CHRISTOPHER NELSON,

Grievant,

v. **Docket No. 05-HHR-315**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/OFFICE OF INSPECTOR

GENERAL and DIVISION OF PERSONNEL ,

Respondents.

D E C I S I O N

Grievant initiated this proceeding on August 8, 2005, against his employer Department of Health and Human Resources ("HHR"). Grievant is employed as a Health and Human Resources Specialist, Senior. His Statement of Grievance reads:

> WVDHHR/OIG/IFM has shown favoritism, and continues to show favoritism, towards three of the four supervisors within the Investigations and Fraud Management Unit. All four supervisors: Melissa Hastings, Patricia Kerbawy, Rebecca Blackburn, and myself, are classified as Health and Human Resources Specialist, Senior, and compensated as such. Hastings, Kerbawy, & Blackburn exclusively supervise employees in the Investigator I classification. I supervise employees exclusively classified as Investigator IIIs. The other three supervisors have been classified and compensated at the same rate as I have, but with less complex duties and responsibilities. Additionally, the other three supervisors enjoy a three pay grade differential above their subordinates, whereas I do not. Hastings, Kerbawy, & Blackburn are employed at pay grade 15, with their subordinates at pay grade 12. I am employed at pay grade 15, with my employees at pay grade 14.
>
> Relief Sought: I seek a 10% increase in pay to compensate me for the additional responsibilities and complexities of my job as compared to Hastings, Kerbawy, & Blackburn, and to equate my position above my subordinates to a three pay grade differential as enjoyed by Hastings, Kerbawy, & Blackburn; retroactive to the filing of this grievance.

This grievance was denied at all lower levels. Grievant appealed to Level IV on October 6, 2005. A Level IV hearing was held in Beckley, West Virginia, on February 1, 2006. Grievant represented himself, Respondent HHR was represented by Jennifer Akers,Assistant Attorney General, and the

Division of Personnel was represented by Lowell Basford, Assistant Director of the Compensation and Classification Division. This matter became mature for consideration on March 2, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant elected not to submit these proposals.

The following material facts have been proven by a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed by HHR in the Office of the Inspector General ("OIG"), as a Health and Human Resources Specialist, Senior, Pay Grade 15.

2. There are four supervisors in the OIG, and all of them are classified as Health and Human Resources Specialists, Senior. All of the supervisors, including Grievant, are paid within their pay grade, and all are properly classified. Grievant is the only male supervisor in this group.

3. At the time of filing this grievance, Grievant was paid $2,952 a month with 11 years of tenure with the state. The other supervisors were paid as follows: 1) Melissa Hastings was paid $2,745 a month with 21 years of tenure; (See footnote 1) 2) Patricia Kerbawy was paid $2,615 a month with 16 years of tenure; and 3) Rebecca Blackburn was paid $2,619 a month with 17 years of tenure.

4. Grievant and his investigators have more technical or complex cases and less volume. Grievant's unit receives approximately 300 to 400 cases each year, and he reviews each one of these personally. The other Supervisors and their investigators haveless complex cases, but much greater volume. These three Supervisors receive approximately 8,000 cases each year and review a sampling of the cases from each of their supervisees.

Issues and Arguments

Grievant asserts he should be paid more money because 1) his work is so much more complicated; 2) his supervisees are only one pay grade below him; and 3) his job is so complex, he needs much greater skills and knowledge than the other supervisors to perform his duties. While Grievant does not assert he is misclassified, he does suggest the other supervisors could be misclassified and perhaps should be placed in a lower classification/pay grade. He also asserts his pay grade should be three times higher than the employees he supervises. Respondents noted

Grievant is paid within his pay grade, makes more money than the three other supervisors in his unit, all of whom have much greater tenure than he, and there is no requirement for a supervisor to have a higher pay grade than his supervisees.

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 wouldaccept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

This case is different from the usual case involving compensation, as Grievant is making thousands of dollars more than other similarly situated Health and Human Resources Specialists, and he is asking for a 10 percent pay increase.

I. Favoritism

Grievant asserts other employees have been treated more favorably. W. Va. Code § 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 The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of favoritism by showing: (See footnote 2)

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that 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. He has not demonstrated that similarly situated employees were treated more favorably than he. Indeed, Grievant's claim of favoritism is difficult to understand. By his own admission, he not misclassified, and he is paid within his pay grade. He is currently enjoying a much larger salary than other similarly situated employees who have much greater tenure. For example, Grievant makes $4,000 more dollars a year than Ms. Blackburn, who has been a state employee six years longer than he has. While his work is more technical and more complex, it is certainly less in volume and is within his class specification.

II. Equal pay for equal work

Grievant also asserts the policy of equal pay for equal work has been violated. W. Va. Code § 29-6-10 directed the Division of Personnel to develop a "pay plan for all employees in the classified service" following the principle of equal pay for equal work.

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 issues raised by Grievant. Largent noted W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification. Largent at Syl. Pts. 3 and 4. Specifically, Largent held "employees who are performing the 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. 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 AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Although addressed in the context of grievances of employees contesting lower salaries than similarly situated employees, the Grievance Board has held no favoritism occurs when properly classified employees are paid different salaries within their pay grades. Hunt v. Dep't of Health and Human Res., Docket No. 03-HHR-224 (Oct. 28, 2003); Thewes & Thompson v. Dep't of Health and Human Res./Pinecrest Hosp., Docket No. 02- HHR-366 (Sept. 18, 2003). Accordingly, Grievant has

not proven a violation of the equal pay for equal work policy as he is properly classified and paid within this pay grade.

The specific issue raised by Grievant about pay grade in relation to supervisees was previously addressed by the Grievance Board in Nafe, supra. In that case, a supervisor was paid less than the employees he supervised. The Administrative Law Judge held this salary disparity did not "violate any statute, policy, rule, or written agreement" under which Nafe worked. See Jacobs & Welker v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 03-HHR-342 (Mar. 9, 2004)(supervisors in lower pay grade than supervisees.). See also Bentley v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 03 HHR-251 (Apr. 1, 2004). Certainly, if a supervisor can be in a pay grade lower than his supervisees, there is nothing wrong with the situation in this grievance as Grievant is a pay grade above those employees he supervises.

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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. 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. Syl. Pts. 3 and 4, Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S. E.2d 42 (1994); Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997).

3. Grievant has failed to prove by a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which he works in relation to his compensation. As he is properly classified, and he is properly compensated within the pay scale for his position. Nafe, supra.

4. There is no statute, policy, rule, or regulation that requires a supervisor to be a certain number of pay grades above the employees he supervises, or even to be in a paygrade above those he supervises. Bentley v. Dep't of Health and Human Res./Div. of Personnel, Docket No. 03 HHR-251 (Apr. 1, 2004).

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

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: May 16, 2006

Footnote: 1

Ms. Hastings has since retired.

Footnote: 2

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).