ROY H. TUNICK,

Grievant,

v. Docket No. 02-HEPC-365

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Roy Tunick (Grievant) employed by West Virginia University (Respondent) as a Professor in the Department of Counseling, filed a level one grievance on May 2, 2002, after the compensation for his summer employment was reduced. Grievant seeks the difference in the compensation he received and the amount for which he agreed to teach the summer courses. Department Chair Jeffrey K. Messing lacked authority to grant the requested relief at level one. Following denials at levels two and three, Grievant advanced his appeal to level four on November 7, 2002. An evidentiary hearing to supplement the level three record was conducted on February 26, 2003. Grievant was represented by Joseph Simoni, and Respondent was represented by Assistant Attorney General Samuel R. Spatafore, Esq. The matter became mature for decision upon receipt of Grievant's "Response to Respondent's Proposed Findings of Fact and Conclusions of Law" on April 29, 2003.

The following facts are derived from the record developed at levels three and four.

Findings of Fact

1. Grievant has been employed by Respondent for twenty-five years, and presently is a full Professor in the College of Human Resources and Education, Department of Counseling, Rehabilitation Counseling and Counseling Psychology. 2. In November 2001, Grievant verbally agreed to teach two classes during Summer 2002 for the department's three-year cohort program offered in Clarksburg, Wheeling, and Shepherdstown. (See footnote 1) Grievant was to be paid $4,236.00, plus fringe benefits, for each class taught. Based upon this agreement, Grievant refused other employment opportunities for Summer 2002.

3. Grievant's classes were scheduled to begin May 1; however, prior to that time he

engaged in planning and preparation for lectures and class discussions.

4. On April 26, 2002, Grievant was informed that summer teaching salaries would be reduced by $636 for each course taught. Grievant objected to the amended salary, but completed his commitment to teaching the summer courses.

5. David Srebalus had also agreed to teach a summer course, and objected to the reduced salary. Because Dr. Srebalus had already begun teaching when the reduction was announced, Respondent subsequently paid him the $636.

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 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §29-6A-6. Grievant asserts that Respondent engaged in discrimination when it elected to compensate Dr. Srebalus at the original rate, but did not give him the same consideration. Respondentargues there was no discrimination since Grievant and Dr. Srebalus were not similarly situated, Dr. Srebalus having already begun teaching when given notice of the salary reductions.

W.Va. Code § 29-6A-2(d) 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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

Once Grievant establishes a prima facie case of discrimination, the burden shifts to

Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248(1981). Thereafter, Grievant may show the demonstrated reason to be pretextual.

Grievant has established that he was similarly situated to Dr. Srebalus, was treated in a manner different from Dr. Srebalus, to his detriment and without his consent. Respondent asserts that Grievant accepted the amended offer of employment in April,prior to the beginning of his classes on May 1, but that Dr. Srebalus' classes had already convened on April 26, thus there was no discrimination. Grievant claims that the reason was pretextual because he had engaged in preparatory work before April 26.

Respondent's argument is specious. While accurate that one individual had actually conducted a class, Respondent does not deny that Grievant would have also completed preparatory work for his classes by April 26. Both faculty members had already begun working, and to grant one the original amount of compensation offered, but not the other, is discrimination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §29-6A-6.

2. W.Va. Code § 29-6A-2(d) 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."

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once Grievant establishes a prima facie case of discrimination, the burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248(1981). Thereafter, Grievant may show the demonstrated reason to be pretextual.

4. Grievant has established a prima facie case of discrimination, and that Respondent's stated reason for the difference in treatment was pretextual.

Accordingly, the grievance is GRANTED, and Respondent Ordered to compensate Grievant an additional $636.00 for each course taught during summer 2002.

Any party 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 itsAdministrative 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.

DATE: MAY 22, 2003

Sue Keller

Senior Administrative Law Judge

Footnote: 1 ***This program allows individuals to earn a Masters degree in three years without traveling to Morgantown.***