THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ELEANOR GOODMAN, et al.,
Grievants,

v. **Docket No. 2019-0863-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants are employed by Respondent, Division of Highways ("DOH"). On January 11, 2019, and on various dates thereafter[1] Grievants filed this grievance against Respondent stating, "This grievance is a result of the passing of salary adjustments for Maintenance Classifications and Bridge Safety Inspectors in December of 2017, which was approved conditionally in that the DOH was to provide to the SPB within 90 days a comprehensive pay plan/structure for all of its employees."[2] For relief, Grievants seek "immediate processing and approval of a pay plan/structure for all DOH employees that is, at minimum, comparable to the new pay grades or structures in place for Maintenance Classification and Bridge Safety Inspectors" and back pay.

Following the March 12, 2019 level one conference, a level one decision was rendered on March 29, 2019, dismissing the grievance as untimely filed. Grievants appealed to level two on March 31, 2019, and various dates thereafter. On May 8, 2019, Respondent, by counsel, filed *Respondent's Motion to Dismiss* alleging the

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[1] An initial representative grievance was filed pursuant to West Virginia Code § 6C-2-3(e)(2). As grievances continued to be filed during the pendency of the action, they were consolidated into the instant grievance in the interests of cost-effectiveness and consistency. There are five hundred one total Grievants.

[2] Many of the grievance forms used the same statement of grievance and relief sought but some used different language. All protest Respondent's failure to include the individual grievant's classification in the pay increases granted.

grievance was untimely filed, Grievants failed to state a claim upon which relief may be granted, and lack of standing. Grievants, by representative, filed their *Response to Motion to Dismiss* on May 17, 2019. On August 8, 2019, the Grievance Board issued a fourteen-page order denying the motion to dismiss but permitting Respondent to renew the motion to dismiss on the issue of timeliness following the presentation of evidence.[3] On August 23, 2019, a status conference was held to discuss the logistics of scheduling and conducting the mediation session given the large number of grievants.

A *Notice of Mediation Session* was issued on September 11, 2019, scheduling the mediation for October 16, 2019. Due to space constraints, the mediation was conducted in-person for a limited number of participants, with all grievants permitted to appear by telephone. On October 18, 2019, an *Order of Unsuccessful Mediation* was entered. Following unsuccessful mediation, Grievants appealed to level three of the grievance process on October 22, 2019, and various dates thereafter.

Despite the prior order, in November 2019 Respondent, by counsel, filed multiple motions to dismiss or alternatively to deny consolidation. The motions were denied by order entered December 5, 2019, and the parties were ordered to initiate a conference call with Grievance Board staff to schedule a status conference to discuss procedural issues relating to scheduling the level three hearing. When the parties failed to initiate the conference call for scheduling, Grievance Board staff contacted the parties to schedule the telephone conference. The parties provided dates for the conference on January 31, 2020, and a *Notice of Telephone Conference* was issued on February 5, 2020, scheduling the conference for March 20, 2020, based on the availability of the

[3] The decision on the motion to dismiss was slightly delayed due to the Grievance Board's relocation to new office space.

parties. The conference was continued due to the temporary closure of the Grievance Board offices due to the COVID-19 pandemic.

On July 23, 2020, Grievance Board staff requested dates to reschedule the status conference and the conference was rescheduled to August 20, 2020. All outstanding procedural issues and motions were decided during the telephone conference. The parties were directed to act without delay, to immediately seek resolution if any further issues arose prior to the hearing, and to initiate a conference call to schedule the level three hearing as soon as possible. The parties failed to initiate a conference call to schedule the level three hearing or file any motion regarding procedural concerns. A ten-page order memorializing the rulings during the phone conference was entered on October 21, 2020, which again ordered the parties to initiate a conference call with Grievance Board staff so the level three hearing could be scheduled without further delay.

The parties again failed to initiate a scheduling conference call, although Grievant's representative, Mr. Simmons, did submit dates of his availability on November 3, 2020. By email dated December 1, 2020, Grievance Board staff directed the parties to respond to representative Simmons' dates or initiate a conference call with staff to schedule the hearing. The parties responded but the earliest date the parties were available was April 6, 2021, for which the level three hearing was scheduled.

Despite the direction of the undersigned in August and the October order for the parties to act without delay and to bring issues forward immediately, Respondent filed *Respondent's Department of Transportation, Division of Highways' Motion to Compel* on

March 11, 2021, just a few weeks prior to the hearing. Grievants objected to the motion to compel and Respondent filed a reply stating that the discovery was required to determine whether the grievance was "intended to usurp the prohibition against collective bargaining." Despite the October order that subpoenas be requested no later than thirty days before the hearing, on March 17, 2021, Grievants requested subpoenas, for which Respondent filed a motion to quash. A telephone conference was held on March 26, 2021, in which the motion to quash was denied and the motion to compel partially granted.

The level three hearing was held on April 6, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievants were not required to appear pursuant to West Virginia Code § 6C-2-3(e)(2) but all Grievants were provided the opportunity to appear either utilizing their own device or by appearing at one of multiple in-person remote locations provided by Respondent. Grievants were represented by Gordon Simmons.[4] Respondent appeared by H. Julian Woods, Executive Director of the Human Resources Division, and was represented by counsel, Rebecca D. McDonald and Jill Dunn. This matter became mature for decision on May 6, 2021[5], upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

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[4] Samantha Crockett, Field Organizer, UE Local 170 had entered a written appearance and was notified of the procedureal status conference and the hearing but failed to appear for either proceeding.

[5] Although it was clearly announced at the level three hearing that the deadline to submit PFFCL was May 4, 2021, on April 26, 2021, shortly before close of business, Respondent, by counsel, emailed requesting the timeframe be "extended" to April 29, 2021. The undersigned was unavailable to respond on April 26, 2021 and Respondent submitted PFFCL by email after business hours. On April 27, 2021, Grievance Board staff notified Respondent that PFFCL were not due until May 4, 2021, and Respondent

Synopsis

Grievants are employed by Respondent, Division of Highways, in various classifications. Grievants protested Respondent's failure to establish a pay structure for all employees that provided pay increases comparable to the pay increases established for certain other classifications. Grievants argued pay increases for all employees were mandated by the Legislature and the State Personnel Board and that failure to provide pay increases to all employees was discrimination. Respondent asserted the grievance was untimely filed, that its pay plan complied with the mandates of the Legislature and the State Personnel Board, and was not discriminatory. Respondent failed to prove the grievance was untimely filed. Grievants failed to prove Respondent was required to provide pay increases to all employees or that the pay plan was discriminatory. Accordingly, the 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 are employed by Respondent, Division of Highways, in various classifications.

2. On October 17, 2017, the West Virginia Legislature passed Senate Bill 2003, which amended West Virginia Code § 17-2A-24 relating to the employment

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withdrew its PFFCL. Respondent submitted a second PFFCL on May 5, 2021, one day late, with no explanation of the late filing. On May 6, 2021, Grievant Joshua Norris also submitted a statement. By email of the same date, Respondent stated it did not object to the consideration of the statement as PFFCL. The undersigned has accepted the late filings by Respondent and Grievant Norris. For Respondent, the undersigned has considered only the PFFCL submitted on May 5, 2021. Facts that were not presented as evidence at the level three hearing discussed in Grievant Norris' PFFCL were not considered.

procedures of Respondent. The bill was signed into law by Governor Jim Justice on October 24, 2017.

3. Prior to the enactment of Senate Bill 2003, Respondent was subject to the Classification and Compensation Plan as administered by the West Virginia Division of Personnel ("DOP"). Senate Bill 2003 removed Respondent from the oversight of the DOP giving Respondent sole authority to administer the Plan for its own employees. The bill also permitted Respondent to create its own classification and compensation plan subject to the approval of the State Personnel Board.

4. The legislation was the result of the findings of a previous legislative performance audit documenting Respondent's difficulty filling positions and the enactment of legislation that created increased funding that would exacerbate Respondent's staffing shortage.

5. Respondent had experienced problems with recruitment and retention of employees for many years. Prior to the enactment of Senate Bill 2003, Respondent had worked within the existing framework to present proposals to the State Personnel Board to address these issues, including the Transportation Worker Apprenticeship Program in 2014 and the Bridge Safety Inspector Program, which the State Personnel Board approved on September 28, 2017, one month prior to the enactment of Senate Bill 2003.

6. A month after Senate Bill 2003 was enacted, on November 30, 2017, then Secretary of Transportation, Thomas J. Smith, P.E., submitted two proposals to the State Personnel Board: SPB #2763-A to amend the Bridge Safety Inspector Program and SPB #2773 to implement a salary adjustment for multiple maintenance organization

classifications. Both proposals were to address salary inequities caused by the Transportation Worker Apprenticeship Program and the Bridge Safety Inspector Program.

7. The Bridge Safety Inspector Program increased the Bridge Safety Inspector I entry salary, which was necessary to correct recruitment issues in that classification but resulted in newly-hired Bridge Safety Inspector I's making almost or more than experienced incumbents. This salary compression would eventually lead to a salary inversion as, upon promotion to Bridge Safety Inspector II, those employees would be paid more than experienced incumbent Bridge Safety Inspector IIs.

8. The November 30, 2017 Bridge Safety Inspector Program proposal, SPB #2763-A, was intended to remedy this situation by creating new minimum salaries for each classification in the series and established a set percentage increase based on experience for incumbents moving upwards in classification.

9. The 2014 Transportation Worker Apprenticeship Program created a structured tier system with hourly rates of pay that increased salaries in the Transportation Worker classification series to address severe recruitment and retention issues. At the time the program was established, the Transportation Worker series had a retention rate for new hires of less than 20%. As of September 2020, the retention rate had increased to 83%.

10. While the Transportation Worker Apprenticeship Program did vastly improve the recruitment and retention issues in the Transportation Worker classification series, it then created salary inequities for experienced employees in other maintenance organization classifications. In those affected supervisory classifications, supervisors

made near or even less than the employees they supervised. Further, when Transportation Worker Apprenticeship Program participants were promoted into those supervisory classifications, they then made more money than the experienced incumbents.

11. The November 30, 2017 proposal for the affected maintenance organization classifications, SPB #2773, was a one-time salary adjustment to correct the above salary inequities.

12. At a meeting of the SPB on December 21, 2017, the State Personnel Board approved both proposals but approved the maintenance organization proposal conditioned upon Respondent providing to the State Personnel Board within ninety days "a comprehensive pay plan/structure for all its employees."

13. By two letters dated January 2, 2018, DOP Director Sheryl R. Webb notified Secretary Smith of the State Personnel Board's approval of the amendment to the Bridge Safety Inspector Program proposal and the conditional approval of the proposed salary adjustment for maintenance organization classifications.

14. By memorandum dated March 23, 2018, Secretary Smith notified management that all employees would receive the "across-the-board salary adjustment" approved by the Governor and the Legislature and asked employees to be patient. This refers to the Fiscal Year 2019 budget bill, which appropriated funds to provide pay increases for all state employees.

15. On April 13, 2018, Secretary Smith approved Respondent's *Pay Plan Policy* to be effective May 1, 2018. The *Pay Plan Policy* established a pay plan for all Respondent's employees by classifying employees as either hourly or salary,

establishing pay schedules for each type of employment, and providing procedures to be followed for all employees in setting or adjusting employee pay. The two pay schedules were appended to the *Pay Plan Policy*. The pay schedule for salaried employees adopted the DOP's twenty-five grade salary schedule but increased the minimums, market rate, and maximums for all grades.

16. In compliance with the State Personnel Board's January 2, 2018 directive, Respondent submitted a proposal to the State Personnel Board to approve the *Pay Plan Policy*, including the pay schedule appendices (termed "Salary Pay Plan" and "Hourly Pay Plan"), and a proposal to implement the Salary Pay Plan. At implementation, the Salary Pay Plan would increase the pay of any employee below the new minimum to the new minimum. The implementation was to be effective August 1, 2018, to allow the across-the-board pay increase granted by Governor Justice and Legislature to be applied before determining if any employee's salary was still below the minimum.

17. At its meeting on April 19, 2018, the State Personnel Board approved Respondent's proposal.

18. On June 7, 2018, Drema Smith, Acting Director of the Human Resources Division, notified upper-level management of the *Pay Plan Policy* by memorandum attaching the plan and stating that it had gone into effect on May 1, 2018.

19. Respondent's pay plan resulted in immediate pay increases only for those employees who were being paid less than the newly-created minimum salaries.

20. No evidence was presented regarding how individual Grievants were notified of either the State Personnel Board's approvals of the November 30, 2017

proposals, the implementation of the *Pay Plan Policy*, or that there would be no more pay increases as a result of the Senate Bill 2003.

21. Secretary Smith was removed as the Secretary of the Department of Transportation in March 2019 and Byrd White was appointed as the Secretary of the Department of Transportation.

22. On May 23, 2019, the State Personnel Board approved additional revisions to the *Pay Plan Policy* relating to the hourly pay schedule, contingent on the passage of legislation providing a second across-the-board pay increase for state employees.

23. In 2020, Respondent provided responses to the Joint Committee on Government and Finance regarding the impact of Senate Bill 2003.

24. On April 26, 2021, Governor Justice signed House Bill 2720 into law that repealed West Virginia Code § 17-2A-24, removed the Department of Transportation's employees from the civil service system, and directed the Secretary of Transportation to establish the Department's own system of personnel administration.

Discussion

In its proposed findings of fact and conclusions of law, Respondent renewed its prior motion to dismiss asserting untimeliness and lack of standing and added the argument that the grievance was an impermissible attempt at collective bargaining. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19 (2018). "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a

party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3.

In the August 8, 2019 prior order denying Respondent's motion to dismiss, the denial of dismissal on the grounds of standing was final. Respondent was only permitted to renew its motion regarding timeliness due to the factual component of that determination.[6] Therefore, Respondent's argument regarding standing will not be further addressed. Respondent's argument that the grievance is improper collective bargaining is absurd. Grievants are exercising their statutory right to seek relief from the grievance procedure in a consolidated, representative grievance authorized by the same. That is not collective bargaining, and that argument will not be further addressed.

Respondent previously argued the grievance was untimely filed because the grievance was filed more than five months after the *Pay Plan Policy* was implemented on August 1, 2018. Respondent now argues Grievants should have filed within fifteen days of the approval of the pay plan on April 19, 2018, because the meeting minutes are available on the internet.

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[6] The August 8, 2019 *Order Denying Motion to Dismiss* is incorporated by reference.

An employee is required to file a grievance as follows:

> 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, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff'd*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016). In addition, "This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995) disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996)." *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999).

As in the prior motion, Respondent asserts that the pay disparity allegation in this case is not a continuing practice, which would be timely filed under *Martin*, but is continuing damage from a discrete event, which would be untimely under the West

Virginia Supreme Court of Appeals' memorandum decision in *Clark v. W. Va. Div. of Nat. Res.*, No. 14-0626 (W. Va. Sup. Ct., May 15, 2015). *Clark* stems from the Supreme Court's prior decision determining that a single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. *See Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990).

Clark is one of the last of a line of West Virginia Supreme Court of Appeals cases addressing grievance timeliness based on continuing damage versus continuing practice. *Spahr* was the first case to address this issue. In *Spahr*, teachers were promised a salary supplement but, due to an administrative oversight, several teachers did not receive the pay because they were left off a list of employees to receive the supplement. Four years after they were left off the list resulting in the loss of pay the teachers filed their grievance after learning from their union representative that others had received the supplemental pay. In determining that this was continuing damage and not a continuing practice the Court stated:

> We do not believe that the legislature intended this language to cover the present situation. Under the circuit court's interpretation, each new pay check would constitute "the most recent occurrence of a continuing practice," and would permit a grievant to obtain an indefinite accrual of back pay by delaying the filing. The current case, however, involves a single act -- the inadvertent failure to include the teachers on a list -- that caused continuing damage, i.e., the wage deficit. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice. Once the teachers learned about the pay discrepancy, they had an obligation to initiate the grievance procedure.

Spahr v. Preston Cty. Bd. of Educ., 182 W. Va. 726, 729, 391 S.E.2d 739, 742 (1990). Ultimately, the granting of the grievance was upheld in that the Court found the

grievants had grieved under the discovery rule exception as the grievants had filed within the proper time after discovering that others had received the supplement.

The Court next addressed the issue in *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995). In *Martin*, the grievant was demoted and reclassified resulting in a reduction in pay, supposedly for budget reasons. A male employee was also affected by the reorganization but suffered no loss in pay, although the Superintendent had informed the grievant at the time of her demotion that the male employee's pay would also be reduced. Two years after her demotion the grievant was transferred and filed a grievance. The grievance was denied finding that the difference in pay between the two employees occurred when Grievant was originally demoted, which was not a continuing practice but continuing damage. The Supreme Court reversed. The Court recognized that the demotion was a discrete event. *Martin,* 195 W. Va. at 307, 465 S.E.2d at 409. However, the Court compared the demotion to an act of gender discrimination under the Human Rights Act and determined that the timeliness of the allegation of discrimination made by the grievant should be analyzed under the same timeliness standard used in Human Rights Act cases. Therefore, the Court found:

> Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a "continuing violation," so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if it is filed within the statutory limitation period after such compensation disparity last occurred.

Syl. Pt. 2, *Martin* 195 W. Va. at 302, 465 S.E.2d at 404. Although the Court did not discuss *Spahr* in its opinion, the Court seems to address the *Spahr* Court's concern that allowing a claim based on a continuing practice would allow an "indefinite accrual of back pay," by limiting the back pay to fifteen days before the filing of the grievance.

Although *Martin* was specific to an allegation of pay disparity based on gender discrimination, the Supreme Court then extended this view to a discrimination claim not based on protected class in *Flint v. Bd. of Educ.*, 207 W. Va. 251, 255, 531 S.E.2d 76, 80 (1999) (*per curiam*) (overruled, in part, on other grounds by *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004)). In *Flint*, the Court also further clarified the difference between a continuing practice and continuing damage. The grievants in that case were hired under 240-day contracts and alleged pay disparity as they were performing similar work to other employees who held 261-day contracts. The employer argued that the posting of the positions as 240-day contracts was a single act that caused continuing damage, citing *Spahr*. The Court rejected this argument stating, "We fail to see how the one-time act of failing to place the grievants' names on a list in *Spahr* compares to the BOE's continuous failure to provide uniform employment contracts to similarly situated employees." *Flint,* 207 W. Va. at 256, 531 S.E.2d at 81.

Although dicta, the Court appears to have applied an analysis similar to *Martin* and *Flint* in *Breza v. Ohio Cty. Bd. of Educ.*, 201 W. Va. 398, 497 S.E.2d 548 (1997) (per curiam). In *Breza*, the grievant was hired as a speech pathologist and was denied credit for years of work experience gained for jobs she worked in another state, which would have increased her rate of pay. Seven years later, the grievant again sought the work experience credit and grieved when her request was denied. In determining the

appropriate amount of back pay to which the grievant was entitled, the Court stated: "The denial of one year's work experience credit was a continuing practice under W.Va. Code, 18-29-4(1) [1995]." *Breza*, 201 W. Va. at 401, 497 S.E.2d at 551.

Clark, which Respondent argues is dispositive in this case, is one of the last in the line and only a memorandum opinion. The fact pattern of *Clark* is quite complicated. The *Clark* grievance arose because of a previously-filed grievance by other employees of the Division of Natural Resources ("DNR"). In 2000, DNR gave raises to six employees who held the classification of Conservation Officer II and the working title of "field sergeant" but were also designated as Regional Training Officers ("CO2/RTO"). In 2002, three CO2s who were not RTOs filed a grievance alleging pay disparity (the *Antolini* grievance). The Grievance Board granted the grievance by rescinding the raises given to the CO2/RTOs. After a protracted appeal and remand process, the raises granted to the original CO2/RTOs were restored and the *Antolini* grievants were also awarded the same pay raises. In 2009, based on the ultimate success of the *Antolini* grievance, and nine years after the original pay raises, the *Clark* grievants filed a grievance seeking the same pay raise the *Antolini* grievants had been awarded through the grievance procedure.

In upholding the dismissal of the grievance as untimely, the *Clark* decision quotes an extended passage from *Spahr*, including the concern that an indefinite accrual of back pay would result, and then concludes:

> Therefore, like the pay raise at issue in *Spahr*, the WVDNR's decision not to award the 2000 pay raise to petitioners was a singular event, and not a continuing practice. Consequently, once petitioners learned of the pay discrepancy, they had an obligation to initiate their grievance procedure. Accordingly, we find that the Grievance Board and the circuit court

> correctly found the "continuing practice" exception does not apply in this case.

Clark at 4-5. While *Clark* does appear to be somewhat on point, the decision does not discuss *Martin* or *Flint* and specifically cites in its reasoning the *Spahr* Court concern that was already addressed and resolved in *Martin* by limiting the period of recovery. Each of the above cases involves a discrete event, with the Court even specifically recognizing the discrete event in *Martin*, yet some discrete events have been determined to toll the statute of limitations and some have not. Ultimately, *Clark*, while discussing continuing damage, appears mostly concerned that the grievants had sat on their rights because the grievants admitted they knew nine years prior to the grievance filing that others had been awarded raises but did not attempt to grieve until they learned another grievance had been successful.

This grievance is not that situation. Respondent's administration had been attempting to remedy recruitment and retention problems for years. They had repeatedly asked employees for patience as they rolled out solutions in stages. Grievants were not waiting for other employees to be successful in a grievance. Therefore, the instant grievance appears most analogous to *Martin* and *Flint*, in which the continuing practice exception was found to apply.

Even if the continuing practice exception did not apply, Respondent failed to prove when Grievants were unequivocally notified that they were not going to receive pay increases. Despite the detailed analysis in the prior order denying the motion to dismiss and the protracted discussion during the August 20, 2020 telephone conference regarding what evidence would be necessary to prove unequivocal notice and how that evidence could be presented at level three, Respondent presented no such evidence.

Instead, Respondent simply repeated the prior argument that Grievants had failed to allege facts to support that their grievance was timely filed, which had been found invalid in the prior order as timeliness is an affirmative defense. It is Respondent's burden to prove when Grievants were unequivocally notified of the decision being challenged.

As explained in the prior order, it appears quite clear from many of the statements of grievance that Grievants were not aware of the *Pay Plan Policy* at the time the grievances were filed. The only evidence Respondent submitted to prove notification was a memorandum attaching the *Pay Plan Policy*, which was addressed only to upper-level management, and testimony that the memo was "supposed to be distributed through the ranks." As to notification of the State Personnel Board's approval of Respondent's proposals, Respondent merely argues that Grievants were unequivocally notified because the meeting minutes are available on the internet, although Respondent's own witness testified that not all of their employees have access to computers. This is not sufficient to prove unequivocal notice. Respondent has failed to prove the grievance should be dismissed as untimely and the renewed motion to dismiss must be denied.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Before discussion of the issues of law, it is important to be clear on the sequence of events relevant to the grievance. As Deputy Secretary Jimmy Wriston acknowledged in a September 2020 appearance on the *WV on the DOT* podcast, DOH's "entire system was broke[n]" and salary inequities had existed all along. Respondent had experienced problems with recruitment and retention of employees for many years prior to the enactment of Senate Bill 2003 and had attempted to create solutions within the existing framework through the Transportation Worker Apprenticeship Program and the Bridge Safety Inspector Program.

The creation of the Transportation Worker Apprenticeship Program was precipitated by a study which revealed the most effected section within DOH was the Transportation Worker classification series in which Respondent had less than a 20% retention rate for new hires. The State Personnel Board approved the Transportation Worker Apprenticeship Program in 2014, which created a structured tier system with hourly rates of pay that increased pay scales in that classification series and resulted in pay increases for employees of that classification series. No other classifications within DOH received pay increases at that time. Based on the success of the Transportation Worker Apprenticeship Program, in 2017 Respondent created the Bridge Safety Inspector Program, which also included a pay increase for only that classification series. That program was approved by the State Personnel Board one month prior to the enactment of Senate Bill 2003. Therefore, at the time Senate Bill 2003 was passed, Transportation Workers and Bridge Safety Inspectors had received pay increases but no other classification had received pay increases.

Unfortunately, although the Transportation Worker Apprenticeship Program had been very successful in increasing retention rates of Transportation Workers — to 83% from less than 20% — it created salary inequity with other classifications within the maintenance organization. In those affected supervisory classifications, supervisors made near or even less than the employees they supervised. Further, when Transportation Workers who had received pay increases under the Transportation Worker Apprenticeship Program were promoted into positions as supervisors or administrators, their pay on promotion was higher than some incumbents who had served for years because those maintenance classifications had not received a pay increase. Under the DOP's administration of the classification system, this situation could not be easily remedied.

Once Respondent was released from DOP oversight by Senate Bill 2003 in October 2017, Respondent immediately submitted two proposals to the State Personnel Board in November 2017 to correct the salary inequities created by the Transportation Worker Apprenticeship Program and Bridge Safety Inspector Program. Although not explicitly stated, it appears the State Personnel Board was mindful of the requirement in the legislation for pay plan action to be uniform, as the State Personnel Board conditioned its approval of the proposal on Respondent's creation of a comprehensive pay plan for all employees. Respondent did then create its *Pay Plan Policy* and submit their proposal three months later, which the State Personnel Board promptly approved. Respondent's pay plan differed significantly from the DOP's pay plan in that it separated the plan between hourly and salaried employees and for salaried employees increased the minimum, market rate, and maximum pay for all pay grades. However, the

implementation of the *Pay Plan Policy* created immediate pay increases for only those employees who had been paid less than the new minimum salaries.

That was the situation as it stood when the instant grievance was first filed. Grievants assert Respondent was required to provide pay increases to all employees based on the language of Senate Bill 2003 and the State Personnel Board's direction to submit a comprehensive plan and that failure to provide raises to all employees was discrimination.

The language at issue in Senate Bill 2003, as codified, is as follows:

> "The division shall have full authority to exercise its discretion regarding the application of the Division of Personnel's system of compensation for positions in the division within the classified and classified-exempt service: Provided, That application of the provisions of this subdivision shall be uniform. The division may independently submit to the State Personnel Board recommendations for the approval of a special pay scale for the division's personnel."

W. VA. CODE § 17-2A-24(c)(7). The language at issue from the State Personnel Board is the direction that Respondent "provide to the SPB within 90 days a comprehensive pay plan/structure for all of its employees."

"'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. pt. 4, *Security National Bank & Trust Company v. First W. Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (W. Va. 1981)." *Smith v. Bd. of Educ.*, Syl. Pt. 3, 176 W. Va. 65, 66, 341 S.E.2d 685, 686 (1985). Respondent was granted the authority to implement the special employment procedures of Senate Bill 2003, subject to the approval of the State Personnel Board for any

recommendation for a special pay scale or for the creation of amendment of any division classifications.

Neither the plain language of the bill nor the State Personnel Board's direction required Respondent to provide pay increases to all employees. As to the direction of the State Personnel Board, Respondent was ordered to submit a "comprehensive pay plan/structure" and Respondent submitted its *Pay Plan Policy* in response. Grievants' argument is that the plan was not "comprehensive" because it did not provide pay raises to all employees. The State Personnel Board did not require Respondent to provide pay increases, only to provide a pay plan. Respondent provided a plan and it was comprehensive. It provided mechanisms to be followed for all employees in setting or adjusting employee pay. It separated hourly and salaried employees to account for the Transportation Worker Apprenticeship Program. It adopted the DOP's twenty-five grade salary schedule but increased the minimums, market rate, and maximums for all grades. Most importantly, the State Personnel Board, who had directed the submission of the plan, and to whom the Legislature had granted authority to evaluate the plan, accepted Respondent's plan. Obviously, the State Personnel Board considered Respondent's plan to be comprehensive per the State Personnel Board's previous directive or the State Personnel Board would not have approved the plan.

As to Senate Bill 2003, the bill did not direct any specific action on employee pay but only granted Respondent the discretion to administer DOP's existing compensation plan and the discretion for Respondent to create its own special pay scale. Respondent was not required by the bill to create a new pay plan, much less a plan that provided

raises to all.[7] The only portion of the bill that can be argued to create a mandate to increase all pay is the use of the phrase "applications of the provisions of this subdivision shall be uniform."

Grievants argue that the failure to provide pay increases for all employees was not uniform and constituted discrimination. For purposes of the grievance procedure, "'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). Grievants argue they are similarly situated to the employees from other classifications that received pay increases because the statute required all employees to be treated uniformly. Therefore, it is necessary to discuss uniformity both in the determination of the mandate of the statute and whether the requirement of uniformity made all employees similarly situated regardless of classification for purposes of discrimination.

"A similarly situated determination is necessarily factual in nature." *Pritt v. W. Va. Div. of Corr.*, 218 W. Va. 739, 744, 630 S.E.2d 49, 54 (2006). The West Virginia Supreme Court of Appeals has found that employees holding different classifications are not performing like assignments and duties and, therefore, are not similarly situated. *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999), *overruled in part*

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[7] Grievants submitted several letters from individual legislators to support their argument that the bill was intended to provide pay raises to all DOH employees. Regardless of the intent of an individual legislator, the language of the bill does not provide pay raises. Further, this matter was investigated by audit and committee with no additional action taken to mandate pay raises for all. In fact, on April 26, 2021, Governor Justice signed House Bill 2720 into law that repealed West Virginia Code § 17-2A-24, removed the Department of Transportation's employees from the civil service system, and directed the Secretary of Transportation to establish the Department's own system of personnel administration but did not mandate pay increases for employees.

on other grounds by Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004). The Grievance Board has consistently followed *Flint* in determining that employees in different classifications cannot be similarly situated. *Farley v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 00-PEDTA-015 (June 22, 2000); *Wiley v. Dep't of Health & Human Res.,* Docket No. 04-HHR-149 (Jan. 16, 2008); *Randolph v. Div. of Highways*, Docket No. 2019-0287-CONS (Aug. 6, 2019).

Grievants' argument that the word "uniform" means that if one employee receives a pay increase all employees must be receive the same pay increase makes sense in simple terms but fails when attempting to apply that reasoning to a compensation system that encompasses different types of job duties, qualifications, experience, and history. Uniformity is not simple in that context. For the same reason, Grievants are not similarly situated to employees not in their own classification for purposes of discrimination.

The West Virginia Supreme Court of Appeals has recognized the complexities of classification and compensation in addressing a similar discrimination claim relating to the DOP's compensation plan. In determining that the DOP's plan that allowed for a compensation system in which employees within the same classification need not be paid the same amount, the Court found this did not violate the principal of "equal pay for equal work." The Court found that "employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the

interests of the employer." *Largent v. State Div. of Health*, 192 W. Va. 239, 246, 452 S.E.2d 42, 49 (1994).

Although not the same factual situation, the Supreme Court's reasoning in *Largent* is even more appropriate when applying those considerations not only within the same classification but across all classifications in an agency. The interaction of job classifications within the DOH is complex. There are many positions that are unique to the agency but others that are used in agencies throughout the state. There are multiple classifications, such as Transportation Worker, that operate as a series, with employees expected to be able to advance from Transportation Worker I to Transportation Worker II and so on. Several of the series' are also interconnected in that employees from one series are expected to be able to promote into another class series, such as Transportation Worker into Highway Administrator. Thus, pay raises without accounting for existing inequity would create a continuing domino effect of inequity. If Respondent had not made the proposals for the targeted pay increases in November 2018 and simply given pay raises to all, those classifications would still be experiencing the salary inversion caused by the Transportation Worker Apprenticeship Program and the Bridge Safety Inspector Program.

Grievants provided no evidence that all classifications were being paid under market rate. If incumbents in a classification already were being paid market rate on average and an across-the-board raise was given that would not create equity or move the agency's mission. DOH must still operate within its budget and spend its resources for the greatest benefit of the public. Under the *Largent* view of pay equity, Respondent's pay plan is uniform in that it created a pay procedure for all employees in

all situations and created a pay schedule accounting for market forces to raise the minimum, maximum, and market rates for all pay grades. The requirement that Respondent apply the pay provisions of the statute uniformly does not make all employees similarly-situated. There are different classifications because there are different duties, education, and experience requirements for employees. Even within the same classification, unequal market forces due to locality can render employees not similarly situated. *See Hammond v. W. Va. DOT*, 229 W. Va. 108, 111, 727 S.E.2d 652, 655 (2012). Thus, Respondent did not discriminate against Grievants when providing a pay increase to employees in different classifications.

Grievants assert that Respondent has admitted it failed to comply with Senate Bill 2003 citing remarks made by administration in a presentation to the State Personnel Board and during the September 2020 *WV on the DOT* podcast. This argument stems from a misunderstanding of the language of the statute and misinterpretation of isolated remarks. Senate Bill 2003 separately gave Respondent the discretion to create both a new pay plan and a new classification system. Over a period of years, Respondent did both.

Respondent first proposed a pay plan that was approved in April 2018. At that time, Respondent made no attempt, nor was it required to attempt, to create its own classification system. Following the removal of Secretary Smith in March 2019, Respondent's new administration, under the direction of Secretary Byrd White, determined to go forward with creating a new classification system in addition to the prior pay plan. In 2020, after careful study, Respondent's new administration proposed to the State Personnel Board a unified plan entitled the *Comprehensive Classification*

and Compensation Plan. This plan created a DOH-specific classification system and amended DOH's 2018 pay plan. It is the creation of the new comprehensive plan and the remarks about the same that Grievants argue is an admission that the 2018 plan was not comprehensive or uniform.

Respondent's creation of a pay plan in 2018 and classification system in 2020 was authorized by the bill and does not indicate that the pay plan failed to be uniform because the authority to create each was separate. The remarks of administration regarding the plan, to their credit, plainly acknowledged the history of inequity and the continuing concerns of employees. Respondent's admission that a new classification system was necessary and that the existing pay plan should be amended, simply shows Respondent's continuing attempts to accomplish the agency's mission and reflects the change in direction by the new Secretary. That Respondent did not propose a classification system until 2020 is irrelevant because the statute did not require Respondent to create a new classification system; it only gave Respondent the discretion to do so.

The Legislature's stated intent with Senate Bill 2003 was "to allow the Division of Highways to employ qualified applicants to vacant and new personnel positions in the division in a timely manner and to ensure that the Division of Highways has an adequate workforce sufficient to maintain safe roadways for the citizens of West Virginia." W. VA. CODE § 17-2A-24(a)(3). The Legislature gave Respondent broad discretion in accomplishing that purpose subject to the review of the State Personnel Board regarding pay and classification. Given that discretion, the State Personnel Board's approval of the plan, and the clear legal precedent that DOH's interpretation of

the statute be upheld unless clearly erroneous it cannot be said that Respondent's pay plan policy failed to comply with the statute.

It is understandable why Grievants feel betrayed. In its response to the legislative audit in 2020, Respondent admitted that the DOH was ranked 50th in compensation among the nation's state highway agencies. Grievants saw employees in other classifications get substantial pay increases and were told to be patient, yet their raises never came. It is unfortunate that there was confusion created by inconsistent messaging when Respondent clearly put forth a great deal of effort to attempt to create a plan that would address the needs of the agency and its employees within budgetary constraints. While not giving the immediate pay raise Grievants believed they deserve, the plan Respondent created does have real benefits for all employees, and it was a plan Respondent had the discretion to implement as it saw fit. It cannot be said that Respondent's actions were clearly erroneous or discriminatory; therefore, the grievance must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19 (2018). "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of

an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

2. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3.

3. An employee is required to file a grievance as follows:

> 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, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1).

4. The time period for filing a grievance begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff'd*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016).

5. "This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995) disputes alleging pay disparity are continuing violations, which may be grieved

within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. *See Haddox v. Mason County Bd. of Educ.*, Docket No. 98-26-283 (Nov. 30, 1998); *Casto v. Kanawha County Bd. of Educ.,* Docket No. 95-20-567 (May 30, 1996)." *Fleece v. Morgan County Bd. of Educ.*, Docket No. 99-32-090 (Aug. 13, 1999).

6. Respondent failed to prove the grievance was untimely filed.

7. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

8. Senate Bill 2003, as codified, states in pertinent part as follows:

> "The division shall have full authority to exercise its discretion regarding the application of the Division of Personnel's system of compensation for positions in the division within the classified and classified-exempt service: Provided, That application of the provisions of this subdivision shall be uniform. The division may independently submit to the State Personnel Board recommendations for the approval of a special pay scale for the division's personnel."

W. VA. CODE § 17-2A-24(c)(7).

9. "'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. pt. 4, *Security National Bank & Trust Company v. First W. Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (W. Va. 1981)." *Smith v. Bd. of Educ.*, Syl. Pt. 3, 176 W. Va. 65, 66, 341 S.E.2d 685, 686 (1985).

10. "'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).

11. "A similarly situated determination is necessarily factual in nature." *Pritt v. W. Va. Div. of Corr.*, 218 W. Va. 739, 744, 630 S.E.2d 49, 54 (2006).

12. Employees holding different classifications are not performing like assignments and duties and, therefore, are not similarly situated. *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999), *overruled in part on other grounds by Bd. of Educ. v. White,* 216 W. Va. 242, 605 S.E.2d 814 (2004). The Grievance Board has consistently followed *Flint* in determining that employees in different classifications cannot be similarly situated. *Farley v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 00-PEDTA-015 (June 22, 2000); *Wiley v. Dep't of Health & Human Res.,* Docket No. 04-HHR-149 (Jan. 16, 2008); *Randolph v. Div. of Highways*, Docket No. 2019-0287-CONS (Aug. 6, 2019)

13. "[E]mployees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer." *Largent v. State Div. of Health*, 192 W. Va. 239, 246, 452 S.E.2d 42, 49 (1994).

14. Unequal market forces due to locality can render employees not similarly situated, even within the same classification. *See Hammond v. W. Va. DOT*, 229 W. Va. 108, 111, 727 S.E.2d 652, 655 (2012).

15. The Legislature's stated intent with Senate Bill 2003 was "to allow the Division of Highways to employ qualified applicants to vacant and new personnel positions in the division in a timely manner and to ensure that the Division of Highways has an adequate workforce sufficient to maintain safe roadways for the citizens of West Virginia." W. VA. CODE § 17-2A-24(a)(3).

16. Grievants failed to prove Respondent was required to provide pay increases to all employees or that the pay plan was discriminatory.

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: June 22, 2021

Billie Thacker Catlett
Chief Administrative Law Judge