THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN HENDLEY,
Grievant,

v. **Docket No. 2010-1545-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant, John Hendley, filed this grievance on June 9, 2010, against his employer, Department of Environmental Protection, asserting that "Grievant's housing allowance was improperly omitted in calculating his salary upon transfer to the agency." As relief, Grievant seeks "to be made whole, including back pay with interest."

A level one hearing was held on August 6, 2010. The grievance was denied at that level.[1] A level two mediation was held on November 23, 2010. A level three hearing was held on July 18, 2011, before the undersigned Administrative Law Judge at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent was represented by in-house counsel, Kristin A. Boggs. This matter became mature for decision on August 18, 2011, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

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[1]On November 19, 2010, Respondent filed a Motion to Dismiss asserting that the grievance failed to state a claim on which relief can be granted. Grievant claims a violation of discrimination by Respondent for allegedly treating him differently than similarly situated employees. The Motion to Dismiss is hereby denied.

Synopsis

Grievant was previously employed by the Division of Natural Resources as a Park Superintendent II. As part of his compensation package as a park superintendent with DNR, Grievant lived in a house provided by DNR on State-owned property in the area he was employed. This housing benefit amounted to six thousand dollars ($6,000) annually. When Grievant transferred from that position to his current employer, Respondent, the $6,000 housing benefit amount was not included in calculating his base salary.

Grievant asserts that his housing benefit amount of $6,000 while working for DNR, should have been included in calculating his base salary when he accepted a job for Respondent. Grievant argues that similarly situated employees for DNR received promotions and were allowed to include the housing benefit amount in calculating base salary. Respondent asserts that DNR received three exceptions from the Governor's Office to allow the housing benefit amount to be included in base salary as a recruitment incentive.

_____Grievant has failed to demonstrate that he is similarly situated to the DNR employees who received exceptions from the Governor's Office to include the housing benefit amount in calculating base salary, or that he was a victim of discrimination. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant, John Hendley, is employed by Respondent as an Environmental Inspector, assigned to Respondent's satellite office in Teays Valley, West Virginia.

2. Grievant received a letter[2] dated December 3, 2007, from Respondent which stated in part:

> This is to confirm our offer of employment for the position of Environmental Inspector-in-Training, effective December 16, 2007 at an annual salary of $32,772.
> ....
> We are pleased you have accepted our offer of employment and welcome you to Environmental Enforcement.

3. Grievant began his employment with Respondent on December 16, 2007 as an Environmental Inspector-in-Training (pay grade 14).

_____4. Before he was hired by Respondent, Grievant was employed by the Division of Natural Resources (DNR) as a Park Superintendent II (pay grade 12) assigned to Kanawha State Forest.

5. As part of his compensation package as a park superintendent with DNR, Grievant lived in a house provided by DNR on State-owned property in the area he was employed. This housing benefit amounted to six thousand dollars ($6,000) annually. Grievant was responsible for paying his Social Security and Medicare taxes on that six thousand dollar housing benefit.

6. A condition for employment as a DNR park superintendent is to live on a facility at the park that the superintendent manages. As an exception at the few parks that do not offer housing facilities, DNR provides cash in lieu as an emolument.[3]

7. On December 16, 2008, Grievant was reallocated to the position of

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[2]Level one hearing, DEP's Exhibit No. 3.

[3]Level one hearing testimony of Andrea Fout Tinsley, DNR Administrative Services Manager.

Environmental Inspector after he successfully completed the required one-year training period. Grievant's advancement in classification increased his salary to pay grade 15.

8. The salary for pay grade 15 is $31,164 to $57,660.[4] Grievant's salary at the time of filing this grievance was approximately $36,168.

9. None of Respondent's employees receive residential compensation as part of their salary or benefits.

10. In 2010, Grievant learned that when several other DNR employees moved into higher compensated positions within DNR, the amount of the housing benefit was included in the calculation of base pay.

11. DNR treats the housing benefit as an emolument and does not routinely include it in the calculation of an employee's base pay.

12. On three occasions DNR has requested exception from the Governor's Office that the housing benefit amount be included as part of the base pay calculation. DNR sought the exceptions because DNR was having difficulty recruiting people to work in its central office.

13. The Governor's Office granted the three exceptions.

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*

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[4]See level three hearing, Respondent's Exhibits No. 1 and 2.

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).

_____Grievant asserts that the housing benefit amount of $6,000 that he received while working for DNR, should have been included in calculating his base salary when he accepted a job for Respondent. Grievant argues that similarly situated employees for DNR received promotions and were allowed to include the housing benefit amount in calculating base salary.

Respondent asserts that DNR received three exceptions from the Governor's Office to allow the housing benefit amount to be included in base salary as a recruitment incentive. A higher level than minimum salary may be set as an entry level salary when there are recruiting difficulties for the job class, as was the case with DNR. 143 C.S.R. 1 § 5.4(b). *Elmore v. West Virginia State Tax Department*, Docket No. 2010-0385-CONS (June 30, 2010).

Respondent asserts that when it calculated the base salary for Grievant, it followed the Administrative Rule of the Division of Personnel. Administrative Rule 143 C.S.R. 1 § 5.5(a) states:

> Pay on Promotion. When an employee is promoted, the employee's pay shall be adjusted as follows: (1) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current class shall receive an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current class shall receive an increase of one pay increment, as established by the State Personnel Board, per pay

> grade advanced to a maximum of three (3) pay grades, or an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted, whichever is greater. In no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

When Grievant transferred employment from DNR to Respondent, Grievant received the ten percent (10%) promotional salary increase for going from a pay grade 12 to a pay grade 14, pursuant to the Administrative Rule. When Grievant was promoted from Inspector-in-Training to his current Environmental Inspector position, he received another five percent (5%) promotional salary increase for jumping to pay grade 15. Grievant was aware of the salary amount he would receive if he accepted the position, by the December 3, 2007, offer letter from Respondent.

On April 29, 2005, a Memorandum regarding merit increases was issued by then Chief of Staff, Larry Puccio. The Puccio Memorandum states in part:

> I wish to reaffirm that while you have been requested not to grant merit or salary advancements until further notice, you are expected to continue the processing of nondiscretionary increases. The following examples of nondiscretionary increases are being provided.
> ...
> A. Promotions
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> *(language from the Administrative Rule of the Division of Personnel, 143 C.S.R. 1 § 5.5(a), inserted here in the Puccio Memorandum)*
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> B. West Virginia Personnel Board approved pay differentials
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> Newly Personnel Board approved pay differentials to address circumstances such as class-wide recruitment and retention problems, regionally specific geographic pay disparities, shift differentials for specified work periods, and temporary upgrade programs.
> ....
> Any salary increase or advancement above the minimum required, must receive the approval of this office, which will concur only under the most extenuating circumstances...

Grievant asserts that because of the Puccio Memorandum, Respondent should have requested an exception to include the housing benefit amount when calculating his base pay. Grievant argues that Respondent's failure to request an exception constitutes discrimination. "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). 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,
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> (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).

Grievant is not similarly situated to the three individuals at DNR whose base salary calculations included the $6,000 park superintendent housing benefit. It is not regular practice of DNR to include the housing benefit amount when calculating base salary. DNR did so due to recruiting difficulties on three occasions after requesting and receiving exception from the Governor's Office. Further, Grievant was not promoted to DNR's central office like the three individuals to whom he compares himself. Grievant transferred from DNR to Respondent. Grievant has not demonstrated that Respondent previously

included a housing benefit amount in calculating an employee's base salary. Grievant has failed to demonstrate that he is similarly situated to the three DNR employees who received exceptions from the Governor's Office to include the housing benefit amount in calculating base salary, or that he was a victim of discrimination. Respondent properly followed the Division of Personnel's Administrative Rule for calculating Grievant's promotional salary increase for going from a Park Superintendent II for DNR to an Environmental Inspector for Respondent.

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 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).

_____2. A higher level than minimum salary may be set as an entry level salary when there are recruiting difficulties for the job class, as was the case with DNR. 143 C.S.R. 1 § 5.4(b). *Elmore v. West Virginia State Tax Department*, Docket No. 2010-0385-CONS (June 30, 2010).

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

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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 has failed to demonstrate that he is similarly situated to the three DNR employees who received exceptions from the Governor's Office to include the housing benefit amount in calculating base salary, or that he was a victim of discrimination.

5. Respondent properly followed the Division of Personnel's Administrative Rule for calculating Grievant's promotional salary increase for going from a Park Superintendent II for DNR to an Environmental Inspector for Respondent.

Accordingly, this grievance is **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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Jennifer Lea Stollings-Parr
Administrative Law Judge

Date: September 9, 2011