MICHAEL GILLUM,

Grievant,

v.

Docket No. 01-DOH-012

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant, Michael Gillum, against his employer, Respondent, Department of Transportation/Division of Highways ("DOH"), alleging that he was “the victim of gender based discrimination perpetrated by district 2 management. District 2 management also willfully and intentionally misapplied requirements for advancement to favor the above named parties at the expense of my opportunities to advance.” The employees named by Grievant who had received favorable treatment were Yvonne Cantrell, Cheryl Adams, Anna Belle Forth, Lisa Brown, Sue Thomas, and Christy Mullins. (See footnote 1) As relief, Grievant sought the following:

1 1. Immediate elevation of pay to that of the highest paid female employee hired after February 1990.

2 2. Salary adjustment retroactive to date determined above paid in lump sum.

3 3. Delivery of a letter written by district management admitting that promotion requirements have been misused to hinder my career.

4 4. Computation of any past salary adjustments to coincide with the salary

adjustment above on a same date basis. (See footnote 2)

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

Findings of Fact

1. Grievant was hired by DOH on February 26, 1990. He works in District 2, Organization 0279, as a Transportation Engineering Technician - Associate, pay grade 11. (See footnote 3) He passed the examination necessary to advancement to the Engineering Technician classification in 1992, and he passed the examination necessary to advancement to the next highest classification in 1997, although he had not obtained the experience required for advancement into these positions at the time he passed either exam.

2. Cheryl Adams is a female, hired by DOH in Organization 0279, on May 7, 1990, as a Transportation Engineering Technician - Associate. Her position was reallocated to a Transportation Engineering Technician, pay grade 14, on September 1, 1997, when she met the requirements for that classification. She was performing the duties of the position for a period of time prior to the reallocation. The position was not posted as a Transportation Engineering Technician.

3. Lisa Brown is a female, hired by DOH in Organization 0279, on March 22, 1993, as a Transportation Engineering Technician - Associate. Her position was reallocated to a Transportation Engineering Technician on May 16, 2000, when she met the requirements for that classification. She was performing the duties of the position fora period of time prior to the reallocation. The position was not posted as a Transportation Engineering Technician.

4. Sue Thomas is a female, hired by DOH March 22, 1993, in Organization 0279, as a Transportation Engineering Technician - Associate. Her position was reallocated to a Transportation Engineering Technician on September 16, 2000, when she met the requirements for that classification. She was performing the duties of the position for a period of time prior to the reallocation. The position was not posted as a Transportation Engineering Technician.

5. Scott Eplin and Donald Bryant are males, and were hired by DOH in Organization 0279, after Grievant. Both are Transportation Engineering Technicians.

6. Ronnie Brogan and Odell Scites are male employees in DOH's Organization 0279, who have passed the testing requirements to advance to the Transportation Engineering Technician classification. They were hired by DOH on August 26, 1985, and February 16, 1988, respectively,

well before Grievant was employed. Both are in the same classification as Grievant.

7. Twenty-four employees in DOH's organization number 0279, including Grievant, are in the same classification as Grievant. Only one of those employees is a female.

8. Thirty-two employees in DOH's organization number 0279 are classified as Transportation Engineering Technicians. Eight of those employees are female.

9. Employees classified as Transportation Engineering Technicians and employed by DOH are responsible for managing an office or supervising a project. Most of the employees who are office managers are female. None of the employees who is supervising a project is female. 10. Anna Belle Forth, a female, was hired in DOH's Organization 0279 on January 13, 1992. She is a Secretary 2. Her salary is $116.00 per month more than Grievant's salary.

11. Rodney Asbury, a male, was hired in DOH's Organization 0279 on February 14, 1995, and is employed in the same classification as Grievant. His salary is $141.00 per month more than Grievant's salary, and it is also $25.00 more per month than Ms. Forth's.

12. Phil Ray Williamson, a male, was hired in DOH's Organization 0279 on September 21, 1992, and is employed in the same classification as Grievant. He makes $91.00 more per month than Grievant.

13. Gwen Elgin Conley, a male, was hired in DOH's Organization 0279 on August 24, 1992, and is employed in the same classification as Grievant. He makes $122.00 more per month than Grievant.

14. Granville Joseph Justice, a male, was hired in DOH's Organization 0279 on July 26, 1993, and is employed in the same classification as Grievant. He makes $26.00 more per month than Grievant.

15. Kenneth Ray Ross, a male, was hired in DOH's Organization 0279 on March 26, 1992, and is employed in the same classification as Grievant. He makes $113.00 more per month than Grievant.

16. Carter Muncey, a male, was hired in DOH's Organization 0279 on April 10, 1991, and is employed in the same classification as Grievant. He makes $97.00 more per month than Grievant.

17. Thomas Michael Smith, a male, was hired in DOH's Organization 0279 on April 10, 1991, and is employed in the same classification as Grievant. He makes $137.00 more per month than Grievant.

Discussion

Grievant bears the burden of proving his allegations by a preponderance of the evidence. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Grievant claims discrimination and favoritism, based upon his belief that female employees have been advanced into the Transportation Engineering Technician classification ahead of him, and he has not been given the opportunity to advance as the female employees have. DOH denied that it had discriminated against Grievant, or shown favoritism toward female employees, pointing out that male employees hired after Grievant have also advanced, and there are few females in the higher classification.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

This definition encompasses all types of discrimination, including discrimination based upon gender. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95- BOT-387 (Jan. 31, 1995).

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." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell

County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Steele, supra. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

The only evidence presented by Grievant was that he had asked for the opportunity to advance, and had not been given this opportunity, while three female employees hired after him have received advancement. Grievant presented no evidence for the undersigned to evaluate whether there was any “known or apparent justification” for the female employees being advanced. The evidence presented by DOH clearly demonstrates that only one-fourth of the employees in the classification sought by Grievant are female, and that not only have females hired after him received advancement into this classification, but males hired after Grievant have also been advanced into this classification. This evidence demonstrates that Grievant's claim that females have received more favorable treatment than males is without merit. Further, he presented no evidence which would tend to show that he was more deserving of advancement than any other employee, male or female. Although he asserted it was “without question that I have more experience in more of the examples of work of the level three than they do,” heprovided no factual information to substantiate his opinion. Grievant has not demonstrated that he is the victim of discrimination.

As to Grievant's complaint that Ms. Forth makes more money than he does, the record also reflects that several male employees hired after Grievant make more money than he does. He apparently has no problem with other males making more than he. Grievant did not demonstrate he was deserving of a salary equal to or higher than Ms. Forth's. DOH employee salaries are not based solely upon seniority. Further, Wilson Braley, District 2 Administrator, testified that Respondent's Level III Exhibit 2 shows Grievant's employment history, including medical leaves of absence.

Although the exhibit is not entirely clear, it appears Grievant has been on medical leaves of absence for extended periods of time: from April 29, 1994, to June 21, 1994; from October 24, 1994, to October 26, 1994; from October 28, 1994, to October 31, 1994; from April 1, 1996, to August 27, 1996; and from October 28, 1996, to April 22, 1998. This would certainly easily explain why his salary has not kept up with that of his fellow employees. If the undersigned has read the notations on this exhibit correctly, it would also explain why he was not assigned to the Transportation Engineering Technician position held by Cheryl Adams, whose position was reallocated to this classification in 1997. Grievant has not demonstrated any discrimination with regard to salaries.

Grievant also alleges that DOH violated W. Va. Code §§ 29-6-10 and 29-6-20, and that it is not properly using the classification system in order to promote certain employees and not others. In support of his allegations, Grievant pointed to the fact that three female employees who were hired after he was, and in the same classification as he, have attained a higher classification than he without their jobs being posted, even though he has asked to be promoted. He believes DOH was required to post the positions as Transportation Engineering Technicians. W. Va. Code § 29-6-10 authorizes the State Personnel Board to promulgate rules. W. Va. Code § 29-6-20 prohibits favoritism on the basis of religion or race. Code § 29-6- 20 is not applicable to this grievance. Code § 29-6-10 is applicable only as support for the Division of Personnel's requirement that job openings be posted. Rule 9.7 of the Division of Personnel's Administrative Rules provides as follows:

> 9.7. Posting of Job Openings - Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.
>
> (a) The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer. . . .

The term “vacancy” is defined as “[a]n unfilled budgetary position in the classified service to be filled by original appointment, promotion, demotion, lateral class change, transfer, or reinstatement.” Thus, positions which are not budgeted cannot be vacancies, and posting is not required; nor can the position be posted, as funds have not been allocated to bring new employees on staff. Workman v.

W. Va. Div. of Corrections, Docket No. 97- CORR-153 (Sept. 11, 1997).

The positions in question were reallocated. The Division of Personnel's Rule 3.78 defines reallocation as, "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." A grievant challenging the reallocation of a position, arguing it should have been posted, has the burden of demonstrating that a "budgeted 'job opening' or 'vacancy' . . . existed." Junkins v. W. Va. Div. of Labor, Docket No. 91-DOL-460 (May 29, 1992). Absent such a showing, an agency is not required to post a position. Id. In this case, Grievant did not demonstrate that the jobs at issue were budgeted job openings which had to be posted. The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

This definition encompasses all types of discrimination, including discrimination based upon gender. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95- BOT-387 (Jan. 31, 1995).

2. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 29-6A-2(d) and (h), a grievant must demonstrate the following:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,

> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant did not demonstrate he was the victim of favoritism or discrimination. 4. Rule 9.7 of the Division of Personnel's Administrative Rules provides as follows:

> 9.7. Posting of Job Openings - Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.

> (a) The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer. . . .

The term “vacancy” is defined as “[a]n unfilled budgetary position in the classified service to be filled by original appointment, promotion, demotion, lateral class change, transfer, or reinstatement.”

5. Positions which are not budgeted cannot be vacancies, and posting is not required; nor can the position be posted, as funds have not been allocated to bring new employees on staff. Workman v. W. Va. Div. of Corrections, Docket No. 97-CORR-153 (Sept. 11, 1997). A grievant challenging the reallocation of a position, arguing it should have been posted, has the burden of demonstrating that a “budgeted 'job opening' or 'vacancy' . . . existed.” Junkins v. W. Va. Div. of Labor, Docket No. 91-DOL-460 (May 29, 1992). Absent such a showing, an agency is not required to post a position. Id.

6. Grievant did not demonstrate that any of the jobs at issue were vacancies which had to be posted.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filedwithin 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 30, 2001

Footnote: 1

The only evidence presented on Yvonne Cantrell's employment was her date of hire, that her work area was "office," and that she is no longer a DOH employee. The only evidence presented about Christy Mullins was her date of hire, and that her work area is "maint.".

Footnote: 2

This grievance was filed on October 12, 2000. Grievant's supervisor denied the grievance on October 13, 2000, and Grievant appealed to Level II on October 23, 2000. The grievance was denied at Level II on November 21, 2000, and Grievant appealed to Level III on November 27, 2000. A Level III hearing was held on December 5, 2000, and a decision denying the grievance at Level III was issued on January 5, 2001. Grievant appealed to Level IV on January 10, 2001. The Level IV hearing was held on March 7, 2001. Grievant represented himself, and Respondent was represented by Jennifer E.Francis, Esquire, who was allowed to appear by telephone. This matter became mature for decision upon receipt of Respondent's post-hearing written argument on March 28, 2001. Grievant declined to submit written argument.

Footnote: 3

Grievant stated he is being paid in pay grade 10. The record reflects, however, that he is being paid within the pay range of a pay grade 11, and that his classification is in pay grade 11. It appears that Grievant's classification may have been changed by the Division of Personnel from pay grade 10 to pay grade 11. Grievant would not have received a salary increase as a result of this change, as his salary was within the pay range for a pay grade 11. If Grievant's personnel records list his pay grade at 10, this should be corrected.