JAMIL M. CHAUDRI,

Grievant,

v. **DOCKET NO. 02-HEPC-205**

HIGHER EDUCATION POLICY

COMMISSION/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Jamil M. Chaudri, a full professor at Marshall University ("MU"), filed this grievance on May 6, 2002. The Statement of Grievance reads, "Salary Inequity." As relief, Grievant seeks to "bring salary to level it should be." (See footnote 1)

This grievance was denied at all lower levels, and Grievant appealed to Level IV on July 11, 2002. After several continuances, a Level IV hearing was held June 10, 2003, at the Grievance Board's Charleston Office. (See footnote 2) The parties agreed to submit their proposed findings of fact and conclusions of law by August 4, 2003, whereupon the matter became mature for decision.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of the filing of this grievance, Grievant was a tenured Professor of Computer Science at Marshall University ("MU"), Division of Math and Applied Sciences. (See footnote 3)

2. Grievant has experience and education in both Computer Science and Management Information Systems ("MIS").

3. Grievant has been in the Computer Science Division and in the CSD discipline since his first year at MU in 1989.

4. In 1992, Grievant's discipline and the degree it conferred was transferred to the College of Science ("COS"). The other two degrees that had been conferred by Grievant's former division were assigned to other colleges. One degree went to the College of Business ("COB"), and the other went

to the College of Information Technology and Engineering ("CITE"). (See footnote 4)

5. The salary increases each faculty member receives are based on his or her CUPA. This acronym stands for College and University Professional Association, and this Association compiles a national faculty salary survey every year by discipline and rank. For example, for the year 2001 - 2002, a survey of all the Computer and Information Sciences faculties reported the average salary for a Full Professor was $89,492.00.

6. At the time of his transfer and the phasing out of his division, Grievant asked what effect this change would have on his salary. He was told his pay would continue tobe based on this discipline. Grievant's discipline is CSD. (See footnote 5) Grievant's CUPA remained the same, and it is higher than the other faculty in the Division of Math and Applied Sciences.

7. In 1993 or 1994, Herb Tesser, a new faculty member, was made Chair of Grievant's Department. Grievant and several other faculty members complained about their new supervisor. Dr. Tesser was a Full Professor and has seven more years in rank than Grievant. (See footnote 6)

8. Dr. Tesser has not been Grievant's supervisor since 1994, and Dr. Tesser has had no control over Grievant's salary since that time.

9. In 1998, MU merged three departments, and decided to place its computer science program in suspension. Grievant has taught computer science classes since that time in the Division of Math and Applied Sciences.

10. MU's faculty is not paid at the national average, but its goal is to attempt to achieve this average and to pay all faculty members within a Division at the same percentage of this average.

11. Each year the divisions are given an amount of money for salary increases. The 10 percent increase for a promotion in rank is given off the top of this money. The next amount of money is called equity money and is used to increase the faculty to a set percentage of the market value. For example, for the 2001-2002 school year, all the faculty of the Division of Math and Applied Sciences who were not at the 78.2 % level oftheir target salary were raised to this point. (See footnote 7) Grievant's raise was based on his CUPA of 1.13, while the raises for the other faculty members in his Division were based on their CUPA of .99. For his equity raise Grievant received $4,527.00. This was the largest raise in Grievant's division, due in part to Grievant's higher CUPA than the math faculty in his Division.

12. The next part of the money is given in one of two ways of equitable distribution. The

department chair can recommend the money be given as an equal amount across the board or an equal percentage amount across the board to the faculty. This decision is voted on by the division faculty. (See footnote 8)

13. For example, for the 2002 - 2003 academic year, the increase was done as a percentage, which favored Grievant, as he has one of the highest salaries in his Division. This portion of Grievant's salary increase was $1,471.00, was one of the highest in his division, and the total raise for Grievant for that year was $5,998.00, again the highest in his Division.

14. Grievant compared his salary to Dr. Tesser's. Dr. Tesser is in the CSD discipline and located in the CITE. The salaries of all MU faculty are listed in the "State University System Salary Schedule." This Schedule reflects the total payment, but does not reflect what portion of this salary is from the faculty members basic or state salary. The salary in the Schedule can or may include money from an endowed chair, such as Dr.Tesser has and Grievant does not. The salary in the Schedule may also include stipends, research monies, overloads, and department chair compensation. (See footnote 9)

15. As of the Fall 2002, Dr. Tesser received a state salary of $75,060 which is 77.2% of his target salary. Grievant receives a state salary of $69,353 which is 77.2% of his target salary. Dr. Tesser is entitled to a greater state salary than Grievant because of his greater time in rank.

16. Dr. Tesser's overall salary for the 2003 - 2003 academic year is greater than Grievant's because of the additional monies he receives for other duties and activities. (See footnote 10) Additionally, Dr. Tesser's salary was approximately $20,000 greater at the time he was hired, as he was hired as a chair of a division, and he had seven more years in rank.

17. Grievant also compared himself to other faculty, but these faculty members were not in his college, department, or discipline. (See footnote 11)

18. Grievant currently is, and he has in the past, been paid according to the CUPA he had when he came to the Division of Math and Applied Sciences.

19. The COB charges its students an extra fee to increase the salaries of its faculty. The salaries of the COB faculty are tied to accreditation. The other colleges and division do not do this as the salaries are not tied to accreditation.

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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Timeliness

The first issue to address, is Respondent's Motion to Dismiss asserting the grievance is not timely filed. While Respondent's assertion appears to have merit, there is no evidence to support the statutory requirement that this issue was raised at or before Level II. If this issue is not raised at Level II or before, it cannot be raised at Level IV. Accordingly, this Motion is **DENIED**.

II. Merits

Grievant asserted he has been discriminated against, and other employees have been treated in a more favorable manner. Discrimination is defined in W. Va. Code § 29- 6A-2(d), 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(h) defines favoritism as "unfair treatment of anemployee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 12) of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), 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 and/or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. 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, 179 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). Grievant has not met his burden of proof and established a prima facie case of discrimination and/or favoritism. Grievant's case is an example of comparing apples to oranges, and Grievant is not similarly situated to the employees to whom he compared himself. Raises are given by disciplines and within divisions and for time in rank. Grievant's pay increases are governed by his CUPA, and this is why his increases are higher than the Math faculty in his Division. He is not located in the other divisions, and he does not teach the same courses and students as the other faculty to whom he compares himself. He does not engage in the activities that other professors engage in that would increase his income. While it appears the College of Business faculty have higher salaries, this is due, in part, to special accreditation requirements, and this difference does not affect him as he does not teach those courses, and he is not placed in this division.

Grievant has asserted many unproven claims against MU, and the methods by which salary increases are given. The evidence presented by Grievant did demonstrate he was paid less than some professors who taught courses he was probably qualified to teach, but was not currently teaching. He also demonstrated that, at times, new faculty members have negotiated a higher beginning salary. These findings have nothing to do with Grievant's salary. It is an unpleasant fact in higher education and state government that incoming employees may be hired at a salary greater

than the employees who have been there for a while. This circumstance does not mean discrimination or favoritism has occurred, and this phenomenon is why new faculty members do not get the equityincreases. Grievant has not proven he has been discriminated against or treated unfavorably.

Additionally, the force and number of Grievant's unfounded accusations serve to demonstrate his lack of understanding or refusal to understand the salary process at MU. For example, his assertion that his disapproval of Dr. Tesser's job performance approximately eight to nine years ago when Dr. Tesser was his chairperson has affected his current salary is nonsensical. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Because Respondent did not assert the issue of timeliness at Level III or before it cannot assert this issue at Level IV.

3. Discrimination is "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).

4. Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

5. A grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), 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).

6. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep'tof Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 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).

7. Grievant did not meet his burden of proof and establish a prima facie case of discrimination and/or favoritism.

8. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. 0Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of

the county in which the matter originated. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 29, 2003

Footnote: 1

At the Level IV hearing, Grievant asserted he had been subjected to discrimination, favoritism, and harassment. Respondent objected to these assertions, stating Grievant was attempting to amend his grievance as these issues were not stated in his Statement of Grievance. The undersigned Administrative Law Judge ruled that since Grievant completed his grievance form himself, the issues of favoritism and discrimination could be implied from his Statement of Grievance. However the assertion of harassment could not, and Respondent's objection to this portion of his grievance was sustained and will not be discussed further.

Footnote: 2

Grievant was represented by Judy Davis, West Virginia Federation of Teachers, at lower levels, and Jason Poling, Esq., at Level IV. Respondent was represented by its counsel, Jendonnae Houdyschell, Esq., Senior Assistant Attorney General.

Footnote: 3

For the 2003 - 2004 academic year, Grievant requested and received a transfer to the College of Information Technology and Engineering.

Footnote: 4

Due to the lack of clarity in the testimony and the number of years that had passed since these events transpired, the dates in these Findings of Fact may not be exactly correct, but will reflect in general the changes that occurred through the years.

Footnote: 5

At Level III, Grievant stated his discipline was CSD. At Level IV, Grievant asserted his discipline was MIS. Since a faculty member's discipline is based on the courses he teaches, and Grievant teaches CSD courses, his discipline is CSD. Test. McGuffey, Level IV Hearing.

Footnote: 6

Some of these years are not at MU.

Footnote: 7

Newer faculty, who came in at higher salaries and were already at or past this percentage, did not receive any of this money.

Footnote: 8

For example, all faculty could receive $1000.00 or all faculty could receive a 2% increase. This equitable distribution increase is given after the equity increase is given.

Footnote: 9

An endowed chair can result in an increase in compensation of $10,000 to $15,000, a year.

Footnote: 10

There is no indication Grievant currently engages in activities that would increase his basic state salary.

Footnote: 11

Grievant pointed to Rick Weible, an Associate Professor who receives a state salary of $67,375 as a example of discrimination. However, Mr. Weible is in the COB, the Management/Marketing Department, and the MIS discipline. Additionally 23% of Mr. Weible's salary comes from someplace other than the state money for Grievant's salary.

Footnote: 12

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).