DANIEL R. HICKMAN, .

.

Grievant, .

.

v. . DOCKET NO. 94-DOH-435

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION/DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

Daniel R. Hickman (Grievant) submitted the following grievance against the West Virginia Department of Transportation, Division of Highways (DOH) on February 4, 1994:

> I am submitting this Grievance based on the premise of discrimination. Using the format for the reorganiza-tion, several people have now been granted pay increases without regard for evaluations or tenure. These salary increases have been awarded based entirely on their current NICET ratings.
>
> I have been employed by the Department for approximately 17 years. My salary is currently at the bottom level of the Level II NICET (AET) for Construction. Therefore, based on the methods applied under the reorganization any person now holding the same classification is receiving the same salary as I regardless of work experience, evaluation, or tenure.
>
> Even though the pay scale allows the flexability (sic) for persons under a particular classification to receive various levels of pay, presumably based on evaluation of their past work performance, experience, tenure, etc., I feel that none of this has been applied in my case.

> I feel that I have been discriminated against because I have been placed in the same class as employees with far less experience, work related knowledge, and favorable evaluations. It is my opinion that we must assume that work related knowledge is accumulated through years of experience, and so therefore in itself is a valuable asset which should be considered when determining an employee's salary range in their particular job field.

Grievant is seeking the following relief: "I feel my salary should be adjusted based on the above mentioned criteria in order to separate me from those who have met only the minimum require-ments for this field." After his grievance was denied at Levels I and II, a hearing was held at Level III on June 14, 1994. On August 9, 1994, Fred VanKirk, Commissioner of the Division of Highways, concurred with the grievance evaluators at Level III who made the following findings:

> The evaluators did not find that the agency had in any way violated its policies and procedures or treated Mr. Hickman in a discriminatory fashion in administering its salary advancement policies. We believe that Mr. Hickman has been a good dedicated employee and an excellent representative of DOT quality personnel.
>
> While the evaluators must deny this grievance based on the facts, we also understand the frustration of this and similarly situated employees in many classifications. These employees for a variety of reasons including those given in the testimony remain at or near the bottom of the scale for their pay grade, closely bunched with newly promoted or hired employees into that pay grade, most of whom have much less tenure.
>
> Realizing that tenure is not a requirement for compensation, it is a common perception and understanding amongst our personnel and a generally accepted standard practice in society. We would recommend that the Human Resources Division review this problem and make recommendations to the proper entities to eliminate or at least lessen this concern of our employees. We also recommend that the Division use its discretionary options to give a more equitable relationship to this situation at its earliest opportunity.

Grievant appealed to Level IV on August 17, 1994, and a hearing was conducted in this Board's Charleston office on October 24, 1994. Thereafter, this matter became mature for decision on December 1, 1994, following receipt of post-hearing submissions from both parties.

DISCUSSION

The facts in this case are not in dispute. Based upon the evidence introduced at Levels III and IV, Grievant has been employed by DOH for approximately 18 years. As the statewide reclassification project was implemented in DOH, Grievant was classified as an Associate Engineering Technician - Construction. Because Grievant was making less than the minimum of the new pay scale for that classification, Grievant's salary was increased to the entry level salary of the new pay scale. Thus, although Grievant was receiving $1467 per month before reclassification and $1539 per month after reclassification, (See footnote 1) Grievant contends that he was not treated fairly by his employer because such factors as seniority, experience and prior performance, including performance for which he had been awarded merit raises, were not considered when he was assigned to a new pay grade upon reclassification. Because these factors were ignored, Grievant is being paid the same as other employees in the same classification with less seniority and experience, and whose past performance was not sufficiently meritorious to warrant a merit increase.

In addition, Grievant demonstrated that two employees who were in a lower classification at the time reclassification was implemented, but who subsequently passed their NICET (See footnote 2) examinations and were then promoted to the same classification as Grievant, are receiving $1575 per month, $36 per month more than Grievant. These two employees perform essentially the same work as Grievant but have only been employed by DOH for two years. See G Ex 1 at L III.

Grievant alleges that he is a victim of "discrimination" in regard to the salary he is receiving versus other employees in the same classification with less tenure, experience and seniority. Discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 3) of discrimination under § 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

Applying this prima facie analysis to the facts presented here, Grievant has demonstrated that he is similarly situated to one or more other employees who are employed by DOH as Associate Engineering Technicians (AETs). Further, there is undisputed evidence that DOH pays certain recently-promoted AETs more than Grievant. Finally, it does not appear that this pay differential is in any way related to the actual job responsibilities of the employees at issue. Grievant has thus established a prima facie case of discrimination.

Once a grievant establishes a prima facie case of discrimination under § 29-6A-2(d), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260, (Oct. 19, 1989).

DOH established that the actions it has taken in regard to AET salaries has been wholly consistent with the policies of the West Virginia Division of Personnel. In particular, Grievant's placement at the entry rate of the new salary range for his classification was mandated by the Division of Personnel's Pilot Administrative Guidelines, § V(C)(1)(a). Those guidelines clearlyindicate that as of the effective date of reclassification, all classified employees will be placed in the pay grade on the pilot compensation plan assigned to their particular classification. These same guidelines further provide that employees, such as Grievant, "whose salaries are below the entry rate of the new salary range shall be moved to the entry rate of that range." R Ex 1 at L IV. A similar application of the Division of Personnel's rules by DOH was recently upheld by this Grievance Board. Roach v. W. Va. Dept. of Transp., Docket No. 94-DOH-232 (Nov. 29, 1994). See generally, Colesante v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-004 (Apr. 27, 1993).

DOH further established, through the testimony of Jeff Black, Director of Human Resources for

DOH, that the two employees who were promoted at a point in time subsequent to implementation of statewide reclassification from Technician in Training to Associate Engineering Technician, were assigned to their current salaries in accordance with the Pilot Administrative Guidelines. R Ex 1 at L IV. Under § VI(C)(6) of that policy, when an employee is promoted to a classification in a higher salary range in the pilot compensation plan, and the employee's current salary is between the minimum and the lower mid-range for that classification, his salary may be increased by 7% per grade, up to a maximum of 21%. (See footnote 4)

In Largent v. West Virginia Division of Health, 452 S.E.2d 42 (W. Va. 1994), our Supreme Court of Appeals noted that the rules relied upon here by DOH were issued by the Division of Personnel pursuant to W. Va. Code § 29-6-10 and, after reviewing both the statute and the legislative rules, the Court stated: "[W]e conclude that it does not violate the principle of pay equity for the state to pay employees within the same classification differing amounts." Id. at 9. The Court further noted: "All of the relevant language in the definition section of the Administrative Rules and Regulations of the West Virginia Civil Service System reflects the Legislative intent to allow the state to maintain a certain degree of flexibility in setting employee compensation within a classification." Id. at 48.

As in Largent, Grievant here is being paid less than two other recently-promoted AETs as "a result of the discretionary mechanics of the system, not from any discriminatory application or implementation of the pay plan." Id. at 49. See Hollingsworth v. State of La., 354 So. 2d 1058 (La. App. 1 Cir. 1978). Thus, by explaining that its actions were taken in compliance with duly promulgated statewide personnel regulations, DOH has articulated legitimate, nondiscriminatory reasons for the adverse pay anomaly experiencedby Grievant here. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Colesante v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-004 (Apr. 27, 1993); Loomis v. W. Va. Div. of Human Serv., Docket No. 91-DHS-172 (Feb. 27, 1992).

The undersigned agrees with the comments of the Level III evaluators, (quoted earlier in this Decision), to the effect that Grievant's frustration with this situation is understandable and that the DOH Human Resources Division is encouraged to investigate initiatives which could alleviate or lessen the impact of current rules tending to disregard an employee's tenure and experience. Indeed, this Grievance Board has made similar observations in previous decisions and the negative impact of

"salary compression" was specifically criticized by the Governor's Blue Ribbon Personnel Commission. (See footnote 5) Nonetheless, under the circumstances present here, the pay anomaly of which Grievant complains has not been shown to be contrary to any law, rule, policy or statute.

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

FINDINGS OF FACT

1. Grievant is employed by the Department of Highways (DOH) as an Associate Engineering Technician (AET) - Construction.

2. Grievant has been employed by DOH for approximately 18 years and passed his NICET Level II examination nearly five years ago, thereby obtaining promotion to his current status.

3. Upon implementation of the statewide reclassification process in November 1993, Grievant's salary was established at the entry rate for AETs ($1539 per month), because his prior salary ($1467 per month) was below the entry rate of the new salary range. 4. Other AETs with less tenure, seniority and who had not received merit raises comparable to Grievant, were likewise placed at the $1539 per month entry rate upon implementation of reclassification.

5. At least two employees who were promoted from Technician in Training to AET after reclassification were given pay raises consistent with the Division of Personnel's Pilot Administrative Guidelines. As a result, these employees are receiving $1575 per month, $36 per month more than Grievant, although they have only been employed by DOH approximately two years.

CONCLUSIONS OF LAW

1. In order to prevail, Grievant must prove the allegations in his 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. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

3. Based upon the facts stated in Findings of Fact Nos. 3 and 5, Grievant established a prima facie case of discrimination in regard to his salary being less than other similarly situated employees who perform the same duties.

4. The Respondent established that the actions taken in regard to Grievant's salary and that of other less senior AET's, including the two recently-promoted AET's, were consistent with statewide regulations duly promulgated by the West Virginia Division of Personnel. Thus, the Respondent presented legitimate, non-discriminatory reasons for its actions sufficient to refute Grievant's prima facie case. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See generally, Largent v. West Virginia Div. of Health, 452 S.E.2d 42 (W. Va. 1994).

5. Given that Respondent's actions were taken in compliance with statewide regulations promulgated by the Division of Personneland such regulations were not shown to be contrary to the authorizing legislation, Grievant failed to show that the reasons given by the Respondent for its actions were pretextual. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Callaghan v. W. Va. Civil Serv. Comm'n, 273 S.E.2d 72 (W. Va. 1980); Smith v. W. Va. Div. of Corrections, Docket No. 94-CORR-624 (Feb. 27, 1995); Miller v. W. Va. Div. of Highways, Docket No. 93-DOH-011 (June 30, 1993), aff'd, Civil Action No. 93-AA-201 (Kanawha County Cir. Ct. Feb. 7, 1994).

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.

LEWIS G. BREWER

Administrative Law Judge

Dated: February 28, 1995

Footnote: 1The salary figures stated in this decision only relate to regular salary and do not reflect any annual increment based upon years of service authorized under W. Va. Code § 5-5-2.

Footnote: 2National Institute for Certification in Engineering Technologies.

Footnote: 3A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 4Mr. Black indicated that the Pilot Administrative Guidelines have since been superseded by the West Virginia Division of Personnel Pay Plan Implementation Policy dated May 1, 1994. R Ex 2 at L IV. The new policy provides in § III(C)(2) that when an employee is promoted, and his current salary is somewhere "within the range of the current classification," such an employee's salaryis to "be increased by one 5% increment per pay grade range advanced to a maximum of 3 pay grades or to the minimum rate of the higher pay grade, whichever is greater." R Ex 2 at L IV (emphasis added). It appears that the same pay anomaly Grievant complains of may still arise under the new policy, although the disparity between Grievant's salary and that of a newly-promoted AET would be smaller.

Footnote: 5Report to the Governor of the Blue Ribbon Personnel Commission, 16 (1992).