THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JACK LANE POSEY,
Grievant,

v. **Docket No. 2009-1320-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Jack Posey, filed this grievance against the Respondent, Division of Highways, on March 17, 2009, in which he states the following in his Statement of Grievance:

> I applied for a Storekeeper 1 job in Weston for WVDOH and was told I would have to take a 15% pay cut at least. A mechanic did not have to when he transferred to Weston from Buckhannon as a Mechanic 3 to Mechanic 2. That is discrimination and not legal.

As relief, Grievant seeks:

> I want the job with no pay cut and those who broke the law punished to the full extent of the law.

This grievance was denied at level one on April 28, 2009. A level two mediation session was conducted on November 4, 2009. Thereafter, the grievance was noticed for a level three hearing on March 2, 2010, to be conducted before the undersigned in Elkins, West Virginia. Grievant failed to appear for this hearing; however, his representative was present and through agreement of the parties the matter was submitted on the lower level record. Grievant appeared through his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Robert Miller,

Esquire. This matter became mature for consideration upon receipt of the lower level record on June 23, 2010.

Synopsis

Grievant is employed as a Transportation Worker 2 Equipment Operator with the Division of Highways ("DOH"). He applied for a Storekeeper 1 position and at the interview for that position it was explained to him that he would have to take a salary cut of 15% if he was offered and took the position. Grievant left at that time without completing the interview. Grievant alleges that this pay reduction as a condition of the position resulted in him being the victim of discrimination. Grievant failed to establish that he was the victim of discrimination. This grievance is denied.

After a review of the record of this grievance, the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant has been employed with the DOH since August 2008, and currently holds the position of Transportation Worker 2 Equipment Operator.

2. On January 12, 2009, Grievant applied for a posted position of Storekeeper 1 for District 7.

3. During the interview conducted on March 12, 2009, Grievant was informed that, if he took the position, he would be required to take at least a 15% pay decrease.

4. Once he was informed that he would receive a 15% pay cut Grievant walked out of the interview.

5. Peggy Carpenter is the Administrative Service Manager for District 7 and took

part in the interview of Grievant on March 12, 2009. Ms. Carpenter explained the salary that was being paid and what would be paid to Grievant. Ms. Carpenter then went on to explain what the monthly salaries were for Storekeeper 2's and Storekeeper 3's in District 7.

6. Ms. Carpenter explained to Grievant that she was responsible, based upon the principles of pay equity, for assuring that appointments are to be made in a consistent manner with due consideration given to salaries and qualifications of the incumbent employees in the same classification. Respondent Exhibit 3, Level One.

7. Due to Grievant's current salary, it was represented to him by Ms. Carpenter that it was necessary to make that decrease because of a reduction in pay grade. She believed that with each reduction in pay grade an obligation to reduce Grievant's pay by 5% was present. Level One Hearing Transcript, pages 23 and 37-39.

8. The Administrative Rule governing employee transfer provides that DOH is not required to reduce employee pay in a transfer to a lower pay grade, provided that the initial pay is within the established pay range for the new position. Respondent's Exhibit 5, Level One Hearing.

9. Grievant points to DOH employees, and employees working for other state agencies, that received similar demotions between job classifications without a reduction in pay. Their pay was in line, at the time of the transfer, with other employees within that classification and did not give rise to pay equity concerns.

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.

Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant argues that other employees received similar transfers between job classifications as a result of a voluntary demotion with no loss in pay. Grievant asserts he is the victim of discrimination as a result of being told that he would experience a reduction in pay if he was offered and accepted the posted position. Respondent contends that the decision was wholly within the discretion of management, and Grievant did not demonstrate that he was the victim of discrimination.

The Division of Personnel's Administrative Rule, which governs pay on demotion, voluntary or otherwise, 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 is within the pay range of the job class to which the employee is demoted." 143 C.S.R. 1 § 5.6(a).

Grievant's discrimination claim seeks to compare his demotion to other employees who were voluntarily demoted from a higher pay grade to a lower pay grade without a

reduction in pay. 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);
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> (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); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

For purposes of the grievance procedure, discrimination is defined 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).

Grievant has failed to establish the necessary elements of a discrimination claim. The employees he identified as comparable were not similarly situated, in that they were employed in different units of the agency, or a different state agency. In addition, the employees with whom he seeks comparison worked with different supervisors and at different locations, and none were demoted to the same classification that Grievant sought.

There is no dispute that Grievant walked out of the interview when he was told that he would have to take a 15% cut in salary if offered the position. The undersigned concedes that Grievant is correct in his assertion that the administrative rule governing employee transfer provides that the Respondent is not required to reduce employee pay

in a transfer to a lower pay grade, provided that the initial pay is within the established pay range for the new position.[1] It is also understandable that Grievant was upset when told of the pay reduction; however, absent a showing of discrimination, there really is no event in this fact pattern which would meet the definition of "grievance" under our statute.[2] As Respondent's counsel aptly points out, Grievant was given the terms and conditions of the position which he could accept or reject. To carry that analysis one step further, Grievant decided that he did not want to be considered for the position at the salary that was being offered when he walked out of the interview. This Board has consistently held that it is difficult for a grievant to establish standing to complain of Respondent's actions when they do not apply for a position.[3]

The following conclusions of law support the decision reached.

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

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[1]Respondent cites to its Pay Plan Implementation Policy in its effort to ensure that appointments above the entry rate are applied in a consistent manner with salaries and qualifications of the incumbent employees in the same classification. Level One Hearing Transcript, page 24.

[2]Generally, "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997), *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999).

[3]"Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).

of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. An agency may reduce or not reduce the pay rate of any employee who is demoted if the employee's pay is within the pay range of the job class to which the employee is demoted. 143 C.S.R. 1 § 5.6(a).

3. 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).

4. Grievant did not meet his burden of proof.

For the foregoing reasons, this grievance is hereby **DENIED**.

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 (eff. July 7, 2008).

Date: July 22, 2010

Ronald L. Reece
Administrative Law Judge