation Counselor, which was after June 1, 1995.

The Division of Personnel promulgated an Administrative Rule, effective June 1, 1995, which provides in § 5.05 that when an employee is promoted: (a)

> Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an

> increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater; . . ..

(c)

> If an employee has been demoted or reallocated to a class at a lower pay grade with no reduction in pay and is promoted within the next twenty-four months within the same agency, no consideration shall be given to the pay grade(s) reduced in the demotion or reallocation when calculating pay on promotion as provided in sections 5.05(a) and (b) of this rule.

The same rules apply to the reallocation of a position. § 5.04(f)2.b.3.

Lowell D. Basford, Assistant Director of the Division of Personnel, explained that the old regulations did not really address the issue at hand, but Grievant would have received a pay raise when he moved from the position of Counselor Trainee to Rehabilitation Counselor. He explained that the exception quoted above from the new regulations, however, precludes Grievant from receiving a pay raise, because he had received no reduction in salary when he was demoted. Level III transcript, pp. 16-17, 19, 23-24, 26-27.

Grievant moved from the position of Counselor Trainee to Rehabilitation Counselor after the effective date of the new regulations. There is no evidence that the move from Disability Evaluation Specialist to Counselor Trainee to Rehabilitation Counselor was all one transaction subject to the rules in effect prior to June 1, 1995, or that any promises were made to Grievant about his pay upon his placement in a Rehabilitation Counselor position. The regulations themselves do not contain a "grandfather" provision, or exception, for persons like Grievant who had already accepted ademotion without a reduction in pay, so that they would continue to receive the favorable treatment allowed prior to the new rules becoming effective. Quite simply, the rules changed, and Grievant could not, by regulation, receive a pay increase when he moved from Counselor Trainee to Rehabilitation Counselor.

Finally, Grievant alleged he was unlawfully discriminated against. 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant failed to present evidence that any other employee who had taken a demotion without a pay cut to the position of Counselor Trainee prior to June 1, 1995, had received a pay increase when he or she moved to the position of Rehabilitation Counselor after June 1, 1995. Thus, he failed to meet his burden of proving discrimination. Personnel simply changed its rules, as it isallowed by law to do, and when it did so, the new rules adversely impacted Grievant. This is not discrimination.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96- DNR-218 (May 30, 1997).

2. The Division of Personnel's regulations effective June 1, 1995, applied to the reallocation of Grievant's position to Rehabilitation Counselor, Pay Grade 11, and precluded Grievant from receiving a salary increase upon reallocation of his position, because he had previously been demoted from a Pay Grade 11 position within the preceding twenty-four months, without a decrease in salary.

3. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant failed to present a prima facie case of discrimination.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: March 26, 1998

Footnote: 1

Grievant presented no evidence relating to the allegations of reprisal, or age, sex, race, religious, or political discrimination, or discrimination based upon national origin. His discrimination claim was supported solely by his testimony that some unidentified employees had received pay increases upon being promoted from Counselor Trainee to Rehabilitation Counselor. Accordingly, his claim of discrimination generally will be considered, but not his specific allegations of age, sex, race, religious, or political discrimination, or discrimination based upon national origin. His allegation of reprisal is deemed abandoned.

Footnote: 2

Grievant's supervisor responded on March 28, 1996, denying the grievance. Appeal was made to Level II, and the grievance was denied on December 12, 1996. Grievant appealed to Level III, where the Division of Personnel was made a party. After a Level III hearing held on February 21,1997, the grievance was denied on June 17, 1997. Grievant

appealed to Level IV on July 2, 1997. A Level IV hearing was held on October 31, 1997, and this matter became mature for decision on November 17, 1997, upon receipt of Grievant's post-hearing written argument. Respondents declined to submit written argument.