THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY THOMAS,
Grievant,

v. **DOCKET NO. 2010-1037-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

This matter is a consolidation of two grievances filed by Grievant Kimberly Thomas challenging her voluntary demotion without prejudice.[1] Both grievances challenged the salary she was offered for a Child Support Specialist 2 position that she applied for and eventually accepted. Her Grievance Statement is "Current position was offered at 35,000.00. I had to take a pay cut in order to get position. My salary was in the pay range of CSII." As relief, she seeks "to be made whole, including restoration of pay - back pay plus interest."

A level three hearing was held in the Grievance Board's office on March 8, 2010. Grievant was represented by Gordon Simmons of the West Virginia Public Workers Union, and Respondent was represented by counsel, Heather Laick, Assistant Attorney General. The matter became mature for decision on March 31, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

[1]Former Docket Nos. 2009-0923-DHHR and 2010-0423-DHHR.

Grievant's salary was reduced when she applied for and accepted a position in a lower pay grade, which was a voluntary demotion. Grievant negotiated and accepted the offered salary, even though her previous salary was within the pay grade for the new position. Grievant failed to prove the salary she was offered was arbitrary and capricious or discriminatory, and her grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant was employed by Respondent in the Bureau of Child Support Enforcement (BCSE) between 2005 and 2008, when she left to accept a position at the Bureau for Public Health.

2. Grievant was employed by Respondent in its Employee Relations Unit as a Child Support Specialist 2 (CSS2), pay grade 12, earning approximately $31,000 per year.

3. The position Grievant took at the Bureau for Public Health was a Health and Human Resources Specialist, Sr., pay grade 15, at an annual salary of $37,692.

4. In January 2009, Grievant applied for a position with the BCSE as a Child Support Specialist 2, in the BCSE Customer Service Unit, a job still in pay grade 12.

5. Grievant was selected for the position and negotiated a salary of $35,000 per year. Before she could be hired, though, the BCSE Commissioner issued a hiring freeze, and BCSE was not able to complete the hiring process.

6. In July 2009, the hiring freeze was lifted and the CSS2 position was posted again. Grievant applied again, was selected again, and was offered the same $35,000 annual salary she had negotiated earlier.

7. Grievant accepted the position of CSS2 after being informed and after signing a memorandum of understanding that it would be considered a voluntary demotion without prejudice.

8. The CSS2 position in the Customer Service Unit had significantly different duties than Grievant's previous CSS2 position in the Employee Relations unit.

9. Grievant's salary as a Health and Human Resources Specialist with the Bureau for Public Health was within the range for the CSS2 position in pay grade 12.

10. Grievant is one of seven CSS2's on the Customer Service Unit, and earns more than all but one of those employees. Grievant's salary is also higher than those of two of the CSS3's on the unit, and is higher than her supervisor's salary, which is in pay grade 16.

11. Respondent has held salaries level for some employees who were voluntarily demoted in the past. A CSS2 who was demoted to Accounting Technician 2 in pay grade 9 did not have her salary reduced. A Child Support Supervisor in pay grade 13 transferred to a position as payroll assistant in pay grade 8 with no reduction in pay. Another employee went from Accounting Technician 3 to Accounting Technician 2, a one-pay grade reduction, with no loss of pay, and at a different time the same employee went from a CSS1 in pay grade 11 to a pay grade 10 without a reduction in her pay.

Discussion

Grievant bears the burden of proving her allegations by a preponderance of the evidence. 156 C.S.R. 1 § 3. Grievant argues that the management decision to reduce her salary to $35,000.00 was arbitrary and capricious and discriminatory. Respondent

contends that the decision was wholly within the discretion of management, and Grievant accepted the offered salary knowing the reduction would occur.

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). 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."[2] Actions that are arbitrary and capricious, or which are discriminatory, fall within this stated exception.

Grievant's discrimination claim seeks to compare her demotion to several other identified employees who were voluntarily demoted from a higher pay grade to a lower pay grade. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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,

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[2] *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).

(c) that the difference in treatment was not agreed to in writing by the employee.[3]

Grievant's discrimination claim fails to meet at least two parts of the test. First, the employees she identified as comparable were not similarly situated, in that they were employed in different units of the agency with different supervisors and work locations, and none were demoted to the same classification or same pay grade. Second, Grievant agreed to the difference in treatment in writing.

Grievant also fails to establish that Respondent's salary offer was arbitrary and capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion."[4] Upon her return to the CSS2 classification, her salary increased over her old CSS2 salary by almost 13 percent. At the time, she was the second-highest paid CSS2 on the unit, and even made more than her supervisor. The highest-paid CSS2, although he had less tenure with Respondent than Grievant, had more time on the unit. Respondent presented evidence that the new salary would fit within its budget, but maintained that the higher salary requested by Grievant would not.

Grievant has failed to meet her burden of proving the salary she was offered with her voluntary demotion was discriminatory or arbitrary.

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[3] *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

[4] *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997).

The following conclusions of law support this discussion:

Conclusions of Law

1. In non-disciplinary grievances, the grievant bears the burden of proving her allegations by a preponderance of the evidence. 156 C.S.R. 1 § 3, *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

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 a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for*

the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997).

5. Grievant failed to meet her 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 (2008).

July 1, 2010

M. Paul Marteney
Administrative Law Judge