

RODNEY UNDERWOOD, ET AL.,

Grievants,

v.

DOCKET NO. 95-DOH-509

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION/DIVISION OF HIGHWAYS,**

Respondent.

D E C I S I O N

Grievants Fred Miller, Arthur C. Roberts, Manoochehr K. Saidi, and Donald R. Burford, Jr., filed the following grievance on March 30, 1995:

Discriminatory practices in issuing pay raises, or salary adjustments in Dist. #1 Bridge Dept. Other individuals involved in a combined effort to maintain compliance with NBIS standards were ignored.

RELIEF SOUGHT: That all employees involved be made whole; retroactive and compensated in pay accordingly.

Following adverse decisions at the lower levels, those grievants appealed to level four, and their grievance was styled Miller, et al., v. W. Va. Div. of Highways, Docket No. 95-DOH- 526.

Grievants Rodney O. Underwood, Robert Shaw, and David A. Smith, each filed the following grievance separately on July 18, 1995:

In April of 1995 we learned that all Level III inspectors in the Dist. One Bridge Dept. received salary increases. This was a direct result of a grievance filed by one of the inspectors with no regard given to job performance. We feel this salary adjustment should not be limited to Dist. One only.

On April 13, 1995 we met with Dist. Four Bridge Engineer Randy Harris, who agreed that the Level III inspectors in Dist. Four should also receive salary increases. A request for this adjustment was sent through the proper channels. It has evidently been ignored. We feel that the salary adjustments are being held up and information concerning inspectors salaries is being withheld to prevent other Level III inspectors from discovering that Dist. One received raises.

In this District we do far more work with less personnel than any other district in the state. (168 bridges per inspector.) Our quality of work and compliance with NBIS

inspection frequency is beyond reproach. In all fairness we should be duly compensated.

Relief Sought

We are requesting a salary increase of no less than 10% or possibly more considering the amount of work performed. Also, we are requesting the salaries for all bridge inspector positions statewide. We would like these salaries to be separated by district. Example:

Dist. XX

BRSFIN III	\$1500 mo. w/10 yrs. service
BRSFIN III	\$1500 mo. w/10 yrs. service
BRSFIN II	\$1100 mo. w/7 yrs. service
BRSFIN II	\$1050 mo. w/6 yrs. service
BRSFIN I	\$1000 mo. w/1 yr. service

We are also requesting along with the salary increase, back pay to the date that the first Level III inspector in Dist. One received his increase.

Following adverse decisions at the lower levels, these grievants separately appealed to level four, and their grievances were styled Underwood v. W. Va. Div. of Highways, Docket No. 95-DOH-509; Shaw v. W. Va. Div. of Highways, Docket No. 95-DOH-570; and Smith v. W. Va. Div. of Highways, Docket No. 95-DOH-508.

Over the objection of all parties involved, these matters were all consolidated at level four by Administrative Law Judge Jeffrey N. Weatherholt by Order dated January 29, 1996, and styled Underwood, et al., v. W. Va. Dept. of Trans./Div. of Highways, Docket No. 95-DOH-509. [\(See footnote 1\)](#) Hearing was held in this Board's Charleston, West Virginia office on April 18, 1996, at which time this case became mature for decision.

Although arising out of the same facts, because the grievances in District One and District Four were not identical, each District presented its case separately.

Background

District One

Sometime in late 1994, Alvin Messenger, a Level III Bridge Inspection Crew Leader in District One, filed a grievance over not receiving a merit increase. Before that grievance reached level four, the parties settled the grievance, and Mr. Messenger received a 10% salary increase as a result of the settlement. That raise put Mr. Messenger's salary above all other Level III Crew Leaders in District One, although he had less time and experience in the position.

Steve Campbell, Bridge Engineer for District One, did not recommend Mr. Messenger for a merit increase in 1994, and did not believe the Messenger grievance should have been settled, in part because the other crew leaders in District One had received higher performance evaluations than Mr. Messenger. Mr. Campbell felt the pay raise to Mr. Messenger "created a serious pay inequity among [his] bridge inspection crew leaders", and on December 21, 1994, he requested a 7.5% merit raise be given to Charles Hudnall, and a 6.5% raise be given to Fred Mullins and Ross Warfield, in order to give those men a 10% total raise for the year, which matched that given to Mr. Messenger. LIV, G. Ex. 6. West Virginia Division of Highways Transactions Forms were prepared for those three gentlemen and processed through the proper channels. The reason given for the requested salary advancements was ". . . to correct a pay inequity." LIV, G. Ex. 2. Raises for the above three gentlemen were approved and became effective April 1, 1995.

The District One Grievants became aware of these increases on or about March 24, 1995, when they found, in a Xerox machine, a copy of a memorandum to Jeff Black, Human Resources Director, apparently from Carl Thompson, District Engineer for District One, requesting the raises for the above gentlemen. The memo stated that "[t]hese individuals are inspection crew leaders in our Bridge Department who have made an extraordinary effort in recent months to maintain a 100% inspection frequency in accordance with National Bridge Inspection Standards." LIV, G. Ex. 7.

Mr. Thompson indicated that the memo was written because it appeared the raises were being held up and he wanted to give additional justification for the raises. The memorandum was never signed nor sent to Mr. Black because raises were approved in the interim. Nonetheless, the Grievants became aware that a pay raise was being requested for the three Level III Crew Leaders and filed the above District One grievance.

District Four

The Grievants in District Four also found out in April 1995 that the Level III Crew Leaders in

District One had received salary increases. They felt the salary increases should not be limited to District One. They met with Randy Harris, District Four Bridge Engineer, who agreed that the Level III Inspectors in District Four should also receive salary increases. Harry Carr, the District Four District Engineer processed a request on April 25, 1995, for a salary adjustment for these individuals through the proper channels. LIII, G. Ex. 2. At the time the grievance was filed, on July 18, 1995, no response had been received regarding this request. On July 21, 1995, a response was received from the Human Resources Division acknowledging the outstanding job performance of the District Four personnel, but ultimately denying the request for a salary increase. LIII, G. Ex. 1.

It should be noted that the Grievants in this case occupy various classification titles, from Level I, II and III Bridge Inspectors to Highway Engineers III.

Discussion

District One

Grievants bear the burden of proving their claims by a preponderance of the evidence. W. Va. Code § 29-6A-6. The District One Grievants allege, in essence, that it was discriminatory for Respondent to have recommended raises for the three Bridge Inspection Crew Leaders and not everyone else in the District.

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). The District One Grievants cannot sustain a claim of discrimination in this matter, as they are not similarly situated to the employees who received the salary increases. See Reed v. Div. of Corr., Docket No. 95- CORR-033 (Apr. 30, 1996). The individuals who received the salary increases in District One were all Bridge Inspection Crew Leaders. None of the Grievants hold that classification. Without a showing that they are similarly situated to an employee who has been treated differently, the District One Grievants cannot establish a prima facie case of discrimination.

District One and District Four

The District One and District Four Grievants also allege that Respondent has violated the principle

of "equal pay for equal work" in awarding raises to District One Bridge Inspection Crew Leaders. Grievants believe that it was unfair for the Crew Leaders to be given salary advances, placing some of their salaries above others with more seniority, without giving the rest of the employees salary advances. Grievants maintain that salaries and salary advancements should be based on time in grade. Grievants argue that they have a legal entitlement to a salary greater than their counterparts who have less experience, seniority, responsibility and job duties. However, that is not the system the State of West Virginia works under with regard to its classification and pay plan.

Grievants' concerns have been addressed both by the West Virginia Supreme Court of Appeals and this Grievance Board. In Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W. Va. 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. [\(See footnote 2\)](#) 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 Transp., Docket No. 94-DMV-209 (Oct. 20, 1994), the grievant contended that her 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. 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 4; see also Salmons v. W. Va. Dept. of Transp., Docket No. 95-DOH-004 (Apr. 20, 1995).

Grievants are not legally entitled to an increase in salary just because other bridge inspectors recently received salary increases and now perhaps make higher salaries than they. This is not to

say that some confusion does not exist within the Districts regarding the raises given. Grievants correctly point out that the raises given to the three crew leaders following Mr. Messenger's settlement and resulting merit raise do not neatly fit into the category of "merit" raise.

The Division of Personnel has promulgated legislative rules, 143 CSR 1, governing, among other things, its compensation plans and salary guidelines. 143 CSR 1.3.82 defines the term "salary advancement" as "[a] discretionary advancement in salary granted in recognition of the quality of job performance." Salary advancements are generally referred to as merit raises. Further, 183 CSR 1.5.08(a) establishes the basis for which all salary advances are to be awarded, and the language of this section reads "[a]ll salary advancements are based on merit as reflected by performance evaluations and other recorded measures of performance e.g. quantity of work, quality of work, and attendance."

During the reclassification of all state employees, the Division of Personnel promulgated Pilot Administrative Guidelines to effectuate the transfer from the old classification and pay plan to the new plans. Pursuant to those Pilot Administrative Guidelines, appointing authorities could recommend "pay inequity" raises in situations where the reclassification put employees with many years of service and experience at the bottom of a pay grade. This provision was temporary only during the reclassification period, and on May 2, 1994, Robert L. Stephens, Jr., Director, Division of Personnel, advised all Cabinet Secretaries and Agency Heads that the salary equity provision had been deleted. LIV, G. Ex. 4.

Grievants contend that, other than the merit raise given to Mr. Messenger, the raises issued to the other three crew leaders in District One were not awarded consistent with the mandates of the Division of Personnel's regulations because they were not based upon "performance evaluations and other recorded measures of performance."

Grievants point out that the reason given for the three crew leaders raises was to correct a "pay inequity." Thus, Grievants contend that Respondent's assertions that the raises given were "merit" increases is incorrect and, in effect, those raises were given in violation of the Division of Personnel's Rules and Regulations. Lowell T. Basford, Director, Classification and Compensation, Division of Personnel, testified that Personnel's only function is to review the basic criteria to see if the individual being recommended for a raise is eligible, in terms of when they last received an increase, and how much of an increase is being recommended. If the individual is eligible, Personnel basically "rubber

stamps" the recommendation and processes the raise. Personnel does not undertake to review exactly what type of raise is being requested, and whether it falls within their rules and regulations.

Respondent maintains that the raises to the three crew leaders were "merit" raises. The undersigned agrees. The District Engineer did not like the fact that Mr. Messenger got a merit raise as a result of his grievance, while the other three crew leaders had better performance evaluations. Thus, the request for salary increases was motivated by those three individuals' performance evaluations, and an effort to correct the inequity that resulted from Mr. Messenger's raise.

Nevertheless, this discussion of "merit" vs. "equity" is a red herring. Grievants are not challenging the crew leaders' raises; rather, they want to get the same salary increase. Grievants cannot suggest the salary raises were illegal to begin with, and then expect to receive the same illegal raise. The more reasoned remedy would be to take the illegal raises away from the three crew leaders, not to give every other Division of Highways employee the same raise. See, e.g., Salmons v. W. Va. Dept. of Transp., Docket No. 95-DOH-004 (Apr. 20, 1995); King, et al. v. W. Va. Dept. of Transp., Docket No. 94-DOH-340 (Mar. 1, 1995).

Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. W. Va. Code § 29-6A-6.
2. The District One Grievants have failed to establish that Respondent engaged in discrimination when it issued merit increases to the three crew leaders in District One, following Mr. Messenger's 10% salary increase resulting from settling a grievance.
3. Both the District One and District Four Grievants have failed to establish a violation of the doctrine of equal pay for equal work. Largent v. W. Va. Div. of Health, 452 S.E.2d 42 (W. Va. 1994); Salmons v. W. Va. Dept. of Transp., Docket No. 95-DOH-004 (Apr. 20, 1995); Thomlinson v. W. Va. Dept. of Transp., Docket No. 94-DMV-209 (Oct. 20, 1994).

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

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.

MARY JO SWARTZ
Administrative Law Judge

Dated: May 21, 1996

[Footnote: 1](#)

For administrative reasons, this matter was reassigned to the undersigned Administrative Law Judge.

[Footnote: 2](#)

Code § 29-6-1 [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.