STEVEN A. HULL, et al.,

Grievants,

v. **Docket No. 03-DOH-321**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Steven A. Hull, Keith E. Loar, and Donald D. Gum ("Grievants") initiated this proceeding on May 13, 2003, alleging entitlement to a 10 percent pay increase. The grievances were denied at level one on May 16, 2003, and at level two on May 29, 2003. A level three hearing was held on August 7, 2003, and the grievance was denied in a decision dated October 6, 2003. Grievants appealed to level four on October 10, 2003. After several continuances granted for good cause shown, a hearing was held in the Grievance Board's office in Elkins, West Virginia, on February 18, 2004. Grievants represented themselves, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration upon receipt of the parties' final fact/law proposals on May 28, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed by the Division of Highways ("DOH") in District Seven. 2. In October of 2001, Grievants were classified as Transportation Engineering Technicians ("TRET") and worked as project managers or supervisors on various types of highway construction projects, mostly bridges. The TRET positions are also known as "Level 3" Engineering Technicians.

3. On October 24, 2001, Ronald C. Smith, District Engineer and Grievants' supervisor, proposed that several employees, including Grievants, receive salary increases due to their

responsibilities overseeing projects. Also, Mr. Smith believed that Grievants had significantly more responsibilities than other TRETs who were not project supervisors, for which they were not being compensated. It was proposed that these specific TRETs receive a 10% increase, and that two TRET--Seniors (TRETSR) receive a 5% increase. 4. Along with Grievants, another employee proposed for a 10% increase was Roger Woodell, a TRET who worked as office manager and resurfacing coordinator. 5. Grievants filed grievances on January 24 and February 1, 2002, requesting a 20% salary increase. This grievance was filed because DOH had implemented a new certification system for engineering technicians, and lower level technicians had been reallocated without having a change in job responsibilities, and received reallocation salary increases. Grievants believed this created salary inequities in the engineering technician job series.

6. On March 14, 2003, Gary Clayton, the new District Engineer, resubmitted the other five employees who had been recommended for salary increases by Mr. Smith. Grievants were not included in the submission, because of their pending grievances regarding the same issue.

7. The salary increases for the other employees were approved and implemented effective April 1, 2002, including Mr. Woodell's 10% increase.

8. In early 2002, DOH administrators were discussing reallocating some project supervisors to TRETSR, also known as “Level 4" Engineering Technicians, based upon supervision of major, complex projects. Grievants were included in this group of employees who were likely going to be reallocated, and, at that time, Mr. Clayton and other administrators did not believe that Mr. Woodell and the other District Seven TRETs who received salary increases were going to be eligible for reallocation.

9. On June 1, 2002, Grievants were reallocated to TRETSR, and received a 15% salary increase, pursuant to Division of Personnel regulations.

10. In late June, 2002, Grievants negotiated a settlement of their salary inequity grievance, and each received a 3% salary increase in addition to the increase they had received upon reallocation. At that time, Grievants believed the other TRETs who had received higher increases would not be reallocated.

11. In early 2003, Mr. Woodell brought to Mr. Clayton's attention the fact that resurfacing coordinators in other districts had been reallocated to TRETSR. Mr. Clayton did not believe the resurfacing coordinator position was even necessary in his district, so he did not believe Mr. Woodell

deserved to be reallocated. However, after discussion with Jeff Black, Human Resources Director, and completion of a position description form, Mr. Woodell was reallocated to TRETSR on April 1, 2003, receiving a 15% salary increase in addition to the 10% he had received the year before.

12. After his reallocation, Mr. Woodell's monthly salary was $3243. He had approximately 25 years of experience. 13. Grievants' salaries as of January, 2003, were as follows: Grievant Gum, $3105 per month, 31 years of experience; Grievant Loar, $3125 per month, 14 years of experience, and Grievant Hull, $3126 per month, 14 years of experience.

14. TRETSR is in Pay Grade 17, with a salary range of $2600 to $4810 per month.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.

Grievants contend that they are entitled to the same 10% salary increase granted to Mr. Woodell, who also received a 15% raise upon reallocation. They believe that Mr. Woodell's reallocation violated their “agreement” with Mr. Clayton, who represented to them in early 2002 that Mr. Woodell was not going to be eligible for reallocation to TRETSR. They argue that they were not considered for the 10% salary increase given to Mr. Woodell and others in retaliation for their ongoing grievance regarding pay inequities, and they have also been the victims of discrimination. Respondent maintains that it had no obligation to provide any employees with salary increases to address pay inequities, and Grievants fairly negotiated a settlement of their claim in the amount of a 3% increase. Respondent contends that Grievants are being paid within the pay range for their classification and have established no entitlement to additional pay. “'Discrimination' means 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). 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, grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants 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 the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996).

It is not discriminatory for employees in the same classification to be paid different salaries. Thewes & Thompson v. Dep't of Health and Human Resources/Pinecrest Hospital, Docket No. 02-HHR-366 (Sept. 18, 2003). The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. *See* AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paidin accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Indeed, it is clear that Grievants are being paid within the pay grade for TRETSR, and, in fact, all are being compensated quite similarly. Moreover, Mr. Woodell's monthly salary is only slightly more than $100 greater than any of Grievants'. Also of importance in this case is the fact that, although now grouped in the same classification, Grievants and Mr. Woodell actually have different job functions, and the parties introduced no evidence regarding Mr. Woodell's actual job duties. Accordingly, Grievants are not similarly situated to Mr. Woodell for a variety of reasons, including differences in their job duties, along with the circumstances which brought about their reallocations. Grievants and other construction project supervisors had been considered for reallocation dating back several years, due to the fact that they were classified and compensated the same as other TRETs who did not have project supervision responsibilities, which DOH perceived to be unfair, and a resulting reconfiguration of several job classifications. Conversely, Mr. Woodell's reallocation came

about a year later than Grievants', but only as a result of other districts reallocating resurfacing coordinators. However, there is little to no evidence in the record explaining why or how resurfacing coordinators became eligible for promotion to TRETSR. Nevertheless, Grievants have failed to establish a *prima facie* case of discrimination.

Merit raises are largely discretionary, and an employer's decision on merit raises will generally not be disturbed unless shown to be unreasonable, arbitrary and capricious, or contrary to law or properly established policies or directives. Terry v. W. Va. Dep't of Transp., Docket No. 91-DOH-186 (Dec. 30, 1991); Osborne v. W. Va. Div. of Rehabilitation Serv., Docket No. 91-DOH-128 (Oct. 8, 1991). While Respondent contends that Grievantsknowingly negotiated a 3% salary increase as settlement of their prior grievance, Grievants contend that the previous grievance was completely unrelated to the situation which later occurred when Mr. Woodell was reallocated. Grievants maintain that the previous grievance was related to changes which had occurred within lower classifications in the engineering technician series, and because those individuals had been reallocated without taking on additional duties, while Grievants did take on additional duties when they were promoted within those lower classifications. However, Respondent argues that Grievants were grieving the inequity raises which had been proposed by their supervisor in late 2001, which had not been implemented by the time they filed their grievance.

The undersigned can only speculate upon the motivation for Grievants' prior grievance, because no documentation from the grievance was introduced into this record. Nevertheless, it is clear that Grievants were contending in that grievance that they were entitled to more pay, and they did settle that claim for a 3% raise, knowing that similarly classified employees had received more. As to Mr. Clayton's representations that Mr. Woodell was not going to be reallocated, the evidence establishes that this was Mr. Clayton's belief *at that time*. It is clear that no District Seven administrator intended in 2001 or 2002 to reallocate the resurfacing coordinator position, a job which some believed was not even necessary in that district. While Mr. Black and other state administrators were, in fact, discussing the possible reallocation of resurfacing coordinators in other districts as early as 2002, that does not mean that District Seven officials had any intention of reallocating Mr. Woodell. The evidence in this case simply does not prove that DOH acted arbitrarily and capriciously when Grievants were given their 3% raise, nor have Grievants established that they are not being fairly compensated within the pay range for their classification. Grievants further contend that they have

been subjected to reprisal as a result of their previous grievance. To demonstrate a *prima facie* case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

> a) that he engaged in a protected activity, e.g., filing or participating in a grievance;
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> b) that he was subsequently treated in an adverse manner by the employer or an agent;
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> c) that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
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> d) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
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> e) that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003).

Grievants have failed to establish a *prima facie* case of reprisal. While Grievants did file claims in 2001 alleging pay inequity, they have not proven that they were treated adversely subsequently, nor can any causal connection be inferred between their previous grievance and Mr. Woodell's pay increase or reallocation. Respondent has explained the sequence of events which occurred, beginning with Mr. Woodell's pay increase, Grievants' voluntary settlement of their grievance for far less than Mr. Woodell had received, Grievants' reallocation, and finally, Mr. Woodell's unanticipated reallocation. No correlation between the prior grievance and Grievants' failure to receive a higher pay increase can be inferred. In fact, the pay increase they did receive cannot be considered adversetreatment, because it was the result of a voluntary grievance settlement. Grievants have established no entitlement to a 10% pay increase.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her 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. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A- 6.

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

3. In order to establish a *prima facie* case of discrimination, as defined by W. Va. Code § 29-6A-2(d), grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 4. To demonstrate a *prima facie* case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

> a) that he engaged in a protected activity, e.g., filing or participating in a grievance;
>
> b) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> c) that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

d) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and

e) that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003).

5. Grievants have failed to establish a *prima facie* case of discrimination or reprisal.

6. Grievants have failed to prove by a preponderance of the evidence that they are entitled to a 10% pay raise.

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, and 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 EmployeesGrievance 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.

Date: June 14, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge