RUSSELL FLETCHER,

Grievant,

v. **Docket No. 04-DOH-138**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

The grievant, Russell E. Fletcher ("Grievant"), is employed by the respondent, the Division of Highways ("DOH"), as a Transportation Crew Chief in District 2. He filed a grievance after DOH hired a temporary employee at a higher hourly rate than Grievant was receiving. His grievance was denied at Levels I and II, on October 24, 2003, and November 3, 2003, respectively. (See footnote 1) Grievant executed a time frame waiver and, thereafter, a Level III hearing was conducted on February 5, 2004. The recommended decision at Level III was issued on April 9, 2004, and adopted by DOH on that same date. Upon Grievant's appeal to Level IV, dated April 12, 2004, a hearing was conducted on June 1, 2004. Grievant was represented by Roger Sowards. DOH was represented by Barbara L. Baxter, Esquire.

At the conclusion of the hearing, the parties agreed that the Level IV record would remain open until June 8, 2004, to allow Grievant to submit an additional document. Todate, he has failed to submit anything further. The record closed on June 8, after which this grievance matured for decision.

Grievant states the basis of his grievance as follows:

> Filing due to where Tom Bevins was hired in as temporary in Work Release as Crew Chief and started out at $13.85 per hour, and I have worked two temporaries at a lot less than $13.85 per hour and my pay now is $10.02 per hour and I will be here two years in January and full time basis and have done my job well in my opinion and have plenty of job experience.

In his request for relief, Grievant asserts that he "[s]hould be making more per hour considering that Tom Bevins started out with as temporary, he is making $3.83 more per hour than I am and that is excessive in my opinion." At the Level III hearing, Grievant amended his grievance to include a claim of favoritism or discrimination. He also clarified that, as part of the relief he was requesting, he wanted to receive an additional $3.83 per hour in pay for the time that Tom Bevins ("Bevins") worked at Work Release.

Upon review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievant is employed by DOH as a Transportation Crew Chief ("TCC") in Maintenance at District 2 (Huntington), working in the Work Release Program.

2 2. The TCC position is at pay grade 13, which has a range of $9.20 through $16.14 per hour.

3 3. Grievant receives $10.02 per hour.

4 4. In October 2003 DOH hired Bevins as a TCC under a temporary contract. His primary duties related to seeking money from insurers to reimburse DOH for repairsmade to guardrails that had been damaged by insured drivers. It was anticipated that Bevins would also be able to fill in as a TCC in the Work Release program, as needed.

5 5. His temporary position expired in March 2004.

6 6. Bevins was paid $13.85 per hour.

7 7. Bevins was hired at a slightly lower rate of pay than Richard Bumgardner, another temporary employee, who had previously handled the guardrail reimbursable program until his temporary position expired.

8 8. Grievant's duties with the Work Release Program include supervising a crew of work release inmates who are assigned various maintenance tasks, such as mowing, flagging, cutting trees, cleaning salt spreaders, and cleaning out ditches.

9 9. When he was assigned to the Work Release Program, Bevins performed the same or similar duties as Grievant.

10 10. As a temporary employee, Bevins did not receive any benefits, such as insurance,

vacation time or sick leave.

11 11. As a permanent employee, Grievant receives all of the aforementioned benefits.

Discussion

Grievant argues that there has been a violation of the pay equity provision found at West Virginia Code section 29-6-10(2). The requirement of equal pay for equal work is not violated simply because employees within the same classification are paid different rates, as long as those rates fall within the range applicable to their pay grade. The Supreme Court of Appeals of West Virginia has expressly stated that West Virginia Code section 29-6-10 “does not provide that employees who are performing the same tasks with thesame responsibilities be placed at the same step within a job classification.” Syl. pt. 4, *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 240, 452 S.E.2d 42, 43 (1994). Without considering the value of benefits, Grievant has demonstrated that he is making less money per hour than the temporary employee Bevins. However, both are being paid within the pay grade 13 range, which is the pay grade applicable to a TCC.

Grievant also argues that he has been the victim of favoritism with respect to the rate at which Bevins was paid. West Virginia Code section 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a *prima facie* case of favoritism, Grievant must prove the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employees;
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee has not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities and were not agreed to by the grievant in writing.

Messinger v. W. Va. Dep't of Trans./Div. of Highways, Docket No. 04-DOH-081 (July 13, 2004). If Grievant establishes a *prima facie* case of favoritism, DOH can rebut same by demonstrating a legitimate basis for treating Grievant differently from Bevins. If DOH meets this burden, Grievant then has an opportunity to prove that the reasons proffered by DOH are pretextual. *Id.*

Grievant and Bevins were both paid within pay grade 13, which is the appropriate pay grade for a TCC, even though they were paid at different rates. In addition to the differences in their rate of pay, there were differences in their job duties. Grievantsupervised work release inmates who were doing work for DOH. Although Bevins also supervised work release inmates, as needed, he was hired for the primary purpose of doing the requisite paperwork to obtain insurance money to reimburse DOH for repairs to guardrails that had been damaged by insured motorists.

Bevins made more per hour than Grievant but, because he was a temporary employee, he did not receive any benefits. Grievant has the assurance of a permanent position, whereas the temporary slot filled by Bevins had already expired by the time the Level IV grievance came to hearing. Based on these differences in employment status (permanent versus temporary) and the differences in job duties, it cannot be said that Grievant has established a *prima facie* case of favoritism. (See footnote 2)

There was some effort on the part of Grievant to prove that Bevins was related to a well-placed DOH employee, Earl Bevins. He was unsuccessful in this regard. It was established, prior to his being hired, that Earl Bevins did not know the other Bevins and was not aware of any family connection between them. Therefore, Grievant was unable to provide a factual predicate for arguing that Bevins was hired as a result of nepotism.

During the Level IV hearing, Grievant attempted to introduce the issue of seniority. However, the parties were in agreement that this was not a non-selection case. As such, the issue of seniority has no bearing on the disposition of this grievance. Grievant has failed to meet his burden of demonstrating, by a preponderance of the evidence, that he is entitled to prevail on his claims of pay inequity or favoritism. This grievance must be denied.

Based upon the foregoing findings of fact, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievant must prove his allegations by a preponderance of the evidence. W. VA. CODE ST.

R. § 156-1-4.21 (2000). "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 Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. The pay equity provision of West Virginia Code section 29-6-10 is not violated where, as here, employees within the same classification are paid at different levels within the appropriate pay grade.

4 4. Grievant has failed to prove a *prima facie* case of favoritism, within the meaning of West Virginia Code section 29-6A-2(h), because he is not similarly situated to Bevins, who was a temporary employee who performed additional duties that differed from those performed by Grievant.

5 5. Grievant was not treated unfairly considering the facts and circumstances surrounding the temporary employment of Bevins. Thus, Grievant has failed to demonstrate that he is entitled to prevail in this grievance.

Accordingly, this grievance is **DENIED**.

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 its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 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: July 27, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

At Level II his grievance was combined, for purposes of hearing only, with a grievance by another employee, Richard Shelby. Separate decisions were issued.

Footnote: 2

Even if Grievant had established a prima facie case, the differences in status and duties between Grievant and Bevins, plus the fact that Bevins was actually paid less than his predecessor who was also a temporary employee, would rebut the prima facie case.