THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROY CALDWELL, et al.,

Grievants,

v. **Docket No. 2011-1193-CONS**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievants Roy Caldwell, Robert Jeffries, and Noah Robertson filed Level One grievances on February 10, 2011, alleging that Respondent Division of Highways ("DOH") discriminated against them by paying other employees large salary increases when those employees were promoted to the position of Transportation Crew Supervisor 1, while Grievants received no pay increases when they were reclassified to the same position in 2007. Further, Grievants argue that Respondent is discriminating against them because the newly promoted Transportation Crew Supervisor 1s are being paid larger salaries than they, even though they are all within the same job classification and as Grievants have more experience in the position. As relief sought, the Grievants ask for pay increases to make their pay equal to that of the promoted employees. The grievances were consolidated at Level One and assigned the docket number set forth above.

A Level One hearing on this consolidated grievance was conducted on February 24, 2011. The grievance was denied by decision dated March 16, 2011. The Level Two appeal was perfected on March 24, 2011. A Level Two Mediation was conducted on May 6, 2011. On May 18, 2011, Grievants perfected their appeal to Level Three. A

Level Three hearing was held on November 9, 2011, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievants appeared in person, *pro se*. Respondent appeared by counsel, Robert Miller, Esquire. This matter became mature for decision on December 12, 2011, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.[1]

Synopsis

Grievants are employed by Respondent DOH as Transportation Supervisor 1s, which is a pay grade 12 salary. Grievants became Transportation Supervisor 1s through reclassification in 2007. Grievants did not receive pay increases when they were reclassified because the salaries they were earning before the reclassification fell within the pay range for their new positions. On February 1, 2011, two other DOH employees were promoted to the position of Transportation Supervisor 1. As a result of this promotion, those two employees received 15% pay increases. Thus, the two newly promoted workers are now paid more than Grievants, even though Grievants have been in the Transportation Supervisor 1 position for years, and did not receive raises when they were placed into the same job classification. As such, Grievants claim Respondent has discriminated against them. Respondent denies Grievants' allegations and asserts it followed the applicable rules and policies for reclassification and promotion. Grievants

[1] The Grievance Board received a handwritten letter signed by Grievant Caldwell on December 7, 2011, which was interpreted to be Grievants' proposals for the undersigned's consideration. It is unclear from the document whether Grievant provided a copy of the same to counsel for Respondent. It is noted that in this letter, Mr. Caldwell tries to introduce what appears to be new evidence to support Grievants' claim. Evidence was closed at the conclusion of the Level Three hearing on November 9, 2011. The undersigned cannot consider any evidence presented after the close of evidence. Therefore, the undersigned has not considered the new evidence, or information, provided in Grievant Caldwell's letter in rendering this decision.

did not demonstrate by a preponderance of the evidence that Respondent discriminated against them. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants Roy Caldwell, Robert Jeffries, and Noah Robertson are employed by Respondent DOH as Transportation Crew Supervisor 1s, pay grade 12 salary.

2. Grievants were reclassified as Transportation Crew Supervisor 1s in September 2007, as part of a statewide reclassification plan which eliminated their previous job classifications.

3. Grievants did not receive pay increases as a result of the 2007 reclassification because the pay they were already receiving at that time fell within the pay range for the new classification, which was a pay grade 12 salary.

4. Grievants' salaries remain within the pay range for pay grade 12 salary.

5. Steven Kitchen and Daniel Viers are employed by DOH. They were promoted to the position of Transportation Supervisor 1, the same job classification and pay grade as Grievants, on February 1, 2011.[2] These promotions moved Kitchen and Viers up at least three pay grades. As a result of their promotions, Kitchen and Viers received 15% pay increases, a 5% pay increase for each pay grade they moved up.

6. Grievants have been Transportation Supervisor 1s years longer than Kitchen and Viers; however, Kitchen and Viers are now paid more than Grievants.

[2] *See*, Lower Level record ("LL").

7. On or about February 1, 2011, Grievants learned that Kitchen and Viers received 15% pay increases when they were promoted to Transportation Supervisor 1s.

8. Promotion and reclassification are not identical actions. They are separate administrative actions that are controlled by different rules and policies.

Discussion

As this is not a disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "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). "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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

At the commencement of the Level Three hearing, Respondent, by counsel, moved the undersigned to dismiss this grievance as untimely filed.[3] Therefore, the first issue to discuss in this grievance is that of timeliness. The burden shifts to Respondent to prove the grievance was not timely filed. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is

[3] Respondent moved to dismiss this grievance at Level One, and its motion was denied.

upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See also, Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee. See, W. VA. CODE § 6C-2-4(a)(1); *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 6-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

The undersigned signed finds that this grievance was timely filed. The Grievants learned of their co-workers' pay increases on or about February 1, 2011. The Grievants filed their respective grievances on February 14, 2011. Therefore, the grievances were timely filed. The Respondent's Motion to Dismiss is denied.

Grievants argue that Respondent has discriminated against them because Respondent granted two other employees, Steven Kitchen and Daniel Viers, 15% pay

increases when they were promoted to the position of Transportation Crew Supervisor 1, but failed to grant Grievants any pay increases when they were reclassified into the same position in 2007. Grievants assert that their respective salaries should be increased to match that of Kitchen and Viers. Respondent denies that it discriminated against Grievants, and asserts that it complied with the applicable Division of Personnel ("DOP") policies regarding salary increases for promotions and reclassification in this matter.

In the grievance process, 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). 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, 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, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The West Virginia Division of Personnel Administrative Rule 5.4(f)(2)(a) provides the following regarding pay upon reclassification:

> 1. When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted

to the new minimum.

2. Where the salary of the incumbent coincides with a pay rate in the new range, the salary shall remain unchanged.

Grievants were reclassified into the position of Transportation Crew Supervisor 1 in September 2007. Grievants received no pay increases upon reclassification because their salaries were already within the pay range for their new classification. Such is consistent with the above provision of the Administrative Rule. Kitchen and Viers were not involved in the 2007 reclassification action. Kitchen and Viers became Transportation Crew Supervisor 1s on February 1, 2011, through promotion. Their promotions changed their pay grades from "pay grade hourly 12" to "pay grade 12 salary."[4] This resulted in Kitchen and Viers moving up four pay grades. Pursuant to the Division of Personnel Pay Plan Implementation Policy, they were to receive a pay increase of 5% for each pay grade they moved up. However, this policy limits pay increases to 15%, even if an employee moves up more than three pay grades. As such, Kitchen and Viers received 15% pay increases. *See*, DOP-P12, Section III (C)(2) (July 1, 2005).

Even though Grievants, Kitchen, and Viers now share the same job classification, the ways by which they were placed in this classification are different. Grievants became Transportation Supervisor 1s through reclassification, while Kitchen and Viers were promoted to the position years later. Reclassification and promotion are different processes controlled by different rules and policies. Therefore, Grievants, Kitchen, and Viers cannot be considered similarly situated. As such, the undersigned cannot find

[4] *See*, LL record.

that Respondent discriminated against Grievants by not giving them pay increases when they became Transportation Supervisor 1s.

Grievants further argue that they have been discriminated against and treated unfairly because employees with the same job classification who have less seniority in that classification are now being paid higher salaries than they. "The West Virginia Equal Pay Act, W. Va. Code 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). "'W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification. *Largent at Syl. Pts 3 and 4.* Specifically, *Largent* held 'employees who are performing the same tasks with the same responsibilities should be placed within the same job classification,' but a state employer is not required to pay these employees at the same rate. *Largent* at Syl. Pts. 2 & 3. The requirement is that 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)." *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006). Further, "[i]t is not discriminatory for employees in the same

classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health and Human Resources/Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003).

No evidence has been offered to suggest that Grievants, Kitchen, or Viers are being paid outside the pay range for their job classifications. Even though these circumstances seem completely unfair, given the established law, the undersigned has absolutely no authority to rectify this pay inequity.

Lastly, Grievants argue that the DOP Pay Plan Implementation Policy Internal Equity provision should be applied to increase their salaries by 10%.[5] This provision states as follows:

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority ***may*** recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.

See, DOP-P12, Section III(D)(3) (July 1, 2005) (Emphasis added). From the evidence presented, it appears that no one at DOH has recommended an in-range salary adjustment, as described above, for Grievants. If the appointing authority at DOH would wish to do so, there exists an established procedure, which includes following set guidelines and completing certain forms, which must be followed before DOP will

[5] Grievants referred to this policy as the "20% rule." It is noted that counsel for Respondent objected to Grievants raising the issue of the Pay Plan Implementation Policy, asserting that Grievants did not raise such at Levels One or Two. However, the undersigned notes that the Level One decision states that the Grievants referred to this policy in support of their arguments.

approve any such pay increase. However, "the granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of the Respondent." *Harris v. Dep't of Transp.,* Docket No. 06-DOH-224 (Jan. 31, 2007). Further, an agency's decision not to recommend a discretionary pay increase generally is not grievable. *See, Lucas v. Dep't of Health and Human Res.,* Docket No. 07-HHR-141 (May 14, 2008). Therefore, the undersigned cannot compel Respondent to utilize the DOP Pay Plan Implementation Policy to resolve the issues raised in this grievance.

For the reasons set forth herein, the undersigned finds that Grievants have not met their burden of proving their claims by a preponderance of the evidence. Therefore, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. *See,* Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990).

2. 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).

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, 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, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievants are not similarly situated to the employees to whom they compared themselves.

5. "W. VA. CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, *Largent v. W. Va. Div. of Health,* 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-386 (Mar. 26, 1997)." *Nelson v. Dep't of Health and Human Resources,* Docket No. 05-HHR-315 (May 16, 2006).

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

7. Grievants did not meet their burden of proving by a preponderance of the evidence that Respondent discriminated against them by failing to grant them pay increases when they became Transportation Supervisor 1s.

8. Grievants did not demonstrate that the difference between their salaries and those of the other identified employees within their job classification was the result

of discrimination.

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 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: May 31, 2012.

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Carrie H. LeFevre
Administrative Law Judge