THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMELA D. ELMORE
Grievant,

v. **DOCKET NO. 2010-0385-CONS**

WEST VIRGINIA STATE TAX DEPARTMENT,
Respondent.

DECISION

Grievant Kimela D. Elmore filed her grievance on September 9, 2009, stating, "On September 1, 2009 a new Tax Regional Supervisor, Kimberly Silvester, was hired for the North Central Regional Office with a salary of $36,696.00. Her beginning salary is far above what my compensation is for 7 years in this same position in the Beckley Regional Office at an amount of $33,036.00. I have a total of 18 ½ loyal years of service to the tax department and my grievance is the violation of compensation that I'm receiving." Her stated relief sought is "[A] comparable level of compensation for my work as tax Regional Supervisor for the Beckley Regional Office to be on par with the entry level received by the Tax Regional Supervisor in the North Central Regional Office. My Request would equal $36,696.00 entry plus 1.5% for each year of service as Tax Regional Supervisor with a grand total of $7,513.08 increase in my salary."

On September 18, 2009, Grievant Phillip G. Jones filed a similar Grievance on the same issue, the two grievances were consolidated, at Level 1. The parties unsuccessfully mediated this Grievance on January 20, 2010. Mr. Jones subsequently retired, and filed no appeal to level three. The remaining parties thereafter submitted the matter for decision based on the record developed below. Grievant Elmore appeared *pro se*, and Respondent

was represented by L. Wayne Williams, Esq. The matter became mature for decision on March 23, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant's salary is lower than the starting salary of another employee in the same classification, but both salaries are within the wide pay range for the classification. Grievant did not establish any violation of rule or law with respect to the establishment of the salaries, and therefore 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 Kimela Elmore is employed by Respondent as Regional Supervisor in the Compliance Division of its Beckley regional office.
2. Both Grievant's and Mr. Jones' salaries were set at $33,036 per year.
3. Kimberly Silvester is a Regional Supervisor employed by Respondent in its Clarksburg regional office at an annual salary of $36,696.00.
4. The Tax Regional Supervisor classification has been assigned pay grade 16 by the Division of Personnel, with a range of $33,036.00 to $61,128.00 per year.
5. In 2009, Respondent filled the Clarksburg office position two times.
6. The first time the position was filled, Ms. Silvester was selected, but declined to accept the position because Respondent would not offer her the salary she demanded.

7. The candidate who did accept the job at the offered minimum salary did not work out, and the job was posted again. Again, Ms. Silvester was the most qualified candidate.

8. After negotiation, Respondent agreed to hire Ms. Silvester at the minimum salary she would accept.

9. Grievant voluntarily accepted her position in the Beckley office at the salary that was offered.

10. Another Regional Supervisor, Cindy Stanley, is paid $41,868.00 per year. That salary is the result of a grievance she filed in 1999, Docket No. 99-T&R-490.[1]

Discussion

In non-disciplinary matters such as this, Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence.[2] Grievant alleges, without further specificity, a "violation of compensation," which the undersigned reads as a claim that the rules and law on pay have been violated.

Grievant's complaint, a common one, is that a new person was hired into the same type of position she has held for a long time, and the new person's starting salary is higher than Grievant's has risen to over her long tenure. However, both employees are paid within the low range of the pay grade assigned to the classification, and there is no evidence that Grievant requested a higher salary when she was hired.

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[1]That grievance was denied at Level 4, and reversed on appeal to the Circuit Court.

[2]*Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008).

Grievant's claim, though not expressly stated, is essentially that she was the victim of favoritism towards Ms. Silvester. "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.

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.[3]

It is well settled 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.[4] It is not discriminatory for employees in the same classification to be paid different salaries.[5] Additionally, 128 C.S.R. 62, § 19.4 states any classified employee

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[3] *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] *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

[5] *Thewes & Thompson v. Dep't of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003).

"whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .". As noted by the West Virginia Supreme Court of Appeals in *Largent*, 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."[6]

It is amply evident that the salary set for Ms. Silvester is based on the need of the agency and market forces as required for filling the Clarksburg position with a competent employee. Contrariwise, no such market forces are evident in the hiring of Grievant, who did not demand a higher salary than the minimum that was offered to her when she accepted her job in Beckley.

Respondent followed the applicable rules on starting salaries when hiring Ms. Silvester. A higher-than-minimum salary may be set as an entry-level salary when there are recruiting difficulties for the job class, as was the case here. *See* 143 C.S.R. 1 § 5.4(b). Grievant presented no evidence that such recruiting difficulties existed at the time she was hired.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No.

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[6]*Largent, supra* at 246; *Jenkins v Dep't of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003).

95-DOH-287 (Jan. 22, 1996); Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008).

2. "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);
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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.

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. *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).

3. 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); *Tennant v. W. Va. Dep't*

of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Resources*, Docket No. 91-H-177 (May 29, 1992).

4. It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003).

5. A higher-than-minimum salary may be set as an entry-level salary when there are recruiting difficulties for the job class, as was the case here. 143 C.S.R. 1 § 5.4(b).

6. Grievant did not meet her burden of proving a violation of the rules or law pertaining to her compensation.

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).

June 30, 2010

M. Paul Marteney
Administrative Law Judge