JOHN LAMP,

Grievant,

v.

DOCKET NO. 05-DJS-373

DIVISION OF JUVENILE SERVICES/

DIVISION OF PERSONNEL.

Respondents.

D E C I S I O N

Grievant, John Lamp, filed this grievance against his employer, the Division of Juvenile Services ("DJS") on August 29, 2005. Grievant asserts he should have received a fifteen percent pay increase when he went from pay grade 7 to pay grade 10. Relief sought was to receive an additional five percent increase and back pay from the date of promotion.

This grievance was denied at all lower levels. Grievant appealed to Level IV on October 3, 2005, and a Level IV hearing was held on December 1, 2005. This case became mature on that date, as the parties did not wish to submit proposed findings of fact and conclusions of law. Grievant was self-represented, DJS was represented by Steven Compton, Esq., and the Division of Personnel was represented by Lowell Basford, Assistant Director, in charge of the Classification and Compensation Section.

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

Findings of Fact

1. Grievant began employment with DJS in January 1999, as a Correctional Officer 2, pay grade 10. In June 2000, he was promoted to a Correctional Officer 3, paygrade 11. In January 2004, he was voluntarily demoted to Building Maintenance Mechanic, pay grade 7, as his request.

2. The pay range for pay grade 7 is $15,816 - $29,268; the pay range for pay grade 10 is $19,392 - $35,892; and the pay range for pay grade 11 is $20,760 - $38,400. At this point in time, there are current hiring rates above the minimum for Correctional Officer 2 and Correctional Officer 3 positions due to recruitment problems.

3. At the time of his voluntary demotion, Grievant's Correctional Officer 3 compensation was $23,280. When he went from pay grade 11 to a pay grade 7, his salary was decreased to $21,012. This decrease is a little less than a ten percent cut.

4. Grievant later applied for a Correctional Officer 2 position, and on October 1, 2004, nine months after his demotion, Grievant was hired to fill this new position with a salary of $23,124, which is $156.00 less than he was making as a Correctional Officer 3. 5. Grievant's salary has always remained within his pay grade.

6. At the time of this promotion, Grievant's salary was not increased five percent per pay grade. Grievant signed a memorandum entitled "PROMOTION/DEMOTION" dated October 1, 2004. This letter stated:

> You have been selected as a Correctional Officer 2 for the North Central Regional Juvenile Detention Center resulting in a promotion from a Building Maintenance Mechanic (pay grade 7) to a Correctional Officer 2, (pay grade 10). The promotion is normally 5% per pay grade not to exceed 15%. As you are aware, Mr. Holland has strived to achieve pay equity for positions division-wide, however this promotion would not be consistent with the salaries of other Correctional Officer 2's. The salary offered to you under the provision of demotion in salary, will be $23,124.00.
>
> The Division of Juvenile Services congratulates you and looks forward to a continued working relationship with you.

7. This explanation was followed by this statement, "By signing below you will accept the position of Correctional Officer 2." Grievant signed this memorandum.

8. Ten months later, after finding out the salaries of some of the other Correctional Officer 2's and 3's, Grievant filed this grievance. Although Grievant correctly reported the salaries of several Correctional Officer 2's and 3's, he did not report the salaries of all the Correctional Officer 2's and 3's employed by DJS, nor did he have the salary history of these few employees, including their seniority.

Issues and Arguments

Grievant asserts that he should receive an increase in pay to match other Correctional Officer 2's, and he has been treated unfairly. Grievant also maintains his salary was decreased because the Director of DJS was angry with him for taking the Building Maintenance Mechanic position.

Respondents avers Grievant is paid within his pay grade, the actions taken during his last promotion were within the Division of Personnel's Rules, Grievant was aware at the time of his promotion than he would not receive the fifteen percent, and he has not demonstrated he was treated differently from other employees.

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 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met his burden. Id.

Several Division of Personnel Administrative Rules apply to this grievance. Division of Personnel Administrative Rule 143 C.S.R. 1 § 3.76 defines promotion as "[a] change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities." Rule 143 C.S.R. 1 § 3.27 defines demotion as "[a] change in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the class." (Emphasis added).

Rule 143 C.S.R. 1 § 5.5 discusses "Pay on Promotion" and states:

> When an employee is promoted, the employee's pay shall be adjusted as follows: (a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current class shall receive an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. An employee whose

> salary is within the range of the pay grade for the current class shall receive an increase of one pay 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 class to which the employee is being promoted, whichever is greater. 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.

Rule 143 C.S.R. 1 § 5.6 (a) discusses "Pay on Demotion" and states, "The appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted if the employee's pay rate is within the pay range of the jobclass to which the employee is demoted." Further, the Division of Personnel's Pay Plan Implementation Policy states at III. C. 2., "Salaries within the range of the current classification shall be increased by one 5% increment per pay grade range advance to a maximum of 3 pay grade ranges or to the minimum rate of the higher pay grade, whichever is greater."

Mr. Basford explained the action taken was with approval of the Division of Personnel, and it is in compliance with Division of Personnel's Rules governing promotion and demotion. An employer may take these type of actions to maintain pay equity within an agency. It is noted Grievant was well aware he would not be receiving a fifteen percent increase because he was clearly informed by DJS before he accepted the position. Grievant agreed, in writing, to the salary and indicated he still wanted the position.

Grievant was not reduced by four pay grades, when he went from a pay grade 11 position to pay grade 7 position just ten months before this most recent promotion. His pay was only decreased by approximately ten percent. With the increase Grievant received on this promotion, his salary was only $156.00 less than he was making ten months before as a Correctional Officer 3. While Grievant now does not like the deal he made, he has not met his burden of proof and demonstrated any violation of the rules and regulations governing promotion and demotion.

Grievant also asserts he has been treated differently than other employees. 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." Notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claimsraised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004) the West

Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 1)

(a) he or she has been treated differently from one or more similarly-situated employee(s);

(b) the different treatment is not related to the actual job responsibilities of the employees; and,

(c) the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met his burden of proof. Although Grievant submitted the names of several employees who were Correctional Officer 2's and Correctional Officer 3's who had a higher salary than he, he did not show he was similarly situated to them.

The holding of the West Virginia Supreme Court of Appeals in Largent v. West Virginia Division of Health and Division of Personnel, 192 W. Va 239, 452 S.E.2d 42 (1994) is instructive in examining the issue raised by Grievant. Largent dealt with employees in a somewhat similar situation to Grievant, as one employee within the same pay grade was receiving a much larger salary than other employees within the same pay grade. In Largent, the West Virginia Supreme Court of Appeals held "employees who are performingthe same tasks with the same responsibilities should be placed within the same job classification," but a state employer is not required to pay these employees at the same rate. Largent at Syl. Pts. 2 & 3. Further, W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Largent at Syl. Pts. 3 and 4. The requirement is that all classified employees must be compensated within their pay grade. See Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96- HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Res., Docket No. 96- HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Res., Docket No. 91-H-177 (May 29, 1992). See also AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Additionally, in Largent, the West Virginia Supreme Court of Appeals noted pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable

and that advance the interest of the employer." Id. at 246. Consequently, a state employee's salary is the result of many factors, the fact that Grievant makes less than other individuals without further information does not establish Grievant has been discriminated against. (See footnote 2)

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 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met his or her burden. Id.

2. Division of Personnel Administrative Rule 143 C.S.R. 1 §§ 5.5 and 5.6(a) apply to this grievance in terms of compensation in promotions and demotions. Pursuant to these Sections, it is within the discretion of the appointing agency to reduce the pay in this type of situation, if this action is taken with the acceptance and awareness of the employee.

3. The action taken by DJS, of promoting Grievant to the Correctional Officer 2 position and not increasing his pay fifteen per cent was with Grievant's full knowledge and acceptance and did not violate the Division of Personnel's Rules governing compensation.

4. Grievant did not demonstrate he was similarly situated to employees whose salaries were greater than his, and did not demonstrate he had been discriminated against. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Date: January 31, 2006

Footnote: 1

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 2

Grievant also failed to demonstrate he received this salary because the Director did not like him.