SANDRA S. RUMBAUGH, .

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Grievant, .

.

v. . Docket No. 94-DOH-034

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WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a grievance by Sandra S. Rumbaugh (Grievant) against the West Virginia Department of Transportation, Division of High-ways (DOH), alleging the following:

> I was given a retired employee's workload in addition to mine. After a grievance I was allowed a promotion but with little compensation compared to other R/W [right of way] employees. I discussed this with D.E. [District Engineer] but got no response. My salary and benefits should be equal to or better than the retiree since I am a higher level tech and have more R/W experience. Also I should receive merit raises as other emp. [employees] do - especially part-time ones, and wish to be made whole in every way.

After her grievance was denied at Levels I and II, a hearing was held at Level III on November 18, 1993. On January 20, 1994, Fred VanKirk, Commissioner of the Division of Highways, denied the grievance at Level III. Thereafter, Grievant timely appealed to Level IV where a hearing was conducted in this Board's Charlestonoffice on March 23, 1994. At the conclusion of the hearing, the parties waived written post-hearing submissions and this matter became mature for decision at that time.

BACKGROUND

The facts in this case are essentially undisputed. After Bob Samms retired from the District One Right of Way Department in April 1993, Grievant assumed certain of Mr. Samms' duties, in addition to the duties of her existing position as a Right of Way Agent II. At the time of his retirement, Mr. Samms was classified as a Right of Way Technician II. Thereafter, Grievant submitted a misclassification grievance which was granted, resulting in reallocation of her position as a Right of Way Agent III.

Guy Mick, District One Transportation Realty Manager, testified at Level IV that he is Grievant's direct supervisor and has supervised Grievant since August 1987. Grievant was formally transferred to District One in March 1990, receiving a promotion to Right of Way Agent I from Right of Way Technician III. She was promoted to Right of Way Agent II in March of 1991 after filing the necessary paperwork to obtain the appropriate classification. After assuming many of Mr. Samms' duties in April 1993, Grievant filed the misclassification grievance noted above and was reclassified as a Right of Way Agent III.

Mr. Mick testified that he agreed with Grievant's contentions in both previous instances when she was seeking a more appropriate classification. Likewise, Mr. Mick does not oppose paying Grievant the same salary as Mr. Samms was receiving. In recent years, Mr.Mick's unit has been required to perform a greater volume of work with fewer people. He also agreed that Grievant had taken on much of Mr. Samms' work, although some work had been assigned to two other Right of Way Agents. Michael Johnson, a Property Manager in District One, testified at the Level III hearing that he assumed certain of Mr. Samms' duties after he retired. However, his testimony did not contradict Grievant's representation that she inherited the vast majority of Mr. Samms' workload.

DISCUSSION

Grievant complains that, after having to resort to the grievance procedure to obtain recognition that she performs the duties of a Right of Way Agent III in District One, she is still not adequately compensated for the quality and quantity of work she produces for DOH. In particular, Grievant represents without serious contradiction that she assumed much of the workload of an employee who retired and, although she has more relevant training and experience in right of way acquisition and related matters than the individual she replaced, she is nonetheless being paid less than her predecessor. DOH simply points out that Mr. Samms had been employed by DOH for a longer period

of time when he retired, that he therefore had a different work history than Grievant, and that Grievant's salary is consistent with her current classification.

In order to prevail in a grievance of this nature, alleging pay disparity, Grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. ofHealth & Human Resources, Docket No. 92-HHR-441/445/446 (Mar. 23, 1994); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). Grievant failed to cite any policy, rule or regulation of the state or DOH which would compel the result she is seeking. While DOH may have had certain discretion to instate Grievant at a higher salary, and her immediate supervisor may have supported such a course of action, there was no evidence to demonstrate that DOH abused its discretion by assigning her to the pay scale it did. Likewise, Grievant failed to present any specific evidence to establish that she was improperly denied a merit raise. The fact that other employees have received merit raises routinely while Grievant has only been promoted after complaining about her status does not establish that Grievant has been denied a merit raise to which she was otherwise entitled under existing DOH rules or policy. (See footnote 1)

Grievant related various events that transpired as far back as 1986 which she perceived as indicating disparate treatment against her in obtaining transfers, promotions, and similar favorable actions, as well as disparate treatment in receiving a verbal admonishment for leaving work without a signed leave slip in 1989. These matters were not properly included in the substance of thegrievance at issue here. See W. Va. Dept. of Health & Human Services v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). (Grievant indicated at Level IV that she intended to address these matters through federal EEO officials.) Moreover, Grievant's evidence did not establish that there was a pattern and practice of such events so as to create an inference that DOH's actions in assigning her to her current pay category was the result of a discriminatory or retaliatory motive.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Upon the retirement of Bob Samms from the District One Right of Way Department in April 1993, Grievant was assigned a substantial portion of Mr. Samms' workload. Some portion of this workload was also reassigned to two other employees.

2. Mr. Samms was a Right of Way Technician II at the time of his retirement.

3. Grievant submitted a misclassification grievance and was subsequently reclassified as a Right

of Way Agent III.

4. At the time of his retirement, Mr. Samms' monthly salary was approximately $200 greater than the monthly pay Grievant is presently receiving after her reclassification.

CONCLUSIONS OF LAW

1. In order to prevail, Grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has failed to prove that DOH abused its discretion in personnel matters or that it acted out of any discriminatory or retaliatory motive in assigning Grievant to a salary level lower than the retired employee whose duties she substantially assumed. Cf. West Virginia Univ. v. Decker, No. 22100 (W. Va. Sup. Ct. of App. July 8, 1994), wherein substantial latitude is given to an employer setting salaries for personnel above the entry level.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: July 25, 1994

Footnote: 1Grievant was awarded some relief on this issue at Level III as follows: "Grievant should receive merit raises as other employees do; 'based on meritorious performance while taking into consideration such factors as equitable pay relationship and length of service' as outlined in Highways Administrative Operating Procedures, Volume IX, Chapter 15, Section C, Pages 1/6 thru 6/6." Grievant did not indicate at Level IV whether or not this remedy satisfied her grievance on

this issue.