TIMOTHY F. REILLY

v. Docket No. 95-DOH-322

WEST VIRGINIA DIVISION OF HIGHWAYS

D E C I S I O N

Grievant has been employed by Respondent West Virginia Division of Highways (DOH) since March 1977 and is currently classified as a Transportation Realty Agent IV (TRRLAG4 or TRAG4). He complains because a similarly-classified co-worker who was not hired until January 1980 earns approximately $425.00 a month more than he, allegedly because the other worker has received favored treatment. DOH denies all wrongdoing and claims the other employee's higher salary is based on legitimate reasons. A level four hearing was conducted on August 24, 1995. The case became mature for decision upon receipt of the last of the parties' post-hearing written arguments on September 25, 1995.1

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1DOH mailed its brief, which was received on September 18, 1995. Grievant tendered his letter-form written argument by hand delivery on September 25, 1995.

As noted above, this grievance involves salary disparity and whether DOH is responsible for impermissibly enhancing the salary of one employee to the detriment of another employee, Grievant. At the time Grievant filed his complaint, he had worked for DOH in the District 6 Right of Way (RW) office for nearly eighteen years.2 Over the years, he advanced from a RW Technician (RWTE), through the RW Trainee (RWTR) series, and into the RW Agent series (RWAG or TRAG; RWAG became Transporta

tion Realty Agent following an agency-wide reclassification project in 1993). Grievant compares his monthly salary with that of a co-worker, identified for purposes of this grievance as "X," and feels he has unjustly come up short.3 X had nearly fifteen years' seniority with DOH, and thirteen of those years were served in the District 6 RW office.

With respect to his salary and that of the less-senior co-worker in question, Grievant does not raise a claim of equal pay for equal work, or anything of that nature. Instead, Grievant claims he has been the victim of discrimination and/or favoritism. He has not identified any wrongdoing with respect to his salary and X's salary while both were working within Right of Way. Rather, Grievant insists X received favored treatment in the form of several merit raises while temporarily

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2Grievant essentially supplemented the record with brief testimony and two exhibits. In addition to the evidence adduced at level four, the record contains the lower-level pleadings and adverse decisions as well as the transcript and exhibits of the April 27, 1995 level three hearing.

3There is no need to identify this employee by name. serving in the District Engineer's office as an Administrative Aide (AA) for over three years, from approximately July 1, 1991 through late October 1994. T3.25. Grievant complains that, despite the fact that X received promotions before him while they both served in RW, there never was any significant differ ence between their salaries, and that X's raises while serving as AA were unfairly financed from funding sources not available to the few employees who worked in the RW office. See, T3.3-4,

6-7, 14, 25.

At the level three hearing, Grievant also offered a host of other reasons why he should be making as much or more money than X. He hinted that X's return to the RW office, upon orders of a high-ranking DOH official, may have involved some wrongdoing because X was not initially assigned to perform any duties in certain northern panhandle counties. Grievant also questioned what he perceived to be a lack of productivity on X's part when X returned to the RW office, while he, Grievant, remained quite busy with more than his share of work. Grievant also claimed to be the designated person in charge of the RW office when the supervisor was out. T3.7-8, 14. However, when questioned about the legitimacy of the various promotions and raises both he and X received over the three years and three months in question, Grievant conceded that those actions had not been in violation of any statute, regulation or policy. T3.9-10.

Grievant also admits to having a personality conflict with X. T3.3. Grievant did not object to X's salary as long as X remained with the District Engineer. Grievant admitted that X had a college degree, while he did not, and he also stated that X had done a "good job" while working for the District Engineer. T3.8-9. However, Grievant feels that he has more responsibili ties and performs more work than X in the RW office and that, therefore, their salaries should be equalized at the very least. Grievant would be satisfied in this matter if X's salary was reduced (or X was transferred to another office) in order to gain salary equalization. T3.2.

Based on the record as a whole, and for reasons more fully set forth below, the undersigned has determined that Grievant has not proven any wrongdoing on DOH's part in this matter. As

in so many grievances, allegations of favoritism and discrimina tion relate to a single topic. In this case, the area of concern is wages.4 The lead case of Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989), instructs that,

If a grievant successfully proves a prima facie case [of discrimination and/or favoritism], a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. [Cite omitted.]

At first blush it appears that Grievant has met his initial burden of presumptively showing discrimination and/or favorit ism, in that he and X are similarly-situated as TRAG4s in the

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4Favoritism is defined in Code 29-6A-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Discrimination is defined in Code 18-29-2(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."

same work unit/office and that X's salary is higher than his. However, during the three years and three months X was assigned to serve as AA for the District Engineer, specified by Grievant as the time when X received the alleged favored treatment, X's salary increases exceeded Grievant's salary increases by only $48.00 per month. DOH offers a reasonable explanation for the increases.

DOH relies on Saidi v. Div. of Highways, Docket No. 95-DOH-106 (June 13, 1995), and claims the holding in Saidi controls in this matter. According to DOH, X had simply outper formed Grievant during his tenure in Right of Way, and that, over the years, X consistently received promotions and upgrades before Grievant, factors which explain the salary difference. The record affirms DOH's contentions. At level three, the three-member grievance evaluation team concluded that because there are clearly differences between the Grievant and [X] in terms of total experience, time in grade, and job history with the Agency, the Evaluators cannot find any basis for granting the relief sought.

It would be helpful to chronologically review the employ ment history of Grievant and X via a list of the personnel actions and salary modifications involving both men, reproduced below. Dates emphasized in bold represent times in which both employees received salary enhancements at the same time, and divisions mark when X became a DOH employee, when he transferred into the District 6 RW, when he became acting Administrative Assistant to the District Engineer, and when he returned to the RW office, respectively. Asterisks highlight five instances when Grievant and X did not receive identical salary advance ments between July 1, 1991 and October 26, 1994:

DATE WORKER CLASSIFICATION/ACTION MO. SALARY X/PLUS

08/01/77 G RWTE1 Initial employment 608.00

07/01/78 G 5% increase 638.00

02/01/79 G Merit increase 670.00

07/01/79 G 7% increase 718.00

01/14/80 X RWTR1, RWTR2 DOH employment

02/01/80 G RWTR1 Decrease 684.00

07/01/80 G RWTR1 $79.00 increase 763.00

09/01/80 G " In-grade increase 833.00

07/01/81 G " 12.5% increase 937.00

12/01/81 G RWTR2 Promo-increase 980.00

07/01/82 X RWTR2 Transferred into R/W 980.00

09/01/82 X RWAG1 $193.00 Promo-incr. 1173.00 73.00

02/01/83 G RWAG1 $193.00 Promo-incr. 1173.00 0

11/01/83 X WAG2 $112.00 Promo-incr. 1285.00 112.00

07/01/84 X " 7.5% increase 1381.00 208.00

07/01/84 G RWAG1 7.5% increase 1261.00 120.00

09/01/84 G RWAG2 $120.00 Promo-incr. 1381.00 0

07/01/85 X " 5% increase 1450.05 0

07/01/85 G " 5% increase 1450.05 0

07/01/86 X " $50.00 increase 1500.05 0

07/01/86 G " $50.00 increase 1500.05 0

12/01/86 X RWAG3 $138.60 Promo-incr. 1638.65 138.60

12/01/86 G RWAG2 $67.20 Merit increase 1567.25 71.40

09/16/88 G " $37.80 Merit increase 1605.05 33.60

11/16/89 X RWAG3 $38.85 Merit increase 1677.50 72.45

11/16/89 G RWAG2 $33.60 Merit increase 1638.65 38.85

01/01/90 X RWAG3 5% increase 1762.00 123.35

01/01/90 G RWAG2 5% increase 1721.00 41.00

03/16/90 X RWAG4 $298.00 Promo-incr. 2060.00 339.00

04/01/90 G RWAG3 $79.00 Promo-incr. 1800.00 260.00

08/01/90 X RWAG4 $84.00 ATB increase 2144.00

08/01/90 G RWAG3 $84.00 ATB increase 1884.00 260.00

12/16/90 X RWAG4 $50.00 Merit increase 2194.00 310.00

11/01/91 X " *$144.00 Merit incr. 2338.00 454.00

03/01/92 G RWAG3 *$83.00 Merit incr. 1967.00 371.00

08/01/92 X RWAG4 *$56.00 Merit incr. 2394.00 427.00

03/16/93 X " *$108.00 Merit incr. 2502.00 535.00

04/01/93 G RWAG4 *$177.00 Promo-incr. 2144.00 358.00

06/16/94 X TRAG4 $74.00 Merit increase 2578.00

06/16/94 G TRAG4 $74.00 Merit increase 2220.00 358.00

07/01/94 X TRAG4 $84.00 ATB increase 2662.00

07/01/94 G TRAG4 $84.00 ATB increase 2304.00 358.00

02/01/95 X " $67.00 Merit increase 2729.00 425.00

This record demonstrates that, during the time frame in question, Grievant and X were treated differently, in terms of salary adjustments, on five separate occasions. Specifically, X received three merit raises in 1991, 1992 and 1993 totaling $308.00, while Grievant received one merit raise and one promo tional raise, in 1991 and 1993, totaling $260.00. Thus, X netted only $48.00 per month more than Grievant during the critical period while X was not working directly in the Right-of-Way office. This does not appear to be significant when viewed in light of the more substantial amounts X's salary had exceeded Grievant's prior to him leaving the Right of Way office to assist the District Engineer.

Moreover, the difference in X's salary during the critical period appears to be directly related to performance factors which were apparent long before X went to work for the District Engineer. Thus, the difference in the salaries of Grievant and X has a legitimate, rational basis, and Grievant did not show pretext. Grievant has simply failed to prove favoritism and discrimination or any other wrongdoing on DOH's part.5

The factual and legal determinations contained in the foregoing discussion and analysis are supplemented with the following formal findings of fact and conclusions of law.

5In his level four written argument, Grievant expressed disenchantment with what he essentially characterized as a system where employees who "kiss up" to supervisors are rewarded while an employee who does most of the work, and does it well, is not. He acknowledged that it was difficult to prove such charges.

Findings of Fact

1. Grievant began service with DOH in District 6 on or about August 1, 1977, as a Right of Way Technician I (RWTE1); his entry level salary at that time was $608.00 per month.
2. On January 14, 1980, "X" was employed by DOH as a RW Trainee (RWTR) in District 5. X had approximately five and a half years' prior service as a State employee.
3. X transferred to the District 6 Right of Way office as a RWTR on July 1, 1982, at a salary of $980.00 per month. At that point both Grievant and X were earning identical wages.
4. On September 1, 1982, X was promoted to RW Agent 1 (RWAG1); his salary was upgraded to $1173 per month. Grievant was promoted to RWAG1 on February 1, 1983, and his salary was again on a par with X's.
5. X was promoted to RWAG2, at $1285.00 per month, on November 1, 1983. On September 1, 1984, Grievant received the RWAG2 promotion. Due to various salary adjustments, both Grievant and X were earning $1500.00 per month by July 1, 1986.
6. On December 1, 1986, X was promoted to RWAG3, at

$1638.65 per month. At the same time, Grievant received a merit raise, bringing his salary to $1567.25 ($71.40 difference in salaries). This time-frame heralds a pattern whereby X's salary gradually and permanently outpaces Grievant's salary, resulting in an ever-increasing gap between their respective salaries.

7. Grievant next received a merit raise on September 16, 1988, bringing his salary to $1606.05. Thus, Grievant's salary was only $33.60 less than X's salary as a result of this action. Salary increases for both X and Grievant in November 1989 and January 1990 brought them to $1762.00 and $1721.00, respective ly. Accordingly, Grievant's salary was $41.00 less than X's salary in January 1990.

8. On March 16, 1990, X was promoted to RWAG4, at $2060.00 per month. On April 1, 1990, Grievant was promoted to RWAG 3, at $1800.00. At this point, Grievant was making $260.00 less than X. Each employee also received an $84.00 across-the-board increase on August 1, 1990, and Grievant's salary remained $260.00 lower than X's, at $1884.00 and $2144.00, respectively.

9. On December 16, 1990, X received a within-grade merit increase of $50.00, bringing his salary to $2194.00. At that point Grievant earned $310.00 less than X. At the time, Grievant did not protest the fact that he earned $310.00 per month less than X.

10. Eighteen months later, on July 1, 1991, X was assigned to serve as Acting Administrative Assistant (AA) to the District Engineer, at no increase in pay. As both Grievant's and X's salaries remained constant, Grievant still earned $310.00 less than X.

11. During X's service as AA, he initially received a $144.00 merit raise on November 1, 1991; the increase advanced

his salary to $2338.00. Thus, Grievant, still at the $1884.00 level, made $454.00 less per month than X.

12. During 1992, both men received merit increases, Grievant's first while X was out of the Right of Way office. Grievant received his merit raise, $83.00, on March 1, 1992, bringing his salary to $1967.00. X received a $56.00 merit raise, his second while an AA, five months later, on August 1, 1992, bringing his salary to $2394.00. The net result of these two actions decreased the salary difference between the two men to $427.00.

13. On March 16, 1993, X received a third merit raise, $108.00 per month, for a total of $2502.00 per month. At that point Grievant, still at the $1697.00 level, earned $535.00 less than X, the greatest gap ever between his salary and X's salary.

14. A few weeks later, on April 1, 1993, Grievant was promoted to RWAG4 and his salary advanced by $177.00 for a total of $2144.00. This action lowered the gap between Grievant's and X's salary to $358.00 per month.

15. At some point in 1993, the RWAG class/position was renamed Transportation Realty Agent (TRAG), and Grievant and X were retitled at no change in pay.

16. In June 1994 and July 1994, both employees received merit raises of $74.00 and across-the-board increases of $84.00, respectively. Grievant's salary of $2304.00, compared to X's salary of $2662.00, remained $358.00 lower than X's.

17. On or about October 21, 1994, X resumed his regular position in the District 6 Right of Way office as a TRAG4.

18. Discounting two separate instances when both Grievant and X received identical salary increases, during the time X served as an AA to the District Engineer between July 1991 and

October 1994, he received three merit raises which totaled $308.00 per month. During that same time, Grievant, still in the Right of Way office, received a merit raise and a promotion al increase which totaled $260.00. Thus, X netted only $48.00 more than Grievant during this particular time, and, when added to the $310.00 lead in salary he had attained prior to leaving the Right of Way office, X's salary exceeded Grievant's by $358.00 per month when he returned.

19. After X returned to the Right of Way office and Grievant learned of the $358.00 salary difference between them, Grievant filed a grievance and initially sought a salary adjust ment of $358.00 per month.

20. During the pendency of the grievance at the lower levels, specifically, on February 1, 1995, X received a $67.00 merit increase, bringing his salary to $2729.00, while Grievant's salary remained at $2304.00. At level three, Grievant modified his request for relief and sought the new difference of $425.00, the amount which would bring his wages on a par with X's.

Conclusions of Law

1. An employee who alleges wrongdoing on the part of his employer because his monthly salary is less than that of a similarly-classified employee with less seniority bears the burden of proving his claim by a preponderance of the evidence. Saidi v. Div. of Highways, Docket No. 95-DOH-106 (June 13, 1995).

2. The difference between Grievant's salary and that of a like-classified co-worker with less seniority was not shown to be the result of discrimination or favoritism as contemplated by W.Va. Code 29-6A-2(d) and 18-29-2(h). See e.g. Steele v.

Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant has failed to establish discrimination and/or favoritism or any other wrongdoing on DOH's part, or that he is entitled to the relief he seeks under any theory of law.

Accordingly, this grievance is 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 Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: October 3, 1995