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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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BRIAN HOLCOMB

v.

Docket No. 89-DOH-398

**WEST VIRGINIA
DEPARTMENT OF HIGHWAYS**

DECISION

Brian Holcomb, employed by Respondent as a Bridge Maintenance Inspector I, filed a grievance on April 17, 1989, alleging,

When I transferred here [Charleston, from Parkersburg] my pay rate was \$945 per month. The bid sheet upon which I bid showed starting pay as \$1001.25 per month. I did not receive this increase after transferring. I was recently informed that a co-worker did rec[e]ive \$1001.25 after transferring into a job of the same type in the same dep[artmen]t. I feel that I was discriminated against by this action and I am seeking both the pay increase and back pay from the date of my transfer.

The grievance was denied at Levels I and II and at Level III after hearing. Grievant appealed to Level IV on July 28, 1989. While Grievant initially requested a hearing, the parties later agreed that the decision could be made on the record compiled below. With receipt of proposed findings of fact and conclusions of law from both parties on October 12, 1989, this matter may be decided.

Grievant was transferred January 1, 1989. Respondent contends that Grievant knew that he did not get the pay

increase in February 1989 and therefore his April filing was not timely.¹ In Grievant's response to Respondent's motion to dismiss Grievant argues that he did not find out it was possible to receive the \$1001.25 per month until he was told in April that another employee was receiving it, that he filed within ten days of so discovering, and his grievance was therefore filed in compliance with the mandates of W.Va. Code §29-6A-4(a) that it be filed

[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance[.]²

In his proposed findings of fact and conclusions of law Grievant apparently makes the same arguments that were made and rejected in Viriden v. West Virginia Dept. of Highways,

¹Respondent moved to dismiss the grievance on this basis on August 29, 1989. The motion was denied the next day by Order, which further stated that "Respondent is free to so move again at hearing so that the motion can be considered in the decision on this matter." Although the hearing was subsequently cancelled, Respondent's proposed findings of fact and conclusions of law retain the contention. Furthermore, while it has been held that whether a grievance was timely filed cannot fairly be raised at Level IV when no hearing is held because the grievant has no opportunity to present evidence on the issue, see Ford v. Wood Co. Bd. of Educ., Docket No. 54-87-077-3 (Dec. 21, 1987), no such unfairness exists in this case because Grievant was notified of the issue and thereafter requested a decision based on the record and also evidence on the issue was submitted into the record at Level III.

²Grievant makes no contention that this matter involves any continuing practice.

Docket No. 89-DOH-037 (May 31, 1989),³ where it was held that there was no proven illegality in Respondent's utilizing one pay scale when transferring a regular employee and a different, higher scale when promoting an employee.⁴ While those arguments on the merits would therefore be rejected, it may also be determined that the grievance was untimely filed, if the heart of the grievance is that the amount of pay was illegal, as the proposals apparently contend. That Grievant found out in April that another employee had received a higher salary would not excuse the delay, for the "event" pertinent to Code §29-6A-4(a) would be the receipt of the lower salary and Grievant admittedly knew in February that he would not receive the higher salary. It is well-settled that "the date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed." Harris v.

³Grievant's proposals are puzzling since Respondent submitted the decision in Virden into the record at Level III.

⁴Virden also stated that "grievant seems to be making a 'reliance' argument, i.e., that he relied on the posted salary and was not apprised before or during the posting period that there was the possibility of no salary enhancement should he be awarded the position" and ruled, "Inasmuch as the later class change was fully explained to grievant prior to his acceptance of the Operator position, he is estopped from claiming that he relied on the posted salary[.]" While it is not clear, Grievant apparently is making a similar argument in this case. If so, it is rejected.

Lincoln Co. Bd. of Educ., Docket No.89-22-49 (Mar. 23, 1989).⁵

However, that Grievant found out in April that another employee was receiving a higher salary would render his grievance timely insofar as it alleges discrimination.⁶ "Discrimination" is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Code §29-6A-2(d). Since the crux of a discrimination charge is different treatment of employees, the pertinent "event" for Code §29-6A-49(a) purposes is the unequal treatment and a grievance alleging discrimination is timely if filed within ten days of the grievant's discovering that such different treatment had occurred.

Grievant did not establish discrimination, however. It has recently been held that, in order to establish a prima facie case of discrimination, the grievant must establish,

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

⁵While Harris involved a grievance for an education employee, the pertinent language of the provision at issue there, W.Va. Code §18-29-4(a)(1), is synonymous to that of Code §29-6A-4(a).

⁶In that Grievant's proposals do not address the issue of discrimination raised by his statement of grievance, it may be that he abandoned the contention. Nevertheless, because it is uncertain that his failure to address the issue was intentional, it is addressed here.

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to in writing by the grievant.

Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).⁷ That decision further held that a prima facie showing may be rebutted by Respondent's offering a "legitimate, nondiscriminatory reason" for its action and, if such rebuttal is successful, Grievant must demonstrate by a preponderance of the evidence that the offered reason was mere pretext. While Grievant's establishing that the other employee had the same position but was paid the higher salary did fulfill his prima facie showing,⁸ that was rebutted by Respondent's evidence that Grievant was not entitled to be paid under the higher pay scale while the other employee was.⁹ Finally, there was no evidence of record indicating pretext.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are also made:

⁷While Steele was interpreting the definition of discrimination of W.Va. Code §18-29-2(m), that provision is identical to Code §29-6A-2(d).

⁸Clearly grievant did not agree to any difference in pay.

⁹Virden discusses the legality of the dual pay scales.

Findings of Fact

1. Grievant, employed by Respondent as a Bridge Maintenance Inspector I (BMI I) in Parkersburg at a salary of \$945 per month, applied for a BMI I position in Charleston pursuant to a vacancy announcement which stated that the pay range for the position was \$1001.25 to \$1605.00 per month.

2. Grievant was advised during the interview that it was not certain whether the salary would be as announced.

3. Grievant was awarded said position and transferred January 1, 1989.

4. After the transfer he continued to be paid \$945 per month.

5. In February Grievant was advised that he was not entitled to the \$1001.25 monthly pay.

6. Grievant found out in April that another BMI I in Charleston was being paid \$1001.25 per month and filed his grievance within ten days of so discovering.

7. The other BMI I was paid the higher salary because he was newly-hired and entitled to a promotion. Grievant was transferred as a regular employee and was therefore paid on a different scale.

Conclusions of Law

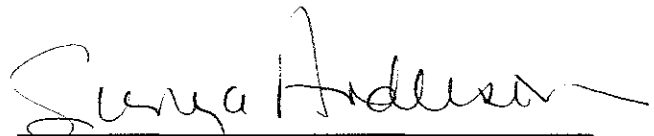
1. Grievant's complaint of discrimination was timely but his complaint that Respondent's failure to award him \$1001.25 per month was illegal was not timely.

2. Grievant failed to establish any illegality in Respondent's continuing to pay him \$945 per month after his transfer to Charleston. See Virden v. West Virginia Dept. of Highways, Docket No. 89-DOH-037 (May 31, 1989).

3. Grievant failed to establish that Respondent discriminated against him by paying him a lower salary than a newly-hired BMI I.

Accordingly, the grievance is **DENIED**.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
HEARING EXAMINER

DATED: October 31, 1989