

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**EDWIN KENT HOLLEY,
Grievant,**

v.

Docket No. 2019-0604-MU

**MARSHALL UNIVERSITY,
Respondent.**

DECISION

Edwin Kent Holley, Grievant, is employed by Respondent, Marshall University, as a Supervisor, Grounds. Mr. Holley filed a level one grievance form dated November 16, 2018, alleging:

On October 4, 2018, Grievant was assigned the duties of his supervisor Mike Farley, Certified Supervisor, Grounds (pay grade 16). Grievant inquired on more than one occasion about additional compensation for performing said duties. On November 7, 2018, Grievant was notified that effective the next day, Ronnie Hicks would begin oversight and management in Mike Farley's absence. Violation of past practice for compensation for acting pay duties and retaliation.¹

As relief:

Grievant seeks to continue performing the duties of his supervisor during his supervisor's absence as per Grievant's PIQ; to be compensated for performing the duties of his supervisor; to be made whole; for all retaliation to cease; and any other relief the grievance evaluator deems appropriate.

¹ When specifically asked, Grievant's representative stated that Grievant was not alleging discrimination. He did, however, address this issue in his Proposed Findings of Fact and Conclusions of Law.

A level one conference was conducted on November 27, 2018. The matter was held in abeyance so the hearing evaluator could be provided additional job duties by the parties. A memorandum denying the grievance was issued on January 7, 2019.

Grievant appealed to level two by form dated January 2, 2019.² A mediation was conducted on March 13, 2019, and Grievant appealed to level three on April 18, 2019. A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on August 7, 2019. Grievant personally appeared and was represented by John E. Roush, Esquire and Christine Barr, AFT-West Virginia/AFL-CIO. Respondent appeared through Bruce Felder, Director of Personnel and was represented by Anna Faulkner, Assistant Attorney General. This matter became mature for decision on September 23, 2019, upon receipt of the last of the parties' Proposed Findings of Facts and Conclusions of Law.³

Synopsis

Grievant alleges that Respondent subjected him to discrimination and violated its own policy by refusing to give him a salary upgrade when he filled in for his supervisor who was gone for an extended time. Part of Grievant's regular duties listed in his job description include filling in for his supervisor when he is absent. Grievant did not prove he was subject to discrimination because he was not similarly situated with the coworkers he identified. Grievant did not prove that Respondent violated its policy of giving employees a salary upgrade when they are required to temporarily perform additional

² No explanation was provided for the appeal date preceding the date of the memorandum formally denying the grievance at level one.

³ These findings were postmarked September 10, 2019. There was no apparent reason for their delay in reaching the Grievance Board.

duties. Filling in for his supervisor is part of his regular duties and does not qualify as an additional duty.

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, Edwin Kent Holley, has been employed by Respondent, Marshall University, thirty-two years. He presently holds the Supervisor, Grounds classification.

2. Grievant's immediate supervisor is Mike Farley. Mr. Farley's position is classified as Certified Supervisor, Grounds.⁴ Grievant and Mr. Farley are the highest-ranking supervisors in the Grounds Department.

3. Grievant Holley held a position classified as a Certified Landscape Worker Lead in 2014. That classification is at pay grade 13.

4. In 2014 Grievant sought a reallocation to Supervisor, Grounds so he could provide supervisory assistance, which was needed by the Certified Supervisor, Grounds in managing that multi-faceted operation.

5. Based upon a Position Information Questionnaire ("PIQ") which he submitted with the assistance and approval of his supervisors, Grievant's position was reallocated to Supervisor, Grounds (pay grade 15) in December 2014.

⁴ "Certified" appears to be a word of art in this setting connoting a higher level on management. It does not necessarily reflect additional education or licensure.

6. The PIQ is a document that lists all duties and responsibilities in a position, including any levels of supervisory authority which is utilized to determine which classification the job falls into. The PIQ is also used as a job description.⁵

7. Grievant's PIQ for the Supervisor, Grounds position, under the heading of *Job Summary*, specifically included, "Assume responsibilities of the Certified Supervisor Grounds in his absence." (Grievant Exhibit 3).

8. The Marshall University *Classified Staff Handbook* contains the following provision related to "Interim Salary Adjustments":

When employees assume additional duties and responsibilities on a temporary basis, they are entitled to receive an interim salary adjustment. The temporary assignment must be for a period of at least four weeks but no longer than twelve months.

(Respondent Exhibit 1).

9. Over a period of years, several of Respondents employees have stepped up to temporarily fill in for supervisors during the supervisor's absence. Examples of those instances were:

1. A Plumber who was temporarily upgraded to a Plumber – Lead position,
2. A Preventative Maintenance Technician who was upgraded to a Preventative Maintenance Technician - Lead,
3. A Landscaper who was upgraded to a Landscaper – Lead,
4. A Landscape Designer was upgraded to a Certified Landscaper – Lead
5. An HVAC⁶ - Lead was upgraded to a HVAC Manager.

10. In all these situations, the upgraded employee was placed in the higher position temporarily until the return of the supervisor or until the vacant supervisory

⁵ Testimony of Mary Chapman, Human Resources and Manager of Classification and Compensation.

⁶ Heating Ventilation Air Conditioning.

position was filled. They were paid at a higher pay grade while they performed the supervisory duties.

11. None of the employees who were upgraded had the duties or responsibilities of the supervisor in the PIQ for their regular positions. None of these regular positions were higher in the supervisory ranking than Leads.

12. In October 2018, it became apparent that Certified Supervisor, Grounds, Mike Farley was going to be absent for an extended period. His absence ultimately extended for roughly three and a half months. By email, on October 4, 2018, Travis Bailey, Physical Plant Director, assigned Grievant to oversee the Grounds Department in Mr. Farley's absence.

13. Grievant acknowledged the assignment the same day and asked, "Is there any paperwork I need to sign or submit for compensation?" Director Bailey replied, "Not at this time."

14. On November 7, 2018, Grievant sent an email asking Director Bailey for a temporary upgrade in classification and pay while he was filling in for Mr. Farley.

15. Director Bailey responded by email dated November 8, 2018, that Grievant's PIQ job summary includes "Assume responsibilities of the Certified Supervisor Grounds in his absence" and concluded that, "Since no additional duties were assigned outside of the PIQ no compensation is necessary." (Grievant Exhibit 1).

16. When Mr. Farley was on the job, he performed a significant number of supervisory duties which Grievant did not have to regularly perform.⁷

⁷ Grievant Exhibit 4, a list of duties compiled by Mr. Farley that Grievant had to assume in Mr. Farley's absence.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant alleges that Respondent violated its policy and long-standing practice related to interim salary adjustments by not upgrading his salary while he was filling his absent supervisor's position. Though Grievant's counsel stated that he was not alleging discrimination at the start of the level three hearing, he addressed that issue in his Proposed Findings of Fact and Conclusions of Law. Grievant believes he is being subjected to discrimination because several employees have received a salary upgrade while substituting for a supervisor and he has not.⁸

Respondent asserts that Grievant's situation is unique because he has already received a reallocation into a Supervisor Classification and his PIQ includes supervisory duties. Specifically, Respondent notes that part of his regular duties listed in his PIQ include performing his supervisor's duties in the supervisor's absence. Since this specific responsibility is included among Grievant's regular duties, Respondent avers he is not

⁸ Respondent may have been misled into not addressing the issue of discrimination by Grievant's assertion at the hearing, the arguments and testimony it presented addresses discrimination at least tangentially. The undersigned will address this issue because Respondent is not prejudiced by Grievant's initial assertions that he was not arguing discrimination.

entitled to additional pay for performing this duty. Respondent also argues that Grievant is not being discriminated against because he is not similarly situated with the employees who have received upgrades.

For purposes of the grievance procedure, 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 discrimination 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).

There is no dispute that Respondent has applied its Interim Salary Adjustment policy to give employees temporary pay increases while they filled in for supervisors. Grievant provided several examples of these incidents through testimony. It is also uncontested that Grievant filled in for his absent supervisor and did not receive a pay adjustment. The key issue in this matter is whether Grievant is similarly situated to the employees who received the temporary adjustments. The answer is no.

All the employees cited by Grievant were in the Lead level or lower when they were temporarily upgraded. They were likely in pay grade 13 or 14, and their supervisory responsibilities were limited. Lead workers may assign and direct work of employees in

their classification and make recommendations regarding evaluations and discipline. However, they do not have the responsibility of supervisors to perform employee evaluations, counsel and discipline employees, and set the goals for all employees in the section, not just those in their classification. Most importantly, none of the job descriptions or PIQ's of the cited employees gave any of the cited employees the specific responsibility to fill in for their supervisor when he or she was absent.

Grievant's situation is much different. Prior to 2014 Grievant was also in a Lead classification in pay grade 13. At that point he was similarly situated to the cited coworkers. Grievant received a reallocation in that year to a Supervisor classification which then included supervisory duties just like his supervisor. In fact, a major reason for the reallocation was to allow Mr. Farley to give supervisory duties to Grievant so the Grounds department could be reasonably and efficiently managed.⁹ As set out above, one of the specific duties added to his PIQ was to fill in for Grievant's supervisor when he was absent. In exchange for accepting these additional duties, Grievant received a pay increase from pay grade 13 to pay grade 15.

Grievant is not similarly situated with the cited employees because, unlike his coworkers, he was reallocated to a position two pay grades higher with the specific responsibility to fill in for his absent supervisor.¹⁰ Grievant did not prove by a preponderance of the evidence that he was subjected to discrimination as that term is applied in the grievance procedure statute.

⁹ See foot note 5 *supra*.

¹⁰ In essence, Grievant received a salary upgrade for filing in for his absent supervisor that he received daily whether he was doing that duty or not.

Grievant also argues that Respondent violated its *Interim Salary Adjustment* policy which states, "When employees assume additional duties and responsibilities on a temporary basis, they are entitled to receive an interim salary adjustment." Grievant argues that this policy applied to his situation when he filled in for Mr. Farley. However, the policy only applies when an employee assumes "additional duties." Grievant's daily responsibilities as set out in his PIQ include filling in for his supervisor if he is absent. Grievant was not required to assume additional duties when he did just that. Grievant did not prove by a preponderance of the evidence the Respondent violated its *Interim Salary Adjustment* policy by requiring him to fill in for his absent supervisor when that duty was specifically stated as part of his daily responsibilities. Accordingly, the grievance is **DENIED.**

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. For purposes of the grievance procedure, 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 discrimination 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).

4. Grievant did not prove by a preponderance of the evidence that he was subjected to discrimination as that term is applied in the grievance procedure statute.

5. Respondent's *Interim Salary Adjustments* policy requires:

When employees assume additional duties and responsibilities on a temporary basis, they are entitled to receive an interim salary adjustment. The temporary assignment must be for a period of at least four weeks but no longer than twelve months.

6. Grievant did not prove by a preponderance of the evidence the Respondent violated its *Interim Salary Adjustment* policy by requiring him to fill in for his absent supervisor when that duty was specifically stated as part of his daily responsibilities.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: October 25, 2019.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**