HAROLD CLIFTON,

Grievant,

v v.

DOCKET NO. 01-HHR-434

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/BUREAU FOR

CHILDREN AND FAMILIES and WEST VIRGINIA

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Harold Clifton, filed this grievance against his employer, the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("DHHR"), and the West Virginia Division of Personnel ("DOP"), on February 7, 2001, alleging as follows:

> The salary I receive as Community Services Manager for Clay District, DHHR has been and continues to be discriminatory based on comparison of my salary, job requirements and qualifications with that of Mr. Larry Tucker, Community Services Manager for Mason District, DHHR. Records indicate that Mr. Tucker has received and continues to be paid a significantly higher salary for his position than I am paid for my work in Clay District. Comparison of our two positions indicates relative equity in the scope of duties, level of responsibilities and position qualifications. It is apparent that this salary inequity has existed since Mr. Tucker's promotion to the position of Community Services Manager. In contend that this situation discriminates against me and I am filing this grievance to request relief from it.
>
> Relief sought: In order to address the discriminatory situation described above I am requesting implementation of the following measures:
>
> #
>
> Adjustment of my current salary to equal Mr. Tucker's current salary as Community Services Manager. #

> Payment to me of the accumulated salary disparity (including interest) between the salary paid to me as Community Services Manager and the salary paid to Mr. Tucker since his promotion to the Mason District, Community Services Manager position.

The grievance was denied at levels two and three of the grievance procedure, and Grievant appealed to level four on July 10, 2001. A level four hearing was held in the Grievance Board's Charleston, West Virginia office, on August 29, 2001, and this matter became mature for decision on September 28, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Ralph Jenkins, DHHR was represented by Anthony D. Eates, II, Esq., Assistant Attorney General, and the Division of Personnel was represented by Robert Williams, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

October 12, 2000 memorandum from Harold Clifton to Thomas P. Gunnoe.

Ex. 2 -

DOP Administrative Rule: Salary Adjustments.

Ex. 3 -

February 16, 2001 level two decision from Jack B. Frazier, Commissioner, to Harold Clifton.

Ex. 4 -

Emigh, et al. v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-408 (May 31, 2000).

Ex. 5 -

Outline of Grievance Procedure.

LIII DHHR's Exhibits

Ex. 1 -

Personnel Action Form WV-11 for Harold D. Clifton.

Ex. 2 -

Largent, et al. v. W. Va. Division of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

LIV Grievant's Exhibits

Ex. 1 -

December 11, 1997 memorandum from Lynn M. Schilling to Mike McCabe.

Ex. 2 -

Application for Employment of Larry Tucker, dated March 15, 1999.

Ex. 3 -

Application for Employment of Harold Clifton, dated October 21, 1997.

Ex. 4 -

March 31, 1999 memorandum from Thomas P. Gunnoe to Jack B. Frazier.

Ex. 5 -

Classification Specification for DHHR Community Services Manager.

LIV DHHR's Exhibits

Ex. 1 -

Personnel Action Form WV-11 for Larry D. Tucker.

Ex. 2 -

Personnel Action Form WV-11 for Jack Frazier.

LIV DOP's Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of Lowell D. Basford, Mike McCabe, and Thomas Gunnoe. DHHR and DOP presented no additional witnesses.

FINDINGS OF FACT

The material facts of this grievance are not in dispute, and are set forth in the following findings.

1. On June 16, 1998, Grievant was promoted to the position of Community Services Manager ("CSM") for Clay District at an annual starting salary of $28,644.00. (See footnote 1) He was previously employed by DHHR as a Staff Development Specialist, compensated at pay grade 11. LIII DHHR Ex. 1.; LIV G. Ex. 3.

2. On April 16, 1999, Larry Tucker was promoted to the position of CSM for Mason District at an annual starting salary of $34,992.00. He was previously employed by DHHR as a Social Services Supervisor, compensated at pay grade 12. LIV DHHR Ex. 1.

3. When promoted, Grievant and Tucker were compensated at pay grade 16, the pay grade for CSMs at the time. (See footnote 2) 4. Salary on promotion is governed by DOP Administrative Rule 5.5, *Pay on Promotion*. Rule 5.5(a) provides for the mandatory salary increase and states as follows:

> (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 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, but in no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

5. Rule 5.5(b) grants state agencies the discretionary authority to pay promoted employees a higher salary than the salary required by Rule 5.5(a). Rule 5.5(b) provides as follows:

> (b) Additional Increase - The appointing authority may grant additional increment increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee must possess at least six months of

> pertinent experience or an equivalent amount of pertinent training for each additional incremental increase granted, but in no case shall the additional incremental experience cause the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

6. The 5.5(b) discretionary increase can only be awarded at the time of the promotion. McCabe Test., LIV.

7. Thomas Gunnoe, Regional Director and Grievant's immediate supervisor, interviewed and recommended Grievant for the Clay District CSM position. Grievant accepted the position and the starting salary, which did not include the discretionary increase. Gunnoe Test., LIV. 8. While the Regional Director can recommend starting salaries for CSMs, the salary must be approved by the Commissioner for the Bureau for Children and Families ("Bureau"). Gunnoe Test., LIV.

9. Jack Frazier became Commissioner of the Bureau on August 12, 1998, two months after Grievant was promoted to CSM. LIV DHHR Ex. 2.

10. The four Regional Directors had a meeting with Mr. Frazier shortly after he became Commissioner. During this meeting, the Regional Directors expressed a desire to increase the salaries for CSMs. Mr. Tucker was the first CSM to be hired in Mr. Gunnoe's region after this discussion took place. Gunnoe Test., LIV.

11. When promoted in April 1999, Mr. Tucker received the discretionary salary increase allowed by Rule 5.5(b). (See footnote 3) Mr. Tucker's salary was a result of the Regional Directors' discussion with Mr. Frazier, and Mr. Frazier's willingness to exercise his discretion under Rule 5.5(b) to increase the salaries of newly-promoted CSMs.

12. DOP reviews each WV-11 twice to ensure that each promoted employee's salary complies with the Administrative Rule. Both Grievant and Mr. Tucker's salaries upon promotion to CSM complied with the Rule. Basford Test., LIV.

DISCUSSION

As a preliminary matter, DHHR maintains that the grievance was untimely filed, and should be dismissed. Grievant argues that DHHR is barred from raising a timeliness defense because it did not raise the defense at or before the level two conference pursuant to W. Va. Code § 29-6A-3(2). Specifically, the Code provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the

level two hearing."

There is no dispute that Commissioner Frazier first raised a timeliness defense in his level two decision dated February 16, 2001. Commissioner Frazier, as the appropriate person to handle the level two appeal, raised the timeliness defense on behalf of DHHR in his written level two decision, thus satisfying the statutory time limit for raising that defense. See Greathouse v. W. Va. Div. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). Moreover, as noted in Greathouse, supra, the grievance statutes are inconsistent regarding level two of the grievance procedure for state employees. W. Va. Code § 29-6A- 4(b) commands the employer's administrator or his designee to hold a conference at level two. But W. Va. Code § 29-6A-3(a)(2) states the employer must raise the timeliness defense at or before the level two hearing. State employers are not required to hold a level two hearing by statute, and DHHR does not hold level two hearings. Therefore, it is impossible for the employer to raise the timeliness defense "at or before the level two hearing", as there is no such step in the grievance procedure for state employees. As explained in Greathouse, W. Va. Code § 29-6A-3(a)(2) was added to the grievance procedure statute in 1998. The language in this subsection is identical to a provision contained in the grievance procedure for education employees in W. Va. Code §18-29-3(a). The grievance procedure for education employees includes a provision for level two hearings, and in contrast to the state statute, education employees (with the exception of higher education employees) regularly have level two hearings, and by-pass level three hearings. It appears the Legislature, in amending the state employees grievance procedure to provide for default and to limit an employer's ability to raise the timeliness defense, adopted the education employees statute wholesale, without changing the language to reflect that state employees are provided evidentiary hearings at level three, rather than level two.

Thus, it was held in Greathouse that, in state grievances, the holding of the level two grievance evaluator in his written decision that the grievance was untimely filed serves to raise the timeliness defense on behalf of the employer in conformance with W. Va. Code § 29-6A-3(2). Therefore, Commissioner Frazier successfully raised the timeliness defense in his level two decision.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance o f the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file

in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v.Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

The event upon which this grievance is based is Mr. Tucker receiving a discretionary salary increase at the time of his promotion to Mason District CSM which occurred in April 1999. At the latest, the Grievant became aware of this fact on October 12, 2000, the date on which he drafted a memorandum to Mr. Gunnoe outlining his complaint about the salary disparity between he and Mr. Tucker.

Grievant argues that he did not file his grievance earlier because he was attempting to resolve the issue informally. In the alternative, Grievant argues that the salary difference between he and Mr. Tucker is a continuing violation, that each paycheck received is a separate occurrence of a continuing practice, and he filed within ten days of the most recent pay day.

While Grievant's attempts to resolve the matter informally are commendable, the statutory limitations for filing a grievance cannot be ignored. Lynch v. W. Va. Dept. of Transp., Docket No. 97-DOH-060 (July 16, 1997). Grievant's claim of continuing violation has been addressed by the West Virginia Supreme Court of Appeals in Spahr v. PrestonCounty Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). Spahr involved three teachers who, became of an administrative oversight, were not awarded a salary supplement to which they were entitled. The teachers filed their grievance

approximately three years after the school board approved the salary supplement. While the Court held the teachers' grievance was timely filed under the discovery rule provision, the Court rejected the claim that each new pay check was the most recent occurrence of a continuing practice. Specifically, the Court stated:

> The current case . . . involves a single *act* - the inadvertent failure to include the teachers on a list - which caused continuing *damage*, i.e., the wage deficit. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice. Once the teachers learned about the pay discrepancy, they had an obligation to initiate the grievance procedure.

Spahr, at 742 (emphasis in original)(Cf. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995), where the Court held that compensation disparity resulting from alleged intentional gender discrimination constituted a continuing violation).

The present case also involves a single act - Commissioner Frazier granting a discretionary salary increase for Mr. Tucker upon his promotion - which caused continuing damage, i.e., a salary disparity between Mr. Tucker and the Grievant. Under Spahr, Grievant had an obligation to file a grievance once he learned of the salary disparity in October 2000.

However, even if the salary disparity were held to be a continuing violation, Grievant has failed to prove that disparity is the result of any wrongdoing on the part of DHHR. Grievant alleges he has been discriminated against because Mr. Tucker was promoted to a CSM position at a higher salary than he received upon his promotion to CSM. DHHRdenies the difference in salary is the result of discrimination, but based upon a legitimate, non-discriminatory reason.

To establish a prima facie case of discrimination, Grievant must demonstrate the following:

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

(b) 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 the actual job responsibilities of

> the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Board, et al. v. W. Va. Dept. of Health and Human Res., Docket No. 99-HHR-329 (Feb. 2, 2000)(citing Parsons v. W. Va. Dept. of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992)).

If Grievant establishes a prima facie case of discrimination, then the employer can offer legitimate reasons to substantiate its actions. Id. Thereafter, the Grievant may show that the offered reasons are pretextual. Id. (citing Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995)).

In the present case, even though both Grievant and Mr. Tucker were CSMs in small districts, Grievant has failed to prove that he is similarly situated to Mr. Tucker in a pertinent way because Mr. Tucker was promoted to CSM almost a year later and under a different administration. In a similar disparity case, the Grievance Board found that a grievant is not similarly situated to an employee who was promoted and received a discretionary salary increase at a different time than the grievant's promotion to the same position. Singleton v. W. Va. Dept. of Health and Human Res., Docket No. 95-HHR-490 (May 24, 1996). As Mr. Gunnoe testified, the Bureau Commissioner must approve salaries for newly- promoted CSMs. Director of DHHR's Office of Personnel Services Mike McCabe testified that change in a bureau commissioner often changes that bureau's philosophy on discretionary salary increases. McCabe Test., Level IV. Finally, according to DOP Administrative Rule 5.5(b), granting an additional salary increase upon promotion is clearly within the discretion of the appointing authority, in this case, the bureau commissioner.

Even assuming Grievant established a prima facie case of discrimination, however, DHHR offered a legitimate reason why Mr. Tucker's salary was higher than Grievant's. Shortly after Bureau Commissioner Frazier took his position in August 1998, the four Regional Directors met with him and expressed their concern that CSM salaries needed to increase. Mr. Tucker was the first individual to be promoted to CSM in Mr. Gunnoe's region since this meeting took place. As a result of the Regional Directors' concerns and the new Commissioner's willingness to act on those concerns, Commissioner Frazier exercised his discretion under DOP Administrative Rule 5.5(b) and approved an additional salary increase for Mr. Tucker. Grievant introduced no evidence that this reason was a pretext. Therefore, Grievant failed to establish that DHHR discriminated against him in setting Mr. Tucker's salary.

Moreover, in Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court concluded:

> [I]t does not violate the principle of pay equity for the state to pay employees within the same classification differing amounts. Indeed, a policy under which the Civil Service Commission was mandated to pay every individual within the same class the exact same pay would be in direct conflict with the intent expressed in the [DOP Administrative Rule].

It is well-settled Grievance Board precedent 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." Nafe v. W. Va. Dept. of Health and Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997)(citing Largent; Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman, supra; Tennant v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health and Human Res., Docket No. 91-H-177 (May 29, 1992)).

It is undisputed that, at the time of their respective promotions, both Grievant and Mr. Tucker were paid in accordance with the pay scale for the CSM classification. Therefore, Grievant is not entitled to have his salary adjusted to equal Mr. Tucker's salary, as requested in his relief sought.

CONCLUSIONS OF LAW

1. W. Va. Code § 29-6A-3(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."

2. Commissioner Frazier, as the appropriate person to handle the level two appeal, raised the timeliness defense on behalf of DHHR in his written level two decision, thus satisfying the statutory time limit for raising that defense. See Greathouse, et al. v. W. Va. Div. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000).

3. In state grievances, the holding of the level two grievance evaluator in his written decision that the grievance was untimely filed serves to raise the timeliness defense on behalf of the employer in conformance with W. Va. Code § 29-6A-3(2). Greathouse v. W. Va. Div. of Transp., Docket No. 99-DOH-413 (Aug. 21, 2000). 4. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely

filing by a preponderance o f the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

5. W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

6. The event giving rise to the grievance occurred, at the latest, on October 12, 2000, but the grievance was not filed until February 7, 2001. See Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990). 7. In non-disciplinary matters, Grievant must prove the allegations in the grievance by a preponderance of the evidence. Owens v. W. Va. Alcohol Beverage Control Comm., Docket No. 90-ABCC-003 (Apr. 30, 1990).

8. “Discrimination” is defined 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).

9. To establish a prima facie case of discrimination under W. Va. Code § 29-6A- 2(d), Grievant must demonstrate the following:

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

(b) 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 the actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Board, et al. v. W. Va. Dept. of Health and Human Res., Docket No. 99-HHR-329 (Feb. 2, 2000)(citing Parsons v. W. Va. Dept. of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992)).

10. If Grievant establishes a prima facie case of discrimination, then the employer can offer legitimate reasons to substantiate its actions. Id. Thereafter, the Grievant may show that the offered reasons are pretextual. Id. (citing Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995)).

11. Because Mr. Tucker received a discretionary salary increase at a different time than Grievant's promotion, Grievant has failed to show he was similarly situated to Mr. Tucker, and therefore, has failed to establish a prima facie case of discrimination. 12. Even had Grievant established a prima facie case of discrimination, DHHR offered a legitimate, non-discriminatory reason for the difference in salaries of Grievant and Mr. Tucker, which Grievant failed to show was a pretext.

13. Moreover, it is well-settled Grievance Board precedent 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.” Nafe v. W. Va. Dept. of Health and Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997)(citing Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health and Human Res., Docket No. 91-H-177 (May 29, 1992)).

14. There is no dispute that Grievant and Mr. Tucker were being paid in accordance with the pay scale for CSMs.

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. The appealing 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: October 30, 2001

Footnote: 1

CSM districts are divided into three categories (small, medium, and large) based on their respective size. Both Clay and Mason Districts are small districts. Basford testimony, LIV.

Footnote: 2

CSMs are currently compensated at pay grade 18.

Footnote: 3

It is undisputed that Mr. Tucker qualified for the additional increase.