WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CASSIUS H. TOON,

Grievant,

v.

Docket No. 07-PSC-341

WEST VIRGINIA PUBLIC SERVICE COMMISSION,

Respondent.

DECISION

Grievant, Cassius H. Toon, filed this grievance against his employer, the West Virginia Public Service Commission ("PSC") on December 13, 2006:

STATEMENT OF GRIEVANCE:

Grievant alleges:

1. that he is and was similarly situated, in a pertinent way, to one or more other employee(s);

2. that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in significant particular; and

3. that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

RELIEF SOUGHT: Raise, back pay and interest for disparate salary treatment.

This grievance was denied at Level I by Grievant's immediate supervisor, Caryn Watson Short, and at Level II by Richard E. Hitt, General Counsel. A Level III hearing was held on March 22, 2007, and a decision denying the grievance was rendered by Grievance Evaluator Jon W. McKinney on June 19, 2007. Grievant appealed to Level IV on June 27, 2007, and the parties submitted the matter on the lower level record with briefing. The matter became mature for decision on August 27, 2007, the deadline for the parties'submission of proposed findings of fact and conclusions of law. Grievant appeared *pro se*, and the PSC was represented by Belinda B. Jackson, Esq. For administrative reasons, the matter was reassigned to the undersigned Administrative Law Judge on December 14, 2007.

Synopsis

Grievant is an Attorney 3 employed in the Legal Division of the PSC. Grievant has been employed at the PSC on two separate occasions, first for a period of five years beginning in July 1969, and again beginning in August 1990 to the present. Grievant's evaluations have always reflected that he has, at a minimum, met expectations, and in recent years, has exceeded expectations. Grievant does not claim that he is misclassified in his position, or that his salary does not fall within an acceptable pay range. Grievant asserts that at various times throughout his employment there have been disparities between his income and that of other similarly-situated attorneys in the Legal Division. Grievant claims that such disparities were the result of being treated differently from other attorneys in the Legal Division.

The record reveals that despite efforts to keep all attorneys' salaries in close range to one another, the PSC lacked authority, particularly within the past several years, to make salary adjustments that were not tied to promotions or reallocations of their positions. Grievant has not proven that the difference in his income as compared to other staff attorneys is the result of favoritism or discrimination.

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

Findings of Fact

1. Grievant is an Attorney 3 employed in the Legal Division of the PSC. Grievant has been

employed by the PSC on two separate occasions, first for a period of five years beginning in July 1969, and again beginning in August 1990.

2. Grievant is one of the more senior staff attorneys in the PSC's Legal Division. Grievant has represented the PSC before the West Virginia Supreme Court of Appeals, various state circuit courts, and federal courts, including the Fourth Circuit Court of Appeals and the United States Supreme Court.

3. Grievant's employment evaluations have always reflected that he met minimum expectations, and of late, has exceeded expectations. Grievant is regarded as a valuable employee to both the PSC and the Legal Division.

4. PSC merit-based salary increases awarded without a change in classification have for the past twenty-six years been difficult to award due to periodic fiscal restraints and policies prohibiting such increases.

5. There has been only one opportunity to award merit-based salary increases to employees in the PSC's Legal Division in the past five years. In late 2004, the opportunity for a merit-based raise was limited to three employees. One of these three increases was awarded to Grievant. (See footnote 1)

6. Grievant identifies Ron Robertson and Terry Owen as the similarly-situated attorneys working with him in the Legal Division. Grievant did not have the same start dateas Mr. Robertson, and Mr. Robertson's pay increases were the result of being reallocated from attorney 2 to attorney 3.

7. Mr. Owen and Grievant were paid at the same salary or substantially the same for the period of time Grievant makes comparison. While a salary difference of $6,892 did exist in 2004, PSC awarded Grievant a merit-based salary increase to adjust for this difference. In addition, Grievant was not similarly-situated to Mr. Owen because they were not in the same classification for the asserted time period.

8. The current administration has implemented a policy declining to approve any discretionary pay increases for employees. (See footnote 2)

9. Respondent failed to raise a timeliness defense at or before Level II.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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). (See footnote 3)

Respondent raises the defense that the grievance was untimely. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. *Ooten v. Mingo County Bd. of Educ.*, Docket No. 96-29- 122 (July 31, 1996); *Hale v. Mingo County Bd. of Educ*., Docket No. 95-29-315 (Jan. 25, 1996). Customarily, a state employer must raise a timeliness defense at or before Level II in order to preserve the right to assert this defense. W. Va. Code . 29-6A-3(a)(2).

Careful scrutiny of the record through Level III fails to reveal any reference to this grievance being untimely filed until briefs submitted by PSC's counsel subsequent to the Level III hearing. The record fails to contain any indication that Respondent asserted a timeliness defense at or before the Level II conference and use of such defense is precluded. Accordingly, Respondent's assertion that this grievance was not timely initiated may not be considered at Level IV. Turning to the merits of this grievance, Grievant maintains that he is entitled to a salary increase, over and above the 5% he received in 2004, in order to provide uniformity of the salaries in the Legal Division. This grievance seeks to correct a perceived inequity in that division among attorneys resulting from disparity in treatment. Grievant identifies Ron Robertson and Terry Owen as the similarly-situated attorneys working with him in the Legal Division. Respondent contends that, due to the constraints of the Governor's prohibition on nondiscretionary salary increases, it could not give Grievant any additional salary.

Unfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited. Therefore, although the PSC's managing attorneys clearly wish to fix this disparity, Respondent's hands are tied by the prohibition on salary increases. *See Ebert Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007).

As has been claimed in similar situations, Grievant believes he has been subjected to

discrimination, because other employees have larger salaries. “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). The West Virginia Supreme Court of Appeals has recently clarified that, 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 Educ. Policy Comm., Slip Opinions Nos. 32163 and 33296 (W. Va. Oct. 12, 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). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE- 217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *White, supra*.

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 also instructive in examining the assertion of discrimination 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, but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2, 3 & 4. The requirement is 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). 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.

As has been the case in other Grievance Board decisions, Grievant cannot establish he is similarly-situated to other employees. He has failed to identify any employees with whom he was similarly-situated, and who were treated differently to his detriment. Grievant did not have the same start date as the other employee to whom he compares himself, Ron Robertson. (See footnote 4) Although the job requirements may be similar, it appears from the record that Mr. Robertson, subsequent to his start date, left the Agency in 1991 only to be rehired in 1993. In the interim, Legal Division's supervisory attorney was able to obtain fairly significant increases for the staff of attorneys on a non-merit basis. Because of Mr. Robertson's separation from the Legal Division, he did not receive the same salary increase the other attorneys received. Some time later, in 1994, the supervising attorney obtained an increase for Mr. Robertson's salary in order to come in conformity with other staff attorneys, such as Grievant. In addition, Mr. Robertson's pay increases were the result of being reallocated from an attorney 2 to attorney 3. Grievant's salary was similarly adjusted following his reallocation. See Level III Transcript Pages 63, 64. This set of facts cannot support a claim of discrimination. *See Wickline v. Dep't of Health and Human Res.*, Docket No. 03- HHR-041 (July 8, 2003). Moreover, Mr. Robertson received his increased salary shortly after his rehire date, and, unfortunately, Grievant's salary increase proposal occurred after the Governor's prohibition was issued. *See Allen*, *supra*.

The other employee whom Grievant seeks comparison is Terry Owen. A review of the record fails to prove that Grievant was treated differently from Mr. Owen, and to demonstrate that Grievant and Mr. Owen were similarly-situated employees. Grievant's exhibits establish that Mr. Owen and Grievant were paid at the same salary or substantially the same for the period of time Grievant makes comparison. See Grievant's exhibits 43 through 48. The only noticeable difference is found in 2004, when Grievant asserts a pay difference of $6,892. To adjust for this discrepancy, PSC used the opportunity to award a merit-based salary increase to Grievant. While not completely compensating for the discrepancy, the salary increase did close the gap in salaries. (See footnote 5) Equivalent treatment is notprobative evidence to support an allegation of being treated differently from a similarly- situated employee.

The other issue is the failure of Grievant to establish he was similarly-situated to Mr. Owen for the asserted time period. The record reflects that Mr. Owen and Grievant were not in the same classification, attorney 2 and attorney 3, respectively. Although the job requirements may be similar, this is, in fact, a different classification from Grievant's. Once again, this set of facts cannot support a claim of discrimination. A slight disparity in Grievant's salary as compared to other staff attorneys with this set of facts does not result from discrimination.

In addition, there is no dispute that, although he could be paid more, Grievant is being paid within the appropriate pay grade for his classification. The principle 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 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); *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). It is not discrimination for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003). It is clear there has been no violation of the equal pay for equal work principle of W. Va. Code § 29-6-10 with this set of facts. The discussion will be supplemented by the following Conclusions of Law.

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 W. Va. Educ. & State Employees Grievance Board, 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 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. Customarily, a state employer must raise a timeliness defense at or before Level II in order to preserve the right to assert this defense. W. Va. Code . 29-6A-3(a)(2).

3. 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).

4. Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. W. Va. Code . 29-6A-2(h).

5. The West Virginia Supreme Court of Appeals has recently clarified that, 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 Educ. Policy Comm., Slip Opinions Nos. 32163 and 33296 (W. Va. Oct. 12, 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). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE- 217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *White, supra*.

6. Grievant has failed to prove that his salary amount violates the laws prohibiting discrimination, as he is not similarly-situated to the employees he compares himself.

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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007).

Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to suchappeal 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

January 4, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Originally a ten-percent increase, it was limited by the Division of Personnel to five percent for reasons that are not apparent from the record.

Footnote: 2

On April 29, 2005, Governor Manchin's Chief of Staff, Larry Puccio, issued a memorandum ("Governor's memo") informing all Cabinet Secretaries they were not to grant any discretionary merit or salary increases, but non-discretionary increases were to be granted pursuant to the Division of Personnel's Rules. The types of non-discretionary increases included were advances received on promotion, upward reallocation, temporary upgrades, and pay differentials approved by the State Personnel Board "to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities, shift differentials for specific work periods, and temporary upgrade programs."

Footnote: 3

In 2007, the Legislature 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 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. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 4

Mr. Robertson began his employment in 1988, and Grievant had a 1990 start date for the relevant time period.

Footnote: 5

Merit-based salary increases at PSC, which are awarded without a change in classification and which are normally either the same dollar amount or the same percentage, have for the past twenty-six years been difficult to award because of the impact of periodic fiscal restraints or policies of incumbent administrations. In the past five years, there has only been one opportunity to award merit-based salary increases to employees in the Legal Division. At that time, in 2004, the opportunity was limited to three employees. One of these three increases, which was recommended as a ten-percent increase, was awarded to Grievant. See Hearing Transcript pages 43-47.