THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

REZA H. MIRI,

Grievant,

v. **Docket No. 2019-0851-DOT**

DIVISION OF HIGHWAYS

Respondent.

DECISION

Grievant, Reza Miri, is employed by Respondent, Division of Highways. On February 2, 2019, Grievant filed a level one grievance against Respondent stating:

> Resurfacing Coordinator Position: I am more qualified than the other candidate to the best of my knowledge he was given his level IV and also received his level V certification a month later as of late last year and I however received my level IV position in 2012 and also had to wait two years prior to the level V certification.

Requested relief: "Stop discrimination and favoritism and compensation."

Gregory Weber entered the case as an Intervenor. A level one hearing was held on February 19, 2019. A decision denying the grievance was issued on March 12, 2019. Grievant appealed to level two on March 21, 2019. Respondent motioned to remove Intervenor Weber from the case on May 6, 2019, stating that Grievant had abandoned his non-selection claim. On May 8, 2019, an order severing Intervenor Weber was issued. A mediation session was held on May 9, 2019. Grievant appealed to level three on May 14, 2019, stating:

> I have been discriminated upon numerous times during my entire course of employment despite of all my educations and credentials, and as a result of favoritism on the recent resurfacing position selection due to the violation of DOH

> policy that was not supposedly not being an issue for advancement according to DOP[.]

Requested relief included: "Stop discrimination and favoritism and demand compensation for being low rate pay in accordance to my qualifications as to MR Weber was making 24$ an hour as a level IV and advanced to 28$ an hour as I am at 21$".

A level three hearing was held before the undersigned at the Westover office of the West Virginia Public Employees Grievance Board on August 19, 2019. Grievant appeared *pro se*.[1] Respondent appeared by Anthony Paletta, District 4 Administrative Services Manager, and by Keith Cox, Esq. Grievant confirmed that he had abandoned his non-selection claims and was only pursuing his discrimination and pay disparity claims.[2] Respondent made an oral motion to dismiss[3] Grievant's discrimination claims as untimely, arguing that they were first raised in the level three appeal and were alleged to have occurred a few years prior. The undersigned noted that the level one grievance mentioned discrimination under "relief sought" and therefore agreed to hear Grievant's evidence of discrimination, subject to reconsideration should Respondent renew its motion to dismiss in its Proposed Findings of Fact and Conclusions of Law (PFFCL). This matter became mature for decision on October 7, 2019,[4] after receipt of each party's

[1]For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).
[2]The undersigned will therefore not address the merits of Grievant's non-selection claim for the Resurfacing Coordinator position.
[3]This was Respondent's first motion to dismiss. "Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two." W. VA. CODE § 6C-2-3(c)(1).
[4]The parties agreed to extend the original mature date of September 23, 2019.

written PFFCL.[5] Respondent did not renew its motion to dismiss any portion of the grievance.

Synopsis

Grievant is employed by Respondent as a Transportation Engineering Technician Senior (TRETSR). Grievant alleges that Respondent discriminated against him due to his Iranian national origin, including failing to pay him as much as coworkers in his position and not reprimanding a coworker who made a bigoted statement towards him. He requests fair compensation and an end to discrimination and favoritism. Grievant did not prove that Respondent discriminated against him or that it showed favoritism to coworkers. Accordingly, 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. Grievant has been employed by Respondent, the Division of Highways (DOH), since January 28, 2008, and is currently classified as a Pay Grade 17 Transportation Engineering Technician Senior (TRETSR) in District 4.

2. Grievant is of Iranian origin and immigrated to the U.S. in 1979. (Grievant's level one testimony)

3. DOH's minimum monthly salary for Pay Grade 17 is $3,478. (Respondent's Exhibit 2)

[5]Grievant makes two new claims of discrimination in his PFFCL. One is based on Grievant's non-selection for a maintenance assistant engineer position in August 2019. The other is a comparison to a third coworker in furtherance of his pay discrimination claim. The undersigned will not address the merits of these new claims because Grievant did not properly raise them in either his grievance or his level one and level three hearings.

4. In November 2015, Grievant received a 10% internal equity pay increase. (Respondent's Exhibit 3)

5. At the time Grievant filed this action in February 2019, his hourly rate was $21.0866, resulting in a minimum monthly salary of $3,655.01. (Grievant's testimony and Respondent's Exhibit 1)

6. On July 1, 2019, Grievant received a salary adjustment of $22.2261 per hour, resulting in a minimum monthly salary of $3,852.52. (Grievant's testimony and Respondent's Exhibit 1)

7. Grievant compares his pay to that of coworkers Martha Wharton and Gregory Weber.

8. While Ms. Wharton has a lower salary than Grievant, her income is higher due to overtime work. (Grievant's testimony)

9. Grievant has not had the same overtime opportunities as Ms. Wharton. (Grievant's testimony)

10. During the period in question, Grievant has frequently been unable to work a 40-hour week and has utilized much leave time. (Grievant's testimony & Respondent's Exhibit 1)

11. In 2015, Respondent suspended Grievant after learning that his license had been suspended, allowing him to return to work only after he had regained his driving privileges. (Grievant's testimony & level 3 grievance)

12. At some point during the course of Grievant's employment with Respondent, one of Grievant's coworkers temporarily lost their driving privileges. Yet,

Respondent did not suspend the coworker during the loss of their driving privileges. (Grievant's testimony)

13. At some point during the course of Grievant's employment with Respondent, Ms. Wharton made a derogatory statement to Grievant, telling him that a class on explosives would be right up his alley as a terrorist, presumably because of Grievant's Iranian national origin. Grievant complained to his supervisor, who told Grievant to let him know next time it happened without addressing the matter further. (Grievant's testimony)

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 (2018). "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*.

Grievant contends that Respondent discriminated against him and favored his coworkers because of his Iranian national origin. Grievant asserts that it did so by paying him less than coworkers Gregory Weber and Martha Wharton, by making him wait two years between his level 4 and level 5 certification while making Mr. Weber wait only two months, by suspending him after he lost his driving privileges while allowing a coworker in the same situation to work, and by not reprimanding Ms. Wharton after she directed a bigoted statement towards him. Grievant further implies that Respondent refused him

discretionary pay raises. Much of Grievant's testimony was uncontested. Respondent counters that Grievant is being paid within the proper salary range, that it is not obligated to grant discretionary pay increases, and that Grievant presented no evidence of discrimination or favoritism.

Discrimination for purposes of the grievance process has a very specific definition. "'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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). 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).

Grievant implicitly bases his 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, 455 S.E.2d 781, 784 (1995).

However, "[t]he West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. Va.Code, § 5–11–1, *et seq*.; nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va.Code, 18–29–2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act." *Id*, at Syllabus point 1. The West Virginia Supreme Court elaborated on this overlap, stating that "[w]e are aware that the Grievance Board in *Connor v. Barbour County Board of Education*, No. 93-01-154 (1994) . . . has stated it has no jurisdiction to entertain sexual harassment claims. *See also Norton v. West Virginia Northern Community College*, No. 89-BOR-503 (1993). As should be clear from the ensuing discussion in the text, the *Connor* decision is correct to the extent that it holds the Grievance Board has no authority to decide whether an employer has violated the Human Rights Act. However, harassing treatment of an employee does not fall outside of 'harassment' within the meaning of W.Va.Code, 18-29-2, simply because it is motivated by or related to the victim's sex. In a grievance under W.Va.Code 18-29-1, *et seq*., an employee alleging harassment only needs to prove harassment. The motivation or nature of the harassment is irrelevant." *Id*, at FN 3. Similarly, the undersigned must analyze Grievant's claims of discrimination motivated by his national origin in the same manner as if discrimination not been so motivated.

As for Grievant's claim of pay discrimination, the West Virginia Supreme Court has held that it is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. *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). Grievant concedes that his wages were within the salary schedule for his pay grade. Therefore, in conjunction with *Largent*, Respondent did not treat Grievant differently in paying him a lower hourly rate than Mr. Weber.

Grievant's contention that Respondent discriminated by denying him discretionary raises granted to some coworkers is dubious, as Grievant presented no evidence to support this allegation. Nevertheless, "[t]he 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, *Largent* applies to discretionary pay increase considerations. While the undersigned must ensure that Respondent adheres to certain standards when paying an employee within pay range for her pay grade, this oversight is limited in scope. "The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the Division of Personnel. *Moore v. W.Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab*., Docket No. VR-88-006 (Mar. 28, 1989)." *Lindsey Gregory et al. v. Division of Juvenile Services*, Docket No. 2018-0179-CONS (February

12, 2018). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). Grievant failed to present evidence that Respondent acted arbitrarily or capriciously in conjunction with discretionary increases.

As for being paid less than Ms. Wharton, Grievant concedes that his hourly rate is higher than Ms. Wharton's, but contends that his yearly income is lower because Respondent provides Ms. Wharton overtime work while denying him overtime work. He asserts that this denial of overtime is discriminatory. Respondent counters that Grievant has taken much leave time and has not been able to accumulate overtime because he frequently did not work at least 40 hours a week. Grievant concedes that he did take a lot of leave. Grievant implies that he could have reached 40-hours a week if Respondent had provided him overtime. Grievant did not present any evidence regarding the feasibility of working 40-hours in the same week he took leave time. Grievant failed to prove he was similarly situated to and treated differently than Ms. Wharton.

Grievant provided uncontested testimony that Respondent required him to wait two years before awarding him the same level 5 certification it later awarded to Mr. Weber within just two months of his level 4 certification. Grievant showed that he and Mr. Weber were similarly situated: that they had the same job descriptions, pay grade, and certification level. Grievant also showed that Respondent treated him differently than Mr. Weber. However, Grievant did not prove that this difference in treatment was unrelated to each's job responsibilities.

Grievant provided uncontested testimony that in 2015, Respondent did not permit him to work while his driver's license was suspended but allowed a coworker to work while their license was suspended. Grievant failed to provide any information about the coworker and their job responsibilities. Grievant therefore failed to show that he and the coworker were similarly situated or that this difference in treatment was unrelated to their job responsibilities.

Lastly, Grievant's most concerning allegation entailed coworker Martha Wharton telling Grievant that, as a terrorist, a class on explosives would be right up his alley, presumably because of Grievant's Iranian ethnicity. Grievant provided uncontested testimony that, after he relayed this incident to Respondent, his supervisor's only response was to tell Grievant to let him know if it happened again. Grievant implies that Respondent discriminated against him by not reprimanding Ms. Wharton. Grievant failed to show that Respondent treated other employees differently when they complained about harassment from coworkers.[6] Further, harassment generally entails more than one incident. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9

[6]The undersigned does not endorse Respondent's failure to act against bigoted statements directed towards Grievant by a coworker. While Grievant may have a remedy elsewhere under different legal standards, he did not prove discrimination under the standard used by the Grievance Board.

(1999). It is likely that Grievant's supervisor told Grievant to inform him if it happened again because his understanding of harassment was that it required more than one incident. Regardless, Grievant did not show that Respondent had on other occasions taken action after only one bigoted or derogatory statement from a coworker.

Accordingly, the grievance 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 (2018). "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. Discrimination for purposes of the grievance process has a very specific definition. "'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). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). 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).

3. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). *See also, Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp*., Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res*., Docket No. 2008-0095-DOC (Oct. 6, 2008): *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); B*owser, et al., v. Dep't of Health & Human Ser./William R. Sharpe, Jr. Hosp*., Docket No. 2013-0247-CONS (Feb. 13, 2014). "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).

4. Grievant did not prove by a preponderance of evidence that Respondent either discriminated against him or showed favoritism to his coworkers.

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 (2018).

DATE: November 12, 2019

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Joshua S. Fraenkel
Administrative Law Judge