JEREMY DAVIS,

Grievant,

v. **Docket No. 98-HHR-435**

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES, BUREAU
FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

On July 21, 1998, Jeremy Davis (Grievant) initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Department of Health and Human Resources (DHHR) had unfairly reduced his salary in comparison to other similarly situated employees. There is no record of a response at Level I. Grievant's supervisor, Arwanna Burroughs, issued a decision denying the grievance at Level II on July 24, 1998. Grievant appealed to Level III where an evidentiary hearing was conducted by Grievance Evaluator M. Paul Marteney on September 29, 1998. Thereafter, on October 6, 1998, Jack Frazier, Commissioner of the Bureau for Children and Families, issued a decision denying the grievance at Level III. (See footnote 1) Grievant appealed to Level IV on October 15,1998. Following a series of continuances, each of which was granted for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on May 12, 1999. (See footnote 2) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on June 18, 1999, following receipt of Respondent's written post-hearing argument.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is currently employed by Respondent DHHR as an Economic Service Worker (ESW) in Pay Grade 8, assigned to the Webster County Office of the Bureau for Children and Families (Bureau).

2. Grievant was previously employed as a Protective Service Worker (PSW) in Pay Grade 11, and was assigned to the Webster County Office. PSWs are in the highest pay classification of the non-supervisory employees assigned to the Bureau.

3. In late April or early May of 1998 two vacant ESW positions were posted in the Webster County Office. Grievant applied for and was interviewed for those vacancies. Although Grievant was not selected for either of the posted vacancies, a third ESW position subsequently became open in the Webster County Office. Grievant was offeredthat position by Keith Kiser, Community Services Manager, who supervised the ESWs in that office.

4. The West Virginia Division of Personnel (DOP) Administrative Rule contains the following provision governing pay on demotion:

> The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

143 C.S.R. 1 § 5.6 (1998).

5. On June 1, 1998, Grievant signed an agreement accepting a ten percent (10%) decrease in salary as the result of his voluntary demotion from PSW to ESW. J Ex A at L IV.

6. Effective July 16, 1998, Grievant's salary was reduced from $1710 per month to $1539 per month. J Ex A at L IV.

7. The Bureau operates through four Regional Directors (RDs) who have been designated as “appointing authorities” in accordance with § 3.8 of DOP's Administrative Rule, 143 C.S.R. 1 § 3.8 (1998). The Webster County Office is in the Bureau's Region Four. Margaret Waybright is RD for Region Four.

8. Prior to April 1998, the Bureau's RDs exercised their discretion to allow employees to retain their salaries upon voluntary demotion in an inconsistent manner. L II HT at 6. 9. Sometime around April of 1998, the RDs met and agreed to reduce the salary of employees who elect to take

voluntary demotions by five percent (5%) for each pay grade.

10. The RDs further agreed that salaries would not be reduced for employees taking demotions to “priority” positions. Priority positions were designated based upon the importance to the agency of the work being performed in those positions. PSWs and Social Service Workers in the Adoption Unit were recognized as priority positions, based upon this rationale. The RDs agreed that additional positions could be excepted from the salary reduction requirement upon the concurrence of all RDs.

11. The RDs' agreement on a standard policy resulted from experience with employees who had been promoted to higher-graded positions in the West Virginia Works Program (also known as the “welfare to work” program) seeking to return to their former positions without suffering a loss in pay. The RDs determined that allowing someone, for example, to return to an ESW position without a loss in pay would adversely impact the morale of more experienced ESWs who would then be receiving less pay for the same work.

12. The RDs' policy on voluntary demotions, as generally described in Findings of Fact Numbers 9 and 10, was not reduced to writing until September 16, 1999, and was never formally adopted as an agency policy or regulation. See A Ex 1 at L III.

13. In accordance with the RDs' agreed policy then in effect, Grievant's salary should have been reduced by 15 percent (15%), but his supervisors did not recognize thathe was being demoted three pay grades, thus calculating his reduction for only two pay grades.

14. Subsequent to July 1998 when Grievant accepted a voluntary demotion, in each case where another employee was voluntarily demoted without suffering a salary reduction, DHHR articulated a job-related reason for the exception as contemplated in the RDs' agreement.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Although Grievant voluntarily accepted a demotion to a lower-graded position and a ten percent salary reduction that went with that demotion, he subsequently learned that not all DHHR employees who moved to lower-graded positions were being required to accept a salary reduction. Grievant alleges that this disparate treatment constitutes discrimination prohibited by W. Va. Code § 29-6A-

2(d). That Code provision 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." This Grievance Board has determined that a grievant, in order to establisha prima facie case (See footnote 3) of discrimination under W. Va. Code § 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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination under § 29-6A-2(d), the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the reasons offered for disparate treatment are merely pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Although none of the other transfers of which Grievant complains involve a PSW accepting a demotion to ESW without a loss of salary, Grievant is similarly situated to otheremployees in the Bureau of Children and Families to a sufficient degree to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d). (See footnote 4) See Travis v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-518 (Jan. 12, 1998); Morris v. W. Va. Dep't of Transp., Docket No. 97-DOH-167 (Aug. 22, 1997). However, DHHR's RDs have only permitted employees

accepting voluntary demotions to retain their current salaries for legitimate, job-related reasons, primarily related to the necessity of quickly filling specific positions where the agency is under external pressure from the federal government, or the state legislature, to meet certain goals and improve the effectiveness of certain programs. The position to which Grievant transferred, although involving important and essential work for the public and his employer, has not been identified as being either difficult to fill with a qualified applicant, or essential to be filled as soon as possible to assure agency effectiveness in delivering a particular service. Grievant did notdemonstrate that the reasons given by the employer were merely pretextual. (See footnote 5) See Hickman, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

3. Although Grievant established a prima facie case of discrimination under W. Va. Code § 29-

6A-2(d) in regard to the employer allowing some employees accepting voluntary demotions to positions in the Bureau for Children and Families to move to such lower-graded positions without a reduction in salary as was required of Grievant, DHHR established legitimate, non-discriminatory reasons for its actions. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. Theappealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 1999

Footnote: 1

At Levels II and III, DHHR denied the grievance, in part, on the grounds that it was not timely filed. This issue was not addressed in Respondent's post-hearing argument and is deemed abandoned.

Footnote: 2

Grievant was represented by Pamela Ray with the American Federation of State, County, and Municipal Employees. DHHR was represented by Assistant Attorney General B. Allen Campbell.

Footnote: 3

A 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: 4

However, Grievant's situation is not sufficiently similar to that of Marilyn L. Grubbs, who transferred to an ESW position in the Bureau from a position in the Department of Tax and Revenue, to compel DHHR to explain that action in response to Grievant's prima facie case. See G Ex C at L IV. Similarly, Carole L. Buckner's demotion is not comparable to Grievant's, as examination of the WV-11 for her transfer indicates that she did suffer a reduction in salary, and thus was not treated differently from Grievant in a significant way. See G Ex B at L IV.

Footnote: 5

Although Francis Winfield transferred from a Social Services Worker III position to a Social Services Worker II position in Cabell County without a reduction in salary, Thomas P. Gunnoe, RD for the Bureau's Region Two, credibly explained how Mr. Winfield received the benefit of a clerical mistake. It is well established that a mistake does not constitute discrimination. Crosston v. W. Va. Dep't of Highways, Docket No. 96-DOH-503 (Oct. 31, 1997); Ritchie v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-181 (May 30, 1997). See also Peters v. Kanawha County Bd. of Educ., Docket No. 20-88-168 (Dec. 28, 1988).