CLYDE EMIGH, CHARLES ROBINETTE,

GARY MOWER, AND TROY WILLIS,

Grievants,

v. **Docket No. 99-HHR-408**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU OF PUBLIC HEALTH

and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants, Clyde Emigh, Charles Robinette, Gary Mower, and Troy Willis are employed as Engineer II's, in the Office of Environmental Health Services ("OEHS"), which is within the Bureau of Public Health ("BPH") in the Department of Health and Human Resources ("HHR"). They each filed a grievance on the same issue between July 20 and 26, 1999. Their Statements of Grievance note that two new hires received a starting salary higher than the minimum, and the new hires are paid more than they are with all their years of experience. They asserted this action was discriminatory, demonstrated favoritism, and violated Division of Personnel ("DOP") policies. The Relief Sought varied with each Statement of Grievance, but the key was that all Grievants want a salary increase and to be paid more than the new hires.

These grievances were denied at all lower levels. Grievants' immediate supervisor, Russell Rader, believed these grievances should be granted, but he was without authority to do so. Upon appeal to Level IV, a hearing was held on March 2, 2000. (See footnote 1) Grievants were represented by Attorney Mary McQuain, Respondent HHR was represented by AssistantAttorney General B. Allen Campbell, and Respondent DOP was represented by Mr. Lowell Basford, Assistant Director of Compensation and Classification. This case became mature for decision on May 1, 2000, the deadline for the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievants' arguments have changed over time. Some of the issues represented a new Statement of Grievance and were not raised until the Level IV hearing. As Respondents objected, these arguments were not allowed pursuant to the West Virginia Supreme Court of Appeals ruling in Hess v. West Virginia Department of Health and Human Resources, 189 W.Va. 357, 432 S.E.2d 27 (1993), which states, "the final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j), can occur is at Level III." (See footnote 2)

Also at Level IV, Grievants wished to clarify and amend their grievance. They stated they were no longer arguing the salaries received by the new hires were incorrect and should not have been received, but now stated the discrimination and favoritism was the failure of HHR to increase their salaries after the new hires were in place. (See footnote 3) Since thisargument was very similar it was allowed. Grievants also contended there was sufficient money in the budget to grant the increase they requested, and they should be given the raises they seek because there are recruitment and retention problems within their classification in HHR. Grievants also asserted that by statute, DOP should play no role in granting these increases, and HHR could grant the requested increases without DOP's input. (See footnote 4) Grievants also stated it was necessary for West Virginia to maintain a merit system to qualify for the federal program, and since HHR had not given many merit increases in recent years, HHR was failing to meet this requirement. (See footnote 5)

Grievants also asserted, at Level IV, that the Director of BPH, Dr. Henry Taylor, was angry at the Engineers as a group for filing prior grievances and had "discriminatory animus" toward them, and this is why he would not recommend a salary increase. Grievants did not argue retaliation. This specific type of discrimination was not raised inthe original grievances, but since the issue of discrimination was raised, this example of possible discrimination will be examined.

Respondents argued there has been no violation of any rule, regulation, policy, or statute, and HHR has followed DOP rules and regulations in setting the salaries for the new hires. Respondents noted the case of Largent v. West Virginia Division of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994) was directly on point. Respondents maintained there were problems in the recruitment of Engineers, and to compete with private businesses, it was necessary to increase the starting salary offered to these new hires. Additionally, Respondents noted the salary offered to one of the new hires was mandated by DOP rules governing promotion. DOP observed that although there was a fairly recent rule which made it possible for DOP to allow an agency to increase the salary of current employees

when there were recruitment and retention problems, DOP does not take action on this issue on its own, but waits for the agency to make a request with supporting documentation. Such a request had not been forthcoming from HHR.

The majority of the facts are not in dispute and will be set out below as formal findings.

Findings of Fact

1. Grievants are employed as Engineer II's and work in the OEHS section of BPH. Their functional title is District Supervising Engineer. Grievant Robinette has received a new position and is now classified as an Engineer IV. His prior position has been posted as an Engineer III. The other Grievants perform the same duties as GrievantRobinette did, and they are required to supervise a number of people in their district offices.

2. Grievants are responsible for carrying out many of the mandates of the Safe Drinking Water Act in their districts in West Virginia. HHR receives federal funds for conducting this program.

3. Grievant Emigh has 23 years of experience with the state, Grievant Mower has 21 years of experience with the state, Grievant Robinette has 9 years of experience with the state, and Grievant Willis has 4 years of experience with the state.

4. The Federal Government, through the Environmental Protection Agency ("EPA") requires the Safe Drinking Water Act Program to be staffed adequately to maintain the components of the program. The Federal Government also requires the employees in the state's program be within a merit system.

5. In recent years, the EPA has expressed concern about the under staffing of the Safe Drinking Water Program in West Virginia, and has threatened removal of grant moneys. The EPA has directed West Virginia to address the issue of recruitment and retention.

6. All Grievants are qualified for their positions, and are effective, valued, and competent employees.

7. Because of the low salaries, BPH has had a problem in retention and recruitment in recent years. The salary range for Engineer II, pay grade 18, is $31,000 - $51,720. 8. The Engineer II position received by Walter Ivey, one of the new hires, was posted several times before anyone applied for the position. At the time of his application, Mr. Ivey was employed as an Engineer I with the Division of Natural Resources. Mr. Ivey was selected by the Interview Committee as the most

qualified of all the candidates. In fact, Mr. Ivey was felt to be "head and shoulders" above the other applicants.

9. DOP Rule § 5.5(a), "Pay on Promotion" states the following:

> When an employee is promoted, the employee's pay shall be adjusted as follows: (a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater, but in no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

Accordingly, the rules mandated that Mr. Ivey received a 5 percent increase in his salary when he received the position, because upon transfer he was promoted from an Engineer I to an Engineer II.

10. Mr. Ivey received his Engineering Degree in 1986, and had worked with private industry until 1991 when he was hired by the Division of Natural Resources ("DNR"). His annual DNR salary at the time he was hired by HHR was $39,400.00. With the required five percent increase, his starting salary as an Engineer II at HHR was approximately $41,400.00. He received the across-the-board increase received by Grievants, and his salary on July 1, 1999, was approximately $42,120.00.

11. There was also difficulty in finding a qualified candidate for the Engineer II position eventually filled by Arnold Keaton. Mr. Keaton applied and was selected by the Interview Committee, from the register, as the most qualified applicant.

12. Mr. Keaton received his Engineering Degree in 1974, and worked in private industry (mining) for twenty-three years. His prior salary as Chief Engineer with Cannelton Industries was $75,000. Because of the need to fill the position, Mr. Keaton was able to negotiate a higher than minimum salary with HHR. His starting salary as an Engineer II at HHR was approximately $38,160.00. (See footnote 6)

13. DOP Rule 5.4 (b), "Entry Salary" governs the salary received by Mr. Keaton and states the following:

> The entry salary for any employee shall be at the minimum salary for the class. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the mid-point of the salary range, unless otherwise

> prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize appointment at a rate above the mid-point where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

14. The new hires were qualified for these positions, and their salaries met all DOP Rules and Regulations in terms of experience and training. They did not have experience with the Safe Drinking Water Act. 15. Grievants' salaries at the time of filing this grievance were approximately: 1) Grievant Willis - $37,900.00; 2) Grievant Robinette - $38,500.00; 3) Grievant Mower - $39,900.00; and 4) Grievant Emigh - $41,640.00.

16. The new hires work in the Central Office. (See footnote 7)

17. The issue of whether Grievants' positions should be reallocated to Engineer III's was placed on hold until Grievants received their pay equity increase. Grievants received this increase in September, 1999, after these grievances were filed. No testimony was elicited about further developments in this area. Grt. Ex. No. 1, at Level IV.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

This grievance presents an unfortunate set of circumstances. Grievants, employees with many years of experience, are now paid less than newly hired employees. It is regrettable that this has happened, but unfortunately this is a fairly frequent occurrence within state government, especially in positions that have recruitment problems. See Hartley v. Bd. of Trustees, Docket No. 96-BOT-347 (Mar. 31, 1997).

Grievants have made multiple arguments, and they will be addressed separately.

I. Equal pay for equal work Grievants argue the concept of equal pay for equal work has been violated by hiring these individuals at salaries higher than theirs. Grievants' equal pay for equal work argument must fail. First, "[t]he West Virginia Equal Pay Act, W. Va. Code § 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based

on merit is in effect." Syl. Pt. 2, Largent, supra. Grievants' employer, the state, has "in place a duty-linked civil service system", and thus, is not covered by the Equal Pay Act. Id. at 243. Further, although W. Va. Code § 29-6-10 does require employees who are performing the same responsibilities to be placed in the same classification, that Code Section does not require these employees to be paid exactly the same. Id. at Syl. Pts. 3 and 4. See Hartley, supra. Previous decisions of this Grievance Board have interpreted that provision to mean that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Since Grievants and the new hires are all within the Engineer II classification, and all are paid within this pay grade, the undersigned Administrative Law Judge cannot find any violation of the equal pay for equal work concept. Largent, supra.

II. Discrimination and favoritism

Grievants also argue that it demonstrates discrimination and favoritism when employees with less seniority and experience are awarded salaries in excess of theirs when their salary have not been similarly increased. Discrimination is defined in 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." 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."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 8) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), 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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievants have not met their burden of proof and established a prima facie case of discrimination or favoritism as Grievants and the new hires are not similarly situated. They are all in the same classification, but the new hires were employed at a later time when HHR was unable to employ someone at a lower wage and was under great pressure from the EPA to correct the under staffing problem. HHR posted the positions at lower wages, but had no takers. HHR was only able to employ someone when it increased the salary.

If the grievance were to be viewed as Grievants having established a prima facie case of discrimination by establishing the positions at issue are similarly situated, HHR has presented legitimate, job-related reasons for these differences. The same reasoning as stated above applies. HHR was unable to hire Engineers for the pay grade's minimumsalary. To obtain adequate staffing required by the EPA it was compelled to offer a higher salary.

The holding of the West Virginia Supreme Court of Appeals in Largent is instructive in examining this issue of discrimination and favoritism. See also Salmons, supra; Hickman, supra; Tennant, supra. Largent dealt with employees in a situation similar to Grievants. The West Virginia Supreme Court of Appeals held that "employees who are performing the same tasks with the same responsibilities should be placed within the same job classification", but a state employer is not

required to pay these employees at the same rate. Largent at Syl. Pts. 2 & 3. Additionally, 128 C.S.R. 62, § 19.4 states any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .". As noted by the West Virginia Supreme Court of Appeals in Largent, 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. A state employee's salary is the result of many factors, especially when the employee has worked for the state for many years. Consistent with Largent, supra, Grievants and the new hires are being paid in accordance with the pay scale for their employment classification, Engineer II. As in Largent, and prior decisions of this Grievance Board, Grievants have not shown there was any discriminatory motive or favoritism when HHR set the salary for the new hires at a level higher than Grievants' salaries, or that it was an act of discrimination and favoritism to notincrease their salaries after the new hires were employed. See Iseli v. Div. of Corrections, Docket No. 99-CORR-260 (Dec. 29, 1999).

Further, as explained by Mr. Basford, Mr. Ivey was entitled to a pay raise upon promotion in accordance with DOP's Rule 5.5(a). This increase was mandatory, and HHR had no discretion in the matter. Certainly it would be unfair to promote Mr. Ivey to an Engineer II, and then decrease his salary. Additionally, Mr. Keaton was able to negotiate his salary due to his experience and HHR's need to fill the positions. Singleton v. Dep't of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1006); Rice v. Dep't of Transp., Docket No. 96-DOH-180 (Aug. 29, 1997). Thus, Grievants have not demonstrated the larger salaries are the result of discrimination or favoritism.

Further, although Grievants state it is an act of discrimination and favoritism to not increase their salaries, they have not pointed to any rule, regulation, policy, or statute which requires this action, and Mr. Basford stated there was no requirement to increase Grievants' salaries. Grievants cite the increase HHR gave to a supervisor in the Fraud Investigation Unit as support for these arguments. In that set of facts, the subordinates of the supervisor were given a 15 percent increase, which made their salaries higher than their supervisor. This situation was corrected by then giving the supervisor a 15 percent increase. Grievants are not similarly situated to the supervisor in this example. Grievants are not the supervisors of the new hires and are within the same classification.

As for the argument of "discriminatory animus" by Dr. Taylor, the only evidence to support Grievants' contention was the hearsay testimony of Mr. Rader, who is no longer employed at HHR. Mr. Rader stated Dr. Taylor said several times that he was angry withEngineers for filing grievances. However, when Mr. Rader requested that Dr. Taylor process the reallocations (See footnote 9) , Dr. Taylor said he would not but did not give Mr. Rader a reason. At Level II, Dr. Taylor explained he was directed by his supervisor, Virginia Tucker, that no other pay increases would be processed until the pay equity awards had been received and processed. Grievants did not testify about hostile treatment or remarks made to them by Dr. Taylor. Given this limited testimony, it is impossible to find discrimination.

Grievants have not shown an entitlement to an increase. The type of increase they seek would be discretionary, and a discretionary increase, by its very nature, is non- mandatory and indicates an employer may grant the increase if it so chooses.

Accordingly, after a review of all the evidence before the undersigned Administrative Law Judge finds, Grievants have failed to demonstrate the new hires' greater salaries violate any rule, regulation, statute, or policy or demonstrates discrimination or favoritism.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Discrimination is defined in 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."

3. 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."

4. To prove discrimination and/or 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); Parsons v. W. Va. Dep't of Transp., Docket No. 91- DOH-246 (Apr. 30, 1992); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). 5. Grievants have failed to establish a prima facie case of discrimination and/or favoritism as they have not demonstrated they are similarly situated to the new hires.

6. 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).

7. Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classifi cation. Largent, supra; Nafe v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

8. 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." Largent, supra at 246.

9. Assuming Grievant established a prima facie case of discrimination and favoritism, HHR established legitimate, non-discriminatory reasons for its actions by demonstrating that the higher salaries were necessary to fill the positions, especially in light of EPA's directive.

10. Grievants did not meet heir burden of proof and demonstrate Dr. Taylor had refused to process appropriate salary increases due to discriminatory animus.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: May 31, 2000

Footnote: 1

A hearing was scheduled for January 20, 2000, but the parties elected to use this time for discovery.

Footnote: 2

Grievants argued the failure to increase their salaries after the new hires came on board with their higher salaries was a violation of the Safe Drinking Water Act. This issue had not been raised at any time prior to the start of the Level IV hearing. Respondents noted they had no advance notice that issue would be raised, and they objected to it. It is noted the Safe Drinking Water Act does not mandate salaries for specific employees, and HHR is required only to identify the amount spent on personnel, but not to detail individual salaries.

Footnote: 3

Additionally, during the presentation of evidence at Level IV, Grievants presented some evidence there had been a change and increase in their work duties, anddiscussions had been held with DOP about reallocating Grievants to Engineer III positions. Grievants stated this was not a misclassification grievance, and Respondents objected as this was not an issue previously raised at the lower levels.

Footnote: 4

This argument will not be discussed further, as Grievants did not demonstrate HHR wanted to increase Grievant's salaries and could not do so because DOP refused to approve this decision. It is noted that there appears to be a conflict

in the requirements from the federal government. W. Va. Code § 16-13c-3 states BPH has the authority to employ engineers in the Safe Drinking Water Act and to determine their compensation without the approval of any other agency. The federal government also requires states receiving funds to have a merit system. This conflict was noted at hearing, but was not addressed in Grievants' proposals.

Footnote: 5

This argument must fail as there is much more to maintaining a merit based employment system than just merit increases. As explained by Mr. Basford, to have a merit system the state must, for example, hire from a certified register, base promotions on merit, treat people within the same classifications equally, and have a system of rules and regulations governing an employee's employment.

Footnote: 6

Although Grievants state Mr. Keaton's salary is above the mid-point for the pay grade it is not. See Finding of Fact 7.

Footnote: 7

Mr. Ivey is now serving as the Acting Administrator of the Drinking Water Treatment Program.

Footnote: 8

A 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: 9

Mr. Rader incorrectly called the request to change Grievants' classification promotions.