KELLY RICE,

Grievant,

v. Docket No. 96-DOH-180

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Kelly Rice, filed two grievances at Level IV. The first states: "Favoritism [;] Storekeeper II at district three equipment division is paid 33% more than I am. I was told when I came here that that would violate equal pay for equal work." The relief sought was "to be paid the salary that I had attained before coming here and back pay." The second grievance states: "favoritism [;] maintenance personnel at other organizations performing work of Storekeeper. e[.]g[.,] district three equipment divisions and others." The relief sought is "[w]ork available should be given to personnel available who have proper classification first." This grievance was denied at all lower levels. A Level IV hearing was conducted on March 12, 1997, and this case became mature on April 14, 1997, the deadline for theparties' proposed findings of fact and conclusions of law. The parties did not submit these proposals.

From a review of all the evidence of record the Undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed in District Three as a Storekeeper II in Wirt County with the Division of Highways ("DOH"). He has been employed in this capacity for four years. Prior to that time, he was employed by ABCC as a Store Manager. (See footnote 1) **When the state liquor stores closed, Grievant was laid off and applied for various other positions with the state. As a prior state employee, he had preference over non- state employees and received the position he currently holds.**

2. After reclassification, the Storekeeper II position was in a Pay Grade 4, with a salary

range of $12,276.00 to $20,016,00. Grievant's salary is $15,504.00. Level II Trans. at 41.

3. Mr. Kelsey Buckley, a Storekeeper II employed in the District Three Shop/Warehouse, receives approximately 33% more salary than Grievant. This employee has fifteen years of experience with DOH and has ten years of experience as a Storekeeper II. Mr. Buckley's salary is approximately $19,000.00. Level III Trans. at 41 & 43.

4. Maintenance employees fill in for Storekeepers when they are absent. Frequently, this arrangement results in absentStorekeepers having to do extra work upon their return to the position, such as inventorying and straightening the supplies and replacing parts.

Discussion

It must be noted that much of the evidence presented by Grievant related only tangentially to the statements on the grievance forms and the requests for relief. Apparently, Grievant has filed many grievances, and at times appeared to forget which grievance he was presenting at both Level III and Level IV.

Grievant's first complaint relates to the fact that another individual in his classification, Mr. Buckley, is paid considerably more than he. He argues that county storekeepers work harder than district store keepers, and thus, should be paid more money than district storekeepers. To prove this allegation, Grievant and another county storekeeper testified they work harder than district storekeepers. Neither employee has ever performed the duties of a district storekeeper.

Mr. Fulton Spears, a DOH employee for thirty-five years, is the Equipment Superintendent I, and is the number two man in the District Three Equipment Division. He evaluates the District Storekeepers and stated that his division has a greater amount of work than the county storekeepers in terms of monitoring supplies and providing a large volume of materials. He noted his division supplies seven counties, and the interstate and heavy maintenance groups with the supplies and equipment they need. Level III Trans. at 48. Grievant also states Mr. Buckley's greater salary is the result of favoritism and unjust pay increases. Grievant presented no evidence to support this theory, as he presented no evidence on Mr. Buckley's pay history, merit increases, evaluations, or the effects of Mr. Buckley's much greater seniority and prior classification as a mechanic.

W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

> **(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 other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant's complaint of favoritism, as it relates to salaries, must also be examined in light of the West Virginia Supreme Court's holding in Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994). W. Va. Code §29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Id. at Syl. Pts. 3 & 4. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Id. at 246.

Grievant and Mr. Buckley are both Storekeepers II, and both their salaries are within the appropriate pay range. Although Mr. Buckley receives a larger salary than Grievant, that fact alone does not demonstrate favoritism. As explained above, a state employee's salary is the

result of many factors, especially when the employee has worked for the state for many years. Thus, no violation of the equal pay provisions was established, nor has Grievant demonstrated that Mr. Buckley's larger salary is the result of favoritism. Accordingly, after a review of all the evidence before the Undersigned Administrative Law Judge, Grievant has failed to demonstrate that another employee's greater salary violates any rule, regulation, statute, or policy.

Grievant's second issue is styled as favoritism and a failure of DOH to allow him, a properly classified storekeeper, to fill infor absent storekeepers. He presented no evidence that any other storekeeper has been allowed to fill in for any absent storekeeper. It is also clear that if Grievant were allowed to fill in for a storekeeper in another county or in the district office, that an employee in Wirt County would be pulled from his classified position to perform Grievant's duties. Grievant would receive no monetary benefit from performing these duties as the employees he seeks to fill-in for are also classified as Storekeepers II. On closer questioning, it became clear Grievant seeks to fill in for the absent Storekeepers in the Wood County area only, as that is where his residence is located.

Grievant did not demonstrate any favoritism because no other employee has been allowed to do what he requests. Additionally, Grievant did not demonstrate that DOH had violated any rule, regulation, statute, or policy by not allowing Grievant to abandon his post in Wirt County to perform storekeeper duties in another area. DOH's method of occasionally shifting employees to perform the duties of a storekeeper outside of their regular classification does not appear to violate the Division of Personnel's Rules on classification. See W. Va. DOP Admin. Rule 4.04 (a) & (d). However, if an individual thinks he is required to work outside his classification inappropriately, he may file a grievance. Grievant has no standing to grieve this issue as he has not been asked to perform duties outside his classification.

The above discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a non-disciplinary grievance, the grievant has the burden of proving his case by a preponderance of the evidence. W. Va. Code § 29-6A-6.

2. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as

demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

3. To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

> **(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 other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 4. Grievant failed to establish a prima facie case of favoritism in either of the two issues raised before the Undersigned Administrative Law Judge.

5. W. Va. Code §29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S. E.2d 42 (1994). 6. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Id. at 246.

7. A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or

health and safety. W. Va Code § 29- 6A-2(i); Ball v. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997).

8. Grievant did not demonstrate Mr. Epler's management decisions to not allow him to abandon his Wirt County position to substitute in another county violated any rule, regulation, or statute, or constituted a substantial detriment to, or interference with, his effective job performance or health and safety. Accordingly, these grievances are 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 29, 1997

Footnote: 1

It is unclear from the record, but likely from the dates and information presented, that Grievant held intervening state positions before he obtained the Storekeeper II position with DOH.