WAYNE AUSTIN, et al.

v. Docket No. 94-BOT-219

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY

DECISION

Grievants, Wayne Austin, Elmer Bennett, Ken Haught, and Paul Sisler, filed a level one grievance on May 2, 1994, in which they alleged

The grievants are grieving the clearly unfair comparative salary situation that has been created in the physical plant paint shop by bringing in a new employee with relatively (compared to others in the shop) little experience, at the same pay grade as others in the shop, but (with an apparent attempt at compliance with BOT RULE 62) at a salary exceeding that of very experienced employees in the shop. Besides being blatantly unfair and negatively impacting on worker morale, this practice violates the letter and spirit of West Virginia State law, Board of Trustees rules, policies and practices, and West Virginia University policies, procedures, and practices.

For remedy the grievants are asking that each of their salaries be adjusted at least to that of the new employee.

By memorandum dated May 23, 1994, Robert Ridgway, Assistant Director/Craft Maintenance & Utilities, advised Grievants that

I received your level one written grievance this date. Although the Supervisor you filed the grievance with failed to respond in a timely fashion, Physical Plant lacks the authority to grant the resolution sought in your grievance and the remedy request is contrary to Board of Trustees' Classification and Compensation Policy and Code.

Therefore, your grievance is denied.

By memorandum dated May 24, 1994, Grievants notified WVUPresident Neil Bucklew that the University was in default by not timely responding to their level one grievance. On May 25 WVU

Associate General Counsel William Hilary Hutchins, III, appealed the default to the Grievance Board in compliance with W.Va. Code §18-29-3. The requested hearing was conducted on August 3, 1994, and the matter became mature for decision on September 9, 1994, with the submission of post-hearing proposed findings of fact and conclusions of law.

The evidence of record establishes the following findings of fact:

1. Grievants are employed by West Virginia University, assigned to the Physical Plant and classified as painters, pay grade 11.

2. On or about April 1, 1994, Pamela Shaffer, previously employed at WVU as a custodian, applied for and received a position of painter at the Physical Plant.

3. Consistent with Board of Trustees Policy Bulletin No. 62, Ms. Shaffer's transfer was considered a promotion entitling her to a five percent per paygrade salary increase or the entry salary at paygrade 11, whichever was higher.

4. Moving from a position classified at paygrade 4 to a position classified at paygrade 11, Ms. Shaffer received a 40% salary increase upon her transfer.

5. Payroll records dated July 1994 indicate Ms. Shaffer's base salary to be $22,500 while Grievants' salaries range from$17,232 to $20,364. (See footnote 1)

6. Grievants filed a level one complaint with their immediate supervisor, Homer Hart, on May 2, 1994.

7. Mr. Hart took no action to respond to the grievance.

8. Upon learning of the pending matter, Physical Plant Assistant Director Robert Ridgway responded to the grievance by memorandum dated May 23 and received by Grievants on May 24, 1994.

9. Grievants filed a claim for default with WVU President Neil Bucklew on May 24, 1994.

W.Va. Code §18-29-3(a) provides that a grievance must be filed within the timelines set forth in Code §18-29-4 and shall be processed as rapidly as possible. If the employer does not render a decision within the prescribed timelines, it appears that the grievant is given two choices. He may appeal to the next level or, unless the grievance evaluator is prevented from making a response due to sickness or illness, the grievant may prevail by claiming default. (See footnote 2) If, as in the present case, the grievants choose to pursue default, the employer may request a hearing at level four. Evaluation at level four is based upon the presumption that the employee(s) prevailed on the

merits of the grievance and the only issue to be considered is whether the remedy is contrary to law or clearly wrong in light of that presumption. WVU bears the burdenof proof in this matter.

Respondent argues that the remedy may not be awarded Grievants because they have stated no grievable issue and have failed to properly follow the procedure outlined in W.Va. Code §18-29-4. Specifically, Respondent asserts that Grievants have not alleged a misapplication or misrepresentation of any statutes, policies, rules, or regulations. There is no allegation that Grievants' job titles or duties have changed and Grievants do not assert that either they or Ms. Shaffer are incorrectly classified. (See footnote 3) On the contrary, Grievants admit that Respondent followed Policy Bulletin No. 62.

Respondent further cites testimony of several Grievants that they had discussed the new employee approximately two weeks before she began her duties at the Physical Plant. Grievant Haught stated that he observed Ms. Shaffer's name and salary on a paper one week before she arrived. Ms. Shaffer assumed the duties of painter on April 4, 1994. In the absence of any offer of a valid reason for the delay, Respondent argues that Grievants failed to timely file at level one.

Second, Respondent asserts that Grievants did not schedule an informal conference with their immediate supervisor to discuss the nature of the grievance and the remedy sought. In addition to skipping the preliminary informal conference, the level one grievance form is dated May 2, 1994, nearly a month after Ms.Shaffer began her duties as a painter, and is not on the form furnished by WVU's Department of Human Resources. Instead, the complaint is written in memorandum form, lacking immediate recognition of its actual purpose. Finally, Grievants' representatives handed Mr. Hart the memorandum advising "Here's your copy" leading him to believe that the grievance would initially be filed at a higher level.

Respondent cites the testimony of Mr. Hart that he was unfamiliar with the grievance procedure and did not know what role he was to perform. When upper-level management learned of the grievance after Mr. Hart questioned Paul Walden, Assistant Director of the Physical Plant, about the status of the complaint, Mr. Hart's supervisor, Mr. Ridgway reasonably and diligently responded to the level one grievance immediately upon notification by Mr. Walden. Thus, Respondent claims that it substantially complied with the intent of the grievance procedure. In the nature of an alternative argument, Respondent asserts that Mr. Hart is not a grievance evaluator as defined by Code §18-29-2(j) who has the power to grant the relief requested and, therefore, is not a person Code §18-29-3(a)

intended as a grievance evaluator whose failure to respond triggers default.

The requested relief, that Grievants' salaries be increased to that earned by Ms. Shaffer, is unsupported by the laws of the State of West Virginia and policy of the BOT and is clearly wrong in light of no claim of entitlement by Grievants, Respondent asserts. BOT Policy Bulletin No. 62 was properly applied to Ms. Shaffer andneither that Policy nor any other rule, policy, or statute provides for a salary increase to all employees in a department upon the promotion of another. Respondent notes that the four Grievants all currently receive salaries in differing amounts and that none have been harmed by Ms. Shaffer's promotion. (See footnote 4) Respondent additionally asserts that it has a property interest at stake and will be harmed if Grievants' requested relief is granted in that the potential ramifications may be far reaching throughout the higher education system resulting in inequities and great cost to the State.

Grievants assert that an informal conference was conducted with Mr. Hart and that the grievance was timely initiated after Ms. Shaffer started working at the higher salary. At level four Grievants allege that they have suffered harm as evidenced by the difference in salaries. This difference is characterized as discrimination, defined in W.Va. Code §18-29-2(m) and a violation of W.Va. Code §18B-9-11 which Grievants' assert requires salary equity. Grievants argue that these two statutory provisions establish that the requested relief is appropriate. Lacking any evidence that the level one decision was delayed due to the sickness or illness of Mr. Hart, and Respondent's failure to prove that the requested relief is clearly wrong or contrary to law, Grievants argue that they are entitled to a salary adjustment comparable to that of Ms. Shaffer.

Mr. Hart's testimony that he met with Grievants' representatives to discuss the matter in mid-April establishes that an informal conference was conducted. Absent any evidence as to the exact date of this meeting, it cannot be determined that either the conference or the subsequent filing at level one on May 2, 1994, was untimely. On the contrary, it would appear that if the informal conference was held in mid-month as Mr. Hart recollects, it was probably conducted within fifteen days of Ms. Shaffer's transfer. Calculating from mid-month, the filing at level one on May 2 would have been at the end of the ten-day period within which a formal grievance is to be initiated. See W.Va. Code §18-29-4(a). Once filed the immediate supervisor must "state the decision" within five days. Therefore, a level one decision was necessary on or before May 9, 1994. Since it is undisputed that no decision was issued by that date, a default occurred. (See footnote 5)

Having established the default, it must be presumed that Grievants prevailed on the merits of the grievance in order to determine whether the remedy is contrary to law or clearly wrong in light of that presumption. Although inartfully articulated in the statement of the grievance, the gist of Grievants' complaint is that Policy Bulletin No. 62 is defective in that it creates a "clearly unfair comparative salary situation" which results in discrimination and salary disparity. For purposes of this review it must be presumed that Grievants have shown Policy Bulletin No.62 to be defective, as described.

Notwithstanding this presumption, the adjustment of Grievants' salaries to match that of Ms. Shaffer is clearly wrong and contrary to law. An adjustment of Grievants' salary to that of Ms. Shaffer is an improper remedy for the presumed wrong, that Policy Bulletin No. 62 is defective. The relief Grievants request is in fact that they benefit from the same defective policy upon which Ms. Shaffer's salary was based. To award the salary adjustments would not correct the alleged wrong. Foreseeably, when another employee transfers into the paint shop at yet a higher salary, Grievants would again file a complaint to keep their salaries competitive. This approach does not resolve the basic problem and to grant such a salary adjustment would be clearly wrong. Further, the requested remedy is contrary to law insofar as there is no direct relationship between the salary increases and the provisions of Policy Bulletin No. 62.

CONCLUSIONS OF LAW

1. Absent a showing of sickness or illness, when Grievants' immediate supervisor failed to respond on or before May 9, 1994, to a level one grievance filed on May 2, 1994, Grievants prevailed by default.

2. A level four review of whether the requested remedy is clearly wrong or contrary to law must be based upon a presumption that Grievants prevailed upon the merits of the grievance. In thiscase it must be presumed that Grievants have proven that the provisions of Board of Trustees Policy Bulletin No. 62 creates a "clearly unfair comparative salary situation."

3. The requested remedy, a salary increase to at least that earned by an employee who transferred to a position of painter in April 1994, is not tied to the alleged wrong and is contrary to

law.

Accordingly, the request for relief is **DENIED**.

December 1, 1994 Sue Keller, Senior Admn. Law Judge

Footnote: 1The base salary is supplemented by a longevity amount which constitutes the employee's total annual salary.

Footnote: 2The time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of circumstances as provided in Code §18A-4-10.

Footnote: 3Nor do Grievants allege that Ms. Shaffer was not qualified to be a painter.

Footnote: 4Grievant Sisler has been employed at WVU 13 years, Grievant Bennett 11 years, Grievant Austin 5 years and Grievant Haught 3 years. Presumably the difference in their base salaries is attributed to varying entry salaries and ongoing merit or other salary increases. Ms. Shaffer has also been employed 13 years.

Footnote: 5There is no provision in W.Va. Code §18-29-3(a) to exempt the default provision from those levels in which the hearing evaluator may not possess the authority to resolve the grievance.