GARLAND SALMONS, .

Grievant, .

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v. . Docket Number: 95-DOH-004

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WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION / DIVISION OF .

HIGHWAYS and WEST VIRGINIA .

DIVISION OF PERSONNEL, .

Respondents. .

D E C I S I O N

Garland Salmons (hereinafter Grievant) filed this grievance pursuant to West Virginia Code §§29-6A-1, et seq., with his employer, the West Virginia Division of Highways (hereinafter DOH), on July 15, 1994. (See footnote 1) The claim was denied at the lower levels of the grievance procedure and appeal was made to level four on January 20, 1995. Thereafter, an evidentiary hearing was held on March 9, 1995, in this Board's Charleston, West Virginia office, and the case became mature for decision on March 31, 1995, after receipt ofthe DOH's post-hearing Proposed Findings of Fact and Conclusions of Law. (See footnote 2) A summary of Grievant's claim as derived from his formal statement of grievance and request for relief is as follows:

> There is a salary gap of $135.00 / month that exists between [DOH employee] Heaton and myself and I feel this is wrong and should be corrected. I have been employed with the Department and a SETCONS (level IV) longer than Heaton. I am

his supervisor at this time and my actual job responsibilities are more than his.

Relief sought: My salary should be adjusted to reflect the more experience, longevity, and a greater actual job responsibility. I request a 10% adjustment increase from $2504 / month to salary of $2754.40 / month, which would be approximately 4% more than Heaton's present salary and to make the grievance [sic] whole.

The material facts are not in dispute and shall be set forth below as Findings of Fact.

Findings of Fact

1. Grievant is an employee of the DOH and has been assigned the classification of Senior Engineer Technician by the Division of Personnel.

2. The DOH has segregated the State into work areas. Grievant is assigned to District Two which includes Cabell, Lincoln, Logan, Wayne and Mason Counties.

3. DOH employee Jerry Heaton is also classified as a Senior Engineer Technician but is normally assigned to District Ten which encompasses McDowell, Mercer, Raleigh and Wyoming Counties.

4. Obviously, the DOH is in charge of many road and bridge construction projects throughout the State. These projects oftenrequire more manpower, depending upon their complexity, than the DOH has available within the project's district. Therefore, from time to time, various employees in differing classifications have been asked to volunteer for, or have been involuntarily assigned to, districts where they do not normally work, in order to fulfill the DOH's manpower needs.

5. At the time this grievance was filed, Grievant was assigned to supervise a construction project on Corridor G in Logan County. Mr. Heaton was also assigned to this project to work as an inspector.

6. At the time this grievance was filed, Grievant's salary was $2504.00 per month and Mr. Heaton's salary was $2639.00 per month.

Discussion

As noted, Grievant's basic contention is that the DOH should be required to increase his salary so

that it is greater than that of Mr. Heaton. He believes his salary should be greater than Mr. Heaton's because he supervises Mr. Heaton on the current project they are working on, and because he has more experience and longevity with DOH than does Mr. Heaton. Much testimony was also given on the fact that Mr. Heaton was involuntarily transferred from his home district to work on the project in question, and because of this fact, he was given a ten percent raise (called a merit raise) as a reward for being cooperative and accepting this assignment. Grievant does not seek to have this raise removed from Mr. Heaton, however, he did opine that it was unfair for the DOH tohave given Mr. Heaton and other employees such a salary increase because employees were not given such a benefit for having agreed to work out of their district in the past.

The DOH contends that Grievant is not entitled to a salary increase simply because he supervises someone within the same classification who has less job responsibilities, duties, seniority, experience or longevity. It also contends that the merit raises given to those employees who transferred from District Ten to District Two was given as a proper exercise of its discretionary authority to make such awards. The Division of Personnel contends that it exercised no decision-making authority in this case above and beyond approving the paperwork for the ten percent raise given to the various District Ten employees.

First, any discussion concerning the appropriateness of the so-called merit raise given to Mr. Heaton in this case is a red herring. (See footnote 3) Although it is true that Mr. Heaton made less than Grievant prior to his assignment to the project within District Two, Grievant's argument is not directly based upon that administrative action. His true legal argument is based upon an allegation of a violation of the doctrine of equal pay for equal work. He appears to argue that he has a legal entitlement to asalary greater than those of his counterparts (other employees within the same classification) who have less experience, seniority, responsibility and job duties. Regardless of the fact that Mr. Heaton was given a ten percent raise after having accepted the transfer to District Two, Grievant cannot establish a violation, misapplication or misinterpretation of the law, regulations or policies under which he works.

Grievant's concerns have been addressed both by the West Virginia Supreme Court of Appeals and this Grievance Board. In Largent v. West Virginia Division of Health, 452 S.E.2d 42 (Nov. 18, 1994), the Court recognized that pursuant to the provisions of W.Va. Code §29-6-10 [1992], which authorizes the Division of Personnel to create both a classification and a pay plan, different pay rates

within the same classification are allowed. (See footnote 4) The Court concluded its discussion on this issue by holding that

> In short, employees who are doing the same work must be placed within the same classification, but within that classification there may be differences if those differences are based upon 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.

Id., at 49.

In Thomlinson v. W.Va. Dept. of Transportation, Docket No. 94-DMV-209 (Oct. 20, 1994), the grievant contended that her base salary was not properly reflective of her years of service and performance level. It was noted that the Division of Personnel's pay plan is not seniority or tenure based and that the salaries for the various classified positions are based upon the general nature of the duties expected of the position and not the qualifications, skills or abilities of the incumbents. (See footnote 5) Finally, it was stated that "[w]ithin the classified service, employees may receive compensation for their years of service by virtue of an annual increment and they may also receive an increase based upon performance through merit raises. Otherwise, these factors do not directly relate to salaries." Id., at p. 4.

Unfortunately for Grievant (and many other State employees) "salary compression" is all too real a problem within the classified service. However, each classified employee's salary at any one time is the product of many transactions and factors occuring throughout that employee's history of employment. Grievant is not legally entitled to an increase in salary justbecause Mr. Heaton recently received a merit raise and now makes a higher salary than he does. This merit raise is just one of probably a number of transactions which have effected Mr. Heaton's salary. Under the facts of this case, Grievant cannot establish a violation of the doctrine of equal pay for equal work.

During the hearing in this matter, Grievant raised an issue in passing which can easily be addressed. He opined that the issuance of the merit raise to those employees who temporarily transferred from District Ten to District Two was discriminatory because other employees who have been assigned duties outside of their normal work area were not awarded merit raises in the past. (See footnote 6) The DOH averred that its decision was made as a proper exercise of discretionary authority and not discriminatory.

Grievant was earlier involved in another grievance handled by this Board at level four styled Salmons, et al. v. W.Va. Dept. of Transportation, Docket No. 94-DOH-555 (Mar. 25, 1995) in which the grievants contended that the DOH discriminated against them by awarding the employees who transferred from District Ten to District Two a merit raise while not giving the employees in District Two a similar pay increase for working on the same project. The project in that case is the same project at issue herein. In essence, the grievants attempted to argue that if some employees received merit raises for working on a particularproject, then all employees on the project should also be similarly compensated. In Salmons, et al., it was determined that the grievants did not establish a prima facie case of discrimination because they were not similarly situated to the employees of District Ten. Id., at p. 4. It was further stated that, assuming arguendo, the grievants were similarly situated, the DOH presented a legitimate business reason for the difference in treatment, therefore; no discrimination could be established under the facts presented.

Here, Grievant is really contending that he is again similarly situated to the employees like Mr. Heaton who have been assigned to work on a project outside of their normal area of assignment, but he now contends that the DOH has favored Mr. Heaton and the other employees by awarding them a merit raise when it did not so reward other employees in the past. "Favoritism" is defined by W.Va. Code §29-6A-2(h) as the "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Grievant's argument is not persuasive.

As was recognized in Salmons, et al., the DOH had a legitimate business reason (albeit not a great one) to award the employees of District Ten a merit raise for temporarily transferring to District Two. Being that the DOH has produced such a rational basis for its action, said difference in treatment of the two groups of employees on this project cannot be categorized as unfair; therefore, Grievant cannot support his claim of favoritism. As was recognized by the DOH, every personnel action or policy must have its originat some point in time and, in this case, the DOH felt that it was appropriate to award merit raises to this one group of employees given that it could not find a sufficient number of volunteers for the project. The situations were obviously different in the past when other employees, like Grievant, transferred out of their region to work temporarily. The facts of this case do not establish by a preponderance of the evidence that the DOH showed favoritism to any one group of employees.

Even if Grievant's argument were to be analyzed under the typical framework used to address claims of discrimination, the same result would occur. Grievant cannot overcome the fact that the DOH seems to have had a legitimate business reason for rewarding those employees who transferred from District Ten to work on the Corridor G project. Therefore, this grievance must therefore be denied.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant bears the burden of proving his claims by a preponderance of the evidence. See, W.Va. Code §29-6A-6.

2. Grievant has failed to establish a violation of the doctrine of equal pay for equal work. Largent v. West Virginia Division of Health, 452 S.E.2d 42 (Nov. 18, 1994); Thomlinson v. W.Va. Dept. of Transportation, Docket No. 94-DMV-209 (Oct. 20, 1994).

3. Grievant has failed to establish that the DOH engaged in either favoritism or discrimination when it decided to issue merit raises to those employees from District Ten who were assigned to work in District Two on the same project which Grievant is currently supervising.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel 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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ALBERT C. DUNN, JR.

Administrative Law Judge

April 20, 1995

Footnote: 1The Division of Personnel was joined as an indispensable party by the Undersigned pursuant to an Order dated January 24, 1995.

Footnote: 2Grievant declined to submit any post-hearing brief in this matter.

Footnote: 3The Undersigned has very serious concerns about the appropriateness of the raise given to the employees involuntarily transferred given the clear and unambiguous language of the Division of Personnel's regulations on the issuance of merit raises, 143 CSR 1, Section 5.08. See also, Roberts v. Division of Personnel, Docket No. 94-DOP-182 (Dec. 1, 1994). However, such analysis need not be made in this case as Grievant's claim would fail in any event.

Footnote: 4Code §29-6-10 [1992] states, in pertinent part,

> *The board shall have the authority to promulgate or repeal rules, in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.], of this code, to implement the provisions of this article:*
>
> *(2) For a pay plan for all employees in the classified service, after consultation with appointing authorities and the state fiscal officers, and after a public hearing held by the board. . . . Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan established hereby.*

Footnote: 5It is noted that under certain market conditions, employers have the ability to offer higher than normal starting salaries to new employees based, in part, on that individual's education and experience credentials. See, 143 CSR 1, Section 5.04(b).

Footnote: 6"Discrimination" is defined by W.Va. Code §29-6A-2(d) 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."