

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TAMMY J. DEWITT,**

**Grievant,**

**v.**

**Docket No. 2017-2082-DHHR**

**DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES/  
BUREAU FOR CHILDREN  
AND FAMILIES,**

**Respondent.**

**DECISION**

Grievant, Tammy J. Dewitt, is employed by Respondent, the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("DHHR"). On April 17, 2017, Grievant filed this grievance against Respondent, which states:

Elissa Reckart resigned from her position as a Social Service Worker II in Adult Services to take a job with the Centralized Intake Unit, Marion County. I also am classified as a Social Service Worker II in Adult Services. It was her choice to take the job position which meant she would be reclassified as a Social Service Worker III and receive a substantial pay increase. This was her reason for accepting the job position with the Centralized Intake Unit. However, once in her new position she did not like it and told former coworkers that she did not like it. Ms. Reckart requested to return to her former position in Adult Services in Morgantown. Ms. Reckart was in her newly chosen job position with Centralized Intake for a maximum of 30 days and was told that she could return to Adult Services and keep her pay increase. I am requesting the same salary as Ms. Reckart as we both perform the same job duties.

§ 143-1-5. Pay Plan and Salary Administration.

5.1. Purpose and Intent. – The purpose and intent of the pay plan is to attract and retain qualified employees in the classified service, the Board shall provide through the pay plan compensations based on EQUAL PAY

FOR EQUAL WORK and market rates as compared to compensation trends in other public and private organizations.<sup>1</sup>

The relief sought states: “This worker should receive same annual gross pay as Ms. Reckart for performing same job duties.”

A level one Hearing was held on July 25, 2017. On August 15, 2017, the hearing examiner issued a level one decision denying the grievance. Grievant appealed to level two on August 18, 2017 and a mediation session was held on November 3, 2017. An Order of Unsuccessful Mediation was entered on November 6, 2017, by the West Virginia Public Employees Grievance Board. Grievant appealed to level three of the grievance process on November 14, 2017. A level three hearing was held before Administrative Law Judge Ronald Reece at the Grievance Board’s Westover office on April 5, 2018.<sup>2</sup> Grievant was represented by attorney Gregory H. Schillace. Respondent was represented by Assistant Attorney General Katherine A. Campbell. Each party was given the opportunity to submit Proposed Findings of Fact and Conclusions of Law by May 30, 2018. However, only the Respondent made this submission, doing so on May 30, 2018. This matter became mature for decision on May 30, 2018.

### **Synopsis**

Grievant is employed by Respondent in a Social Service Worker 2 position<sup>3</sup> in the Adult Protective Service Unit. Grievant and coworker perform the same job duties in the same job classification. Yet Respondent pays Grievant’s coworker more than Grievant.

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<sup>1</sup> Administrative Rule of the West Virginia Division of Personnel, W.VA. CODE ST. R. §143-1-5.1.

<sup>2</sup> The grievance was thereafter transferred to Administrative Law Judge Joshua Fraenkel for administrative reasons.

<sup>3</sup> “Position” and “classification” are used interchangeably.

Grievant filed a grievance against Respondent which alleges that Respondent is discriminating against Grievant by paying coworker more than Grievant and that Grievant is entitled to equal pay for equal work in conjunction with the Administrative Rule of the West Virginia Division of Personnel, W.VA. CODE ST. R. §143-1-5.1. Grievant did not prove by a preponderance of the evidence that she was entitled to be paid the same salary as her coworker or that Respondent had discriminated against her. Therefore, the grievance is denied.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant has worked in the Adult Protective Service Unit under a Social Service Worker 2 classification in Marion County since August 2014.
2. Between February 2011 and August 2014, Grievant also worked in a Social Service Worker 2 position but in the Child Protective Service Unit.
3. Grievant's coworker initially worked in the Adult Protective Service Unit under a Social Service Worker 2 classification when coworker applied for and was awarded the position of Social Service Worker 3 in the Centralized Intake Unit, resulting in a salary increase.
4. After less than 30 days in her Social Service Worker 3 position in the Centralized Intake Unit, Grievant's coworker applied for and was demoted without prejudice to her previous position as a Social Service Worker 2 in the Adult Protective Services Unit.<sup>4</sup>

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<sup>4</sup> Respondent's Exhibit 2.

5. During the period in question, the Commissioner for the Bureau for Children and Families had a practice of permitting employees to retain their higher salary upon a voluntary demotion without prejudice, as long as the demotion was within the salary range of the new job classification.

6. Grievant could have applied for the open Social Service Worker 3 position in the Centralized Intake Unit, but did not do so.

7. The salary range for the Social Service Worker 2 classification is between \$24,912 and \$46,092.<sup>5</sup>

8. Both Grievant and her coworker are paid within the salary range for a Social Service Worker 2 classification.

9. Grievant's yearly salary since 2014 has hovered between \$26,883 and \$27,332.

10. Coworker's yearly salary since she was classified as Social Service Worker 3 has been approximately \$30,500-600.

11. Grievant and her coworker perform exactly the same job functions.

12. Grievant has at least as much experience and job qualification as her coworker, with the exception of coworker's less than 30-day period in a Social Service Worker 3 position.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable

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<sup>5</sup> Respondent's Exhibit 3.

person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

In the instant matter, Grievant alleges that Respondent is discriminating against her by paying her coworker more than her. Grievant asserts that she is entitled to equal pay for equal work in conjunction with the Administrative Rule of the West Virginia Division of Personnel, W.VA. CODE ST. R. §143-1-5.1., and thereby requests the same salary as her coworker.

Grievant has failed to meet her burden of proof. Grievant filed her grievance based on her belief that Respondent discriminated against her when it allowed a coworker holding an identical job classification to apply for and receive a Social Service Worker 3 position, and then, after less than 30 days, granted coworker's request to be voluntarily demoted to her former Social Service Worker 2 position while allowing her to retain her salary from her Social Service Worker 3 position. Grievant admitted that she was not precluded from applying for the open Social Service Worker 3 position. Grievant and coworker are both paid within the compensation range as set by the Department of Personnel for Social Service Worker 2. Grievant also contends that DHHR violated the “equal pay for equal work” statute when it decided to pay a coworker more than it paid Grievant, in spite of the fact that they each hold the same job classification and perform the same job duties.

West Virginia Code § 6C-2-2(d) (2007) defines discrimination 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." In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove that he or she has been treated differently from one or more similarly-situated employee(s), that the different treatment is not related to the actual job responsibilities of the employees, and that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did not satisfy the first element of the *Frymier* test in that she failed to prove that she and her coworker were "similarly situated" and "treated differently." Grievant and her coworker were not "similarly situated" because Grievant's coworker obtained a promotion and then retained the salary increase accompanying the promotion when she was voluntarily demoted without prejudice a few weeks thereafter. Regardless, even if the Grievant and her co-worker had been "similarly situated," Respondent did not treat Grievant differently from her coworker under the law.

The West Virginia Supreme Court has held that "W. Va. Code § 29-6-10 [1992], does not provide that employees who are performing the same tasks with the same responsibilities be placed at the same step within a job classification." Syl. Pt 4, *Largent v. W. Va. Div. of Health and Div of Personnel*, 192 W. Va. 239, 452 S.E. 2d 42. (1994).

“In *Largent* this Court recognized that, although State employees doing same work had to be placed in same classification, there could be pay differences within that classification.” *Hammond v. West Virginia Department of Transportation, Division of Highways and the Divisions of Personnel*, 229 W.Va. 108, 727 S.E.2d 652, 655 (2012).

Also, the West Virginia Code of State Rules and Division of Personnel’s Pay Plan Policy allow Respondent to keep a demoted employee at the higher salary she received in her prior position if that higher salary is within the pay range of the employee’s new job class.<sup>6</sup> W.VA. CODE ST. R. §143-1-5.6(a) provides that “[t]he appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted if the employee’s pay rate is within the pay range of the job class to which the employee is demoted.” West Virginia Division of Personnel Pay Plan Policy provides that “[a]n employee who has been demoted without prejudice or reallocated downward may retain his or her current salary or have his or her salary reduced at the appointing authority’s discretion so long as the employee’s pay rate is within the compensation range of the job class to which the employee was demoted or reallocated.”

Both Grievant and her co-worker are classified as Social Service Worker 2s. The salary range for Social Service Worker 2s is between \$24,912 and \$46,092. Salaries for both Grievant and her coworker are within this range. Therefore, Respondent did not

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<sup>6</sup> W.VA. CODE § 29-6-1 et. seq. is the enabling code through which the West Virginia legislature grants the Division of Personnel the authority to enact its administrative rules as found in its Pay Plan Policy and the Code of State Regulations section 143.

treat Grievant differently than her coworker by paying coworker a higher salary than Grievant.

The Respondent exercised lawful discretion in choosing to not reduce coworker's salary upon her voluntary demotion from the Social Service Worker 3 position since this salary was within the pay range of the Social Service Worker 2 position to which coworker was demoted. When Respondent chose not to reduce the salary of the Grievant's coworker upon coworker's voluntary demotion without prejudice, Grievant did not then obtain the right to automatically receive a pay increase equal to her coworker, even if she and her coworker were similarly situated.

Another consideration is that *Largent* held that the West Virginia Equal Pay Act "does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect." *Largent*, at Syl. Pt. 2. See also *Lisa Driscoll v. Dept. of Health and Human Resources/Bureau for Children and Families and Division of Personnel*, Docket No. 2017-2148-DHHR (April 19, 2018). Grievant is employed under a valid civil service system based on merit. Therefore, the West Virginia Equal Pay Act would not apply to Grievant's situation. Regardless, even if it did apply, Grievant is being treated in a non-discriminatory manner because she and her comparable coworker are compensated within the salary range of their classification.

Grievant based her claim of discrimination on the fact that she is approximately the same age, gender, and race, and also had a similar level of experience as her coworker, yet received a lower salary than her coworker. She offered no other argument in support

of her claim. State employees in the same job classification are not entitled to the same salary just because they have the same level of experience and are the same age, gender, and race.<sup>7</sup> Even if they are similarly situated, they must still prove that they were treated differently.

Grievant's discontent with what she views as different treatment is understandable. However, the Respondent did not treat Grievant differently from her coworker. The crucial distinction between the Grievant and her co-worker is that the coworker applied for and received the position of Social Service Worker 3, albeit for less than 30 days, while the Grievant did not apply for or receive this position. They each had the same opportunity to apply for the Social Service Worker 3 position. While coworker applied, the Grievant did not apply for the position. Coworker did not receive preferential treatment in being awarded the Social Service Worker 3 position, since the Grievant never allowed that to play out by applying for the same position. As such, Grievant and her coworker are not similarly situated and Grievant cannot now argue that she was subject to discrimination

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<sup>7</sup>Grievant did not base her claim of discrimination on being a member of a protected class under the West Virginia Human Rights Act. The Human Rights Act "prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap." *Vest v. The Board of Education of the County of Nicholas*, 193 W.Va. 222, 225 (1995). If Grievant had done so, and had proven that she was treated differently because of a protected category such as age, she would have satisfied an element of the *Frymier* test in showing that her treatment by the Respondent was not "related to the actual job responsibilities." *Id.* at 225. However, while the Grievance Board's authority includes jurisdiction to remedy discrimination that would also violate the Human Rights Act, it does not have authority to determine liability under the Human Rights Act. *Id.* Syl. Pt. 1. This could provide a grievant with non-mutually exclusive remedies. *Id.* at 225. Regardless, Grievant did not prove that Respondent treated her differently from coworker, let alone that the basis of any different treatment was her age, race, or gender.

and treated differently than her coworker, because the basis of the coworker's higher salary was Respondents' policy of allowing employees to be voluntarily demoted and yet retain the same salary. Therefore, Grievant's claim of discrimination is denied.

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. W. VA. CODE ST. R. § 156-1-3 (2008). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The Administrative Rule of the West Virginia Division of Personnel, W.VA. CODE ST. R. §143-1-5.1, provides for a pay plan for state employees pursuant to the provisions of W.VA. CODE §29-6-10(2).

3. As the purpose and intent of this rule is "[t]o attract employees and retain them in the classified service, the Board shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses." W.VA. CODE ST. R. §143-1-5.1

4. “The board shall have the authority to promulgate, amend or repeal rules, according to chapter twenty-nine-a of this code, to implement the provisions of this article:... (2) For a pay plan for all employees in the classified service, after consultation with appointing authorities and the state fiscal officers, and after a public hearing held by the board. Such pay plan shall become effective only after it has been approved by the Governor after submission to him by the board. Amendments to the pay plan may be made in the same manner. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.” W.VA. CODE §29-6-10 (2017).

5. Discrimination “ means 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) (2007). In order to establish 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. *Frymier v. Higher Education Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. “W. Va. Code § 29-6-10 [1992], provides that employees who are performing the same tasks with the same responsibilities should be placed within the same job classification.” Syl. Pt. 3, *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 [1992], does not provide that employees who are performing the same tasks with the same responsibilities be placed at the same step within a job classification.” *Id.* at Syl. Pt. 4.

7. “In *Largent* this Court recognized that, although State employees doing same work had to be placed in same classification, there could be pay differences within that classification.” *Hammond v. West Virginia Department of Transportation, Division of Highways and the Divisions of Personnel*, 229 W.Va. 108, 727 S.E.2d 652, 655 (2012).

8. “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 rate is within the pay range of the job class to which the employee is demoted.” W.VA. CODE ST. R. §143-1-5.6(a).

9. “An employee who has been demoted without prejudice or reallocated downward may retain his or her current salary or have his or her salary reduced at the appointing authority’s discretion so long as the employee’s pay rate is within the compensation range of the job class to which the employee was demoted or reallocated.” West Virginia Division of Personnel Pay Plan Policy. At III.B.3. (Effective in 1994 and revised in 2017).

10. The West Virginia Equal Pay Act “does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect.” *Largent*, at Syl. Pt. 2. See also *Lisa Driscoll v. Dept. of Health and Human Resources/Bureau for Children and Families and Division of Personnel*, Docket No. 2017-2148-DHHR (April 19, 2018).

11. Grievant failed to prove her claims by a preponderance of the evidence.

12. Accordingly, the 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 W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE:** July 6, 2018

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**Joshua Fraenkel**  
**Administrative Law Judge**