WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JASON LANE,

Grievant,

v. **Docket No. 2008-0469-DOT**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Jason Lane ("Grievant") filed this grievance on November 30, 2006, alleging discrimination regarding a salary increase granted to him upon reallocation, versus the procedure used to grant a higher increase to a similarly situated employee. The grievance was denied at level one on December 11, 2006, and at level two on January 9, 2007. Before a level three hearing was held, the parties requested that the grievance be transferred to the "new" grievance procedure, on September 13, 2007. (See footnote 1) A mediation conducted on January 17, 2008, was unsuccessful. A level three hearing was conducted by the undersigned in the Grievance Board's office in Westover, West Virginia, on May 23,2008. Grievant was represented by Chuck Paugh, and Respondent was represented by Robert Miller, Esquire. The parties submitted fact/law proposals on June 19, 2008.

Synopsis

Grievant is an employee of the Division of Highways in the Engineering Technician series of classifications. Such employees begin as trainees, then are reallocated to higher classifications upon

completion of a certification program offered through Fairmont State College. Grievant was promoted to the Transportation Engineering Technician classification, the highest in the series, after completing the required training program, a classification which was six pay grades higher than his initial classification. However, although Grievant's district administrator assumed he would receive a 30% pay increase, representing 5% per pay grade, DOP Rules and Policy only allowed him to receive a 15% increase.

A few months after Grievant's reallocation, another DOH employee who had begun employment at the same time, in the same classification and with the same qualifications, became eligible for reallocation. In order to avoid Grievant's situation, DOH administrators first reallocated him to an intermediate classification, then later reallocated him to the Technician classification, resulting in two separate 15% pay increases. This resulted in discrimination and favoritism, because Grievant was similarly situated and did not receive the benefit of the additional 15% pay increase, and the decision was not based upon any differences in job duties of the two employees. Therefore, the grievance is granted.

Findings of Fact

1. Grievant began employment with the Division of Highways (“DOH”) on August 23, 2004, as a Transportation Engineering Technician _ Trainee (“TRETTR”).

2. The TRETTR classification is a trainee position, and employees serving under this job title are required to participate in a certification program offered through Fairmont State College, in which they are enrolled while working as a TRETTR. This classification is in Pay Grade 8.

3. Grievant had completed a Bachelor of Science degree in Engineering Technology in December of 2003, prior to his employment with DOH.

4. After he had completed the Fairmont State program, Assistant District Engineer Donald Williams requested that Grievant be reallocated to the position of Transportation Engineering Technician (“TRET”). Mr. Williams submitted Grievant's position description form and application, showing that he met the minimum qualifications for the position, via memorandum to the DOH central office on February 10, 2005.

5. The TRET classification is the full performance level position in the engineering technician

series and supervises other technicians or medium sized projects, or performs advance level technical work with minimal supervision. This classification is in Pay Grade 14.

6. When Mr. Williams requested Grievant's reallocation, he assumed Grievant would receive a 30% pay increase, representing 5% per pay grade.

7. Pursuant to the Administrative Rule of the Division of Personnel ("DOP") and DOP's Pay Plan Implementation Policy, employees who are reallocated to a position in ahigher pay grade may only receive a pay increase equivalent to 5% per pay grade, with a maximum increase of 15%, despite the number of pay grades advanced.

8. Grievant was granted a 15% pay increase when he was reallocated to TRET, effective April 1, 2005.

9. Upon discovering that Grievant was prohibited by DOP policy and rules from receiving a 30% pay increase, Mr. Williams attempted to have the reallocation rescinded, proposing that Grievant be reallocated to an intermediate level position before being promoted to TRET, but DOH administrators refused the request.

10. Mitch Martin was also hired in August of 2004 as a TETTR, and he has always been assigned to the same unit as Grievant in District 4. When he completed the Fairmont State certification and became eligible for reallocation, Mr. Williams submitted a request that he be placed in the Transportation Engineering Technician _ Associate ("TRETAS") classification, Pay Grade 11, which became effective August 16, 2005. Mr. Williams waited several months, then submitted a reallocation request for Mr. Martin to be placed in the TRET classification, which became effective June 1, 2006, with another 15% salary increase.

11. Mr. Martin received two 15% pay increases, one with each of his reallocations. Mr. Williams purposely requested he be placed in the intermediate TRETAS (See footnote 2) classification first, so that he would be reallocated twice and receive a total of 30% in salary increases, avoiding the problem experienced when Grievant was reallocated. 12. The decision to reallocate Mr. Martin twice, placing him in the TRETAS classification first, was based only upon Mr. Williams' desire to achieve a total of 30% in pay increases when Mr. Martin became a TRET. It was not based upon any differences in Grievant's and Mr. Martin's job duties or responsibilities.

13. Grievant was informed by a coworker at the District 4 office that Mr. Martin had been upgraded to TRET and received an additional 15% pay increase, sometime in November of 2006. He

filed this grievance on November 30, 2006.

14. After his upgrade to TRET in 2006, Mr. Martin began making over $600 a month more than Grievant, despite performing the same job duties.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

As a preliminary issue, Respondent argues that this grievance is untimely, in that Grievant “was aware of the circumstances” of his grievance on April 30, 2005, but waited more than a year and a half to file. Grievant, however, contends that he filed this grievancewithin fifteen days of discovering that Mr. Martin received a second upgrade, in order to receive a total of 30% in pay increases for becoming qualified as a TRET. It was this action that prompted this grievance, and Grievant contends it resulted in discrimination and favoritism.

Pursuant to the provisions of W. Va. Code § 6C-2-3(c), a timeliness defense “shall be made at or before level two” of the grievance process. In the instant case, there is no documentation of record regarding a timeliness defense being raised at any time prior to the level three hearing. (See footnote 3) Accordingly, Respondent's assertion is belated and is prohibited at this juncture. Nevertheless, even if it had been asserted in a timely fashion, the defense would still have been unsuccessful in this grievance, because Grievant filed the grievance within fifteen days of being informed of Mr. Martin's second upgrade, which is the decision he is grieving. As set forth in W. Va. Code § 6C-2-4(a)(1), a grievance must be filed “within fifteen days of the date upon which the event became known to the employee[.]” Respondent has provided no evidence to refute the timing of Grievant's discovery of this information, so its timeliness defense would fail, even if properly raised.

Grievant believes that Mr. Martin received favorable treatment that he did not, in violation of the

principles prohibiting discrimination and favoritism on the part of state employers. “Discrimination” is defined by statute as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. Va.Code § 6C-2-2(d). “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee” unless agreed to in writing or related to actual job responsibilities. W. Va. Code § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., 655 S.E.2d 52 (2007); (See footnote 4) *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

There is no question here that Grievant and Mr. Martin were similarly situated. Both were hired into the same classification at the same time and became eligible for reallocation to TRET after completing the required certification program. The difference in treatment afforded Mr. Martin was a direct result of Mr. Williams' frustration upon learning that employees may only receive a maximum of 15% upon reallocation, regardless of the number of pay grades advanced. As admitted by Mr. Williams on several occasions, including in his level one grievance decision and in a memorandum to Human Resources Jeff Black in October of 2006, Mr. Martin was only reallocated to the TRETAS classificationso that he would receive two separate 15% increases, and this decision was not based upon any differences in the job duties of these two individuals.

Respondent also asserts that it is prohibited from granting any pay increase to Grievant at this time as a result of the prohibition on discretionary pay increases implemented by the Governor's office in April of 2005. However, as held by the Grievance Board in *Haller v. Regional Jail Authority*,

Docket No. 06-RJA-027 (Apr. 14, 2006), "[r]egardless of its reason, a gubernatorial directive cannot justify unlawful discrimination." Grievant has been treated differently from someone in his exact situation, to his detriment, which constitutes discrimination under the grievance statute.

Moreover, if Grievant had received the benefit of the procedure used to promote Mr. Martin, the additional increase he received would not have been discretionary, but a required change in pay resulting from reallocation to a higher position. Pursuant to DOP's Rule, when a position is reallocated to a classification in a higher pay grade, the provisions regarding pay upon promotion are applicable. 143 C.S.R. 1, § 5.4(f)(3). The portion of the Rule which discusses pay on promotion requires that an employee receive an increase of one pay increment per pay grade advanced, up to a maximum of three pay grades. 143 C.S.R. 1, § 5.5(a). In turn, DOP's Pay Plan Implementation Policy (July 1, 2005), provides for salary increases upon promotion equal to a 5% increment per pay grade, with a maximum increase of three pay grades. Indeed, even in the Governor's moratorium in discretionary increases, non-discretionary increases are to continue to be granted pursuant to DOP's Rule, including advances received on promotion, upward reallocation, temporary upgrades, and pay differentials approved by the State Personnel Board. Accordingly, the undersigned concludes that Respondent's actions have resulted in discrimination and favoritism toward Grievant, entitling him to the same pay increase granted to Mr. Martin. Because Mr. Martin received his two reallocations ten months apart, it would seem appropriate for Respondent to make the additional 15% increase for Grievant retroactive to approximately ten months after he was initially reallocated to TRET. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. A timeliness defense must be asserted at or before level two of the grievance process.

3. Because Respondent did not raise the timeliness defense until level three in this matter, it is barred from asserting that defense to this grievance.

4. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(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. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant has proven by a preponderance of the evidence that Respondent's granting of two reallocations to a similarly situated employee, in order to achieve a total of 30% in salary increases, constituted discrimination and favoritism.

Accordingly, this grievance is GRANTED, and Respondent is ORDERED to grant Grievant a 15% salary increase retroactively as described in this Decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 20, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. However, parties were given the option to transfer pending cases to the new process, agreeing to be governed by the statutory changes which went into effect in July of 2007; accordingly, the instant grievance is governed by the provisions of W. Va. Code §§ 6C-2-1, et seq.

Footnote: 2

The TRETAS classification is distinguished from the full-performance level TRET in that incumbents perform intermediate duties as opposed to supervision of projects or other project personnel. This classification also requires the Fairmont State certification.

Footnote: 3

Compounding the fact that the defense was not raised before the level three hearing under the new procedure is the documentation from the level one and two proceedings under the old grievance process, which also contain no discussion of a timeliness issue being raised during those earlier proceedings.

Footnote: 4

Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.