VICKI BRITNER, JOHN MELLINGER

AND WARREN HESS

Grievants,

v. Docket No. 91-DHS-059

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES

Respondent.

D E C I S I O N

This case was remanded by the Supreme Court of Appeals of West Virginia for an evidentiary hearing on whether the Department of Health and Human Resources (Department) "discriminated against the [grievants] by showing 'favoritism'" to a newly-hired probation officer whose salary was set at a much higher level than theirs. (See footnote 1) Accordingly, an evidentiary hearing was held on August 26, 1993, to supplement the record developed at previous hearings, and the case became mature for decision upon receipt of the final brief on October 13.

Evidence introduced at the remand hearing revealed that Grievants at all relevant times were employed by the Department asjuvenile probation officers in positions that are in the classified service under the title of Social Service Worker III (SSW III). As of May 1993, Grievant Britner had been employed by the Department for about ten years and her salary was $18,756; Grievant

Mellinger had been employed for about fifteen years and his salary was $19,092; Grievant Hess had been employed for about fourteen years and his salary was $20,376.

In 1989, the Department selected Michael McLaughlin, the alleged beneficiary of unlawful favoritism, to fill a juvenile probation officer position (SSW III). At the time of his selection, Mr. McLaughlin had been employed by the Department for more than four years as the Director of the Eastern Regional Juvenile Detention Center, also a position in the classified service. To effectuate this personnel action, the Department transferred Mr. McLaughlin to the probation officer position without any reduction in his $24,552 salary; the transfer was processed as a voluntary demotion, with the approval of the West Virginia Division of Personnel (Personnel), since the probation officer position was in a lower pay grade (Gr. Exhs. 29, 30). (See footnote 2)

At the remand hearing, Grievants called Judith K. Williams, an employee of the West Virginia Board of Social Work Examiners, totestify concerning the licensure requirements for Social Workers in this State in an attempt to establish that Grievant was not minimally qualified for the position. She stated that Mr. McLaughlin was not a Licensed Social Worker, that he had been granted a temporary license in March 1990 and passed a basic level examination in October 1991, and that he would not be eligible for a social worker license until March 1994 based upon four years qualifying experience, i.e., working under the supervision of a licensed social worker.

The Department presented the testimony of Lloyd O'Brien, who was area administrator who selected Mr. McLaughlin for the juvenile probation officer position. In outlining the hiring procedure that was followed, Mr. O'Brien stated that he obtained a register containing the names of two persons who were eligible for the position (Dept. Exh. 6), and those two people and Mr. McLaughlin were interviewed by his subordinates prior to the selection. Mr. O'Brien testified that he selected Mr. McLaughlin because he considered him to be the best qualified applicant for the position. Mr. O'Brien stated that since Mr. McLaughlin was already employed by the Department in a classified position he was transferred to the juvenile probation officer position (SSW III), and he explained that Mr. McLaughlin had agreed to accept a voluntary demotion to a position in a lower pay grade without a salary decrease. Mr. O'Brien expressed his belief that the Department had not engaged in favoritism with regard to its employment of Mr. McLaughlin.

The Department also presented the testimony of Mike McCabe who had worked for the Department in the Office of Personnel Services for about three years. Mr. McCabe offered the

opinion that the Department complied with the applicable regulations of Personnel in transferring Mr. McLaughlin to the position without any reduction in salary and noted that the personnel transaction had been approved by Personnel. (See footnote 3)

Discussion

In the initial level four decision, the administrative law judge ruled that the Grievants had established a prima facie case of favoritism. Britner v. W. Va. Dept. of Health and Human Resources, Docket No. 91-DHS-059 (June 13, 1991). In reversing that decision, the Court in Hess ruled that the administrative law judge erred in reaching the favoritism issue because it had not been raised or ruled on at the lower levels of the grievance procedure and thus the Department did not have a full and fair opportunity to rebut the grounds on which the grievance was sustained.

The initial issue that must be addressed in this proceeding is whether the undersigned is bound by the legal conclusion that Grievants have established a prima facie case of favoritism. Grievants contend that the initial decision precludes a reexamination of that issue, presumably on the basis of resjudicata or a similar legal concept. The Department responds that because the Supreme Court held the favoritism issue was not properly before the administrative law judge who issued the initial decision, the entire favoritism issue must be reexamined and, accordingly, Grievants on remand must establish a prima facie case again, based upon all evidence of record, including the evidence introduced at the remand hearing.

The undersigned concludes that the Department's argument is valid and further that it would be legal error not to reexamine that issue looking at all the evidence, including the evidence introduced on remand. To do otherwise would compound the initial error identified in Hess and would not only be unfair but would appear to deprive the Department of its right to procedural and substantive due process, as expressly guaranteed by W. Va. Code, 29-6A-6 ¶1. (See footnote 4)

Having disposed of this preliminary matter, the undersigned will now address the merits. Favoritism is defined as " unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code, 29-6A-2(h). In Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1991), a prima facie analysis was adopted in favoritism cases. To establish a prima facie case, grievants must prove by a preponderance of the evidencethat (1) they are similarly situated, in a pertinent way, to another

employee or employees; (2) the other employees have been given an advantage or shown a preference in a significant manner not afforded grievants; and, (3) the difference in treatment has caused a substantial inequity and there is no known or apparent justification for this difference. If grievants meet this burden, the burden of production, not the burden of proof, shifts to the employer to articulate legitimate reasons for its action. If the employer does offer evidence of a legitimate reason for its action, grievants may still prevail, if the evidence shows that the legitimate reason offered by the employer is actually a pretext for unlawful favoritism.

Hence, one of the essential elements of either a favoritism or discrimination claim is that the grievant be similarly situated in a pertinent way to another employee(s). (See footnote 5) The undersigned is of the opinion that Grievants have not established a prima facie case of favoritism under the Prince analysis. Here, Grievants and Mr. McLaughlin are not similarly situated for purposes of establishing a claim of favoritism. They were not, as was he, transferred into their positions from a higher paying position within the Department. The fact that they all hold the same position in theclassified service is not sufficient, standing alone, to establish that they are similarly situated. (See footnote 6)

The same conclusion was reached in Annon v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-316 (June 30, 1992), a case in which a rehired Revenue Agent was paid a salary well in excess of that paid to other Revenue Agents. In rejecting the favoritism claim, the administrative law judge stated that "[b]ecause [the reemployed agent] was hired at a different time, during different economic conditions and was able to bargain for his salary based on his work experience, the remaining eighteen Revenue Agents are not similarly situated or subject to comparison regarding their respective salaries." Id. at 18. The undersigned concludes that the prohibition against favoritism was simply not designed to address the situation presented by the instant case.

Although Grievants' favoritism claim must be denied, the Grievance Board understands and fully appreciates that large salary disparities, whether created in the manner this one was or in a similar manner, can be quite unfair and have been the source of much dissatisfaction among State employees. See W. Va. Blue Ribbon Personnel Commission's Report, Employee Morale and Job Satisfaction, at 16-18 (Dec. 17, 1992).

Conclusions of Law

1. In order to prevail in a non-disciplinary matter, a grievant must prove the allegations of the

complaint by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. In order to establish a prima facie showing of favoritism under W. Va. Code, 29-6A-2(h), a grievant must be similarly situated in a pertinent way to one or more other employees who were treated in preferential manner.

3. Grievants, who have been employed by the Department for several years as juvenile probation officers, are not similarly situated to an employee who (1) was previously hired for a different position in a higher pay grade and (2) was subsequently transferred to a probation officer position without a reduction in salary.

Accordingly, this grievance must be **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 andprovide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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RONALD WRIGHT

Administrative Law Judge

Dated: April 26, 1994

Footnote: 1 W. Va. Dept. of Health and Human Resources v. Hess, 189 W.Va. 357, 432 S.E.2d 27 (1993).

Footnote: 2 According to Grievants' Exhibit 30, Mr. McLaughlin was demoted and transferred within the Department without a salary decrease ($24,552) from a position in pay grade 18, step 7P, to a position in pay grade 14, step 11P. In May 1989, prior to his demotion, Mr. McLaughlin completed a supplemental civil service application for the Department stating the lowest salary he would accept was $24,500 (HHR Exh. 7). Approximately one year later, he was promoted to Social Service Supervisor III and his salary was increased to $26,796 (HHR Exh. 8).

Footnote: 3 The Personnel Action Form utilized to effectuate the transfer of Mr. McLaughlin to the juvenile probation officer job does contain a dated signature of an employee of the West Virginia Division of Personnel reflecting that

agency's approval of the personnel action.

Footnote: 4 That section of the grievance procedure statute states, in pertinent part, that "[t]he ... hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process."

Footnote: 5 This Board has consistently required employees to establish that they are substantially similarly situated to another employee(s). See e.g., Wyatt v. McDowell County Bd. of Educ., Docket No. 92-33-312 (Apr. 21, 1993); Hayes v. W.Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992)(free parking provided at some work locations but not others).

Footnote: 6 Consequently, it is not necessary to address Grievants' contention that Mr. McLaughlin did not meet the minimum qualifications for the position or that the Department violated Section 5.06 of the Administrative Rules and Regulations of Personnel governing pay on demotion. The undersigned has, nonetheless, considered the latter contention and determined that the Department did not violate Section 5.06 in demoting Mr. McLaughlin without decreasing his salary.