REBECCA HUGHART,

Grievant,

v.

DOCKET NO. 00-DOH-351D

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS

and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

On or about November 8, 2000, Grievant, Rebecca Hughart, filed this grievance as well as a notice of default, against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH") and the West Virginia Division of Personnel ("DOP"):

> I believe I am being discriminated against regarding my rate of pay because I was not given credit for prior related work experience. As other new hires/transfers have been, and as provided for in Div. of Personnel Administrative Rule 5.4(b).
>
> Relief sought: To have my rate of pay increased commensurate with prior work experience, to receive back pay with interest retroactive to June 1, 2000, and to be made whole in any other way.

A default hearing was held in the Grievance Board's Charleston, West Virginia, office on February 16, 2001, and by order dated February 28, 2001, the Grievance Board granted the default. Subsequently, this matter came for hearing of the merits at level four in the Grievance Board's Charleston, West Virginia, office, on May 11, 2001, and became mature on July 9, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Joseph Hill, AFSCME representative, the Division of Highways ("DOH") was represented by Jennifer E. Francis, Esq., and the Division of Personnel ("Personnel") was

represented by Robert Williams, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

DOH Exhibits

Ex. 1 -

W. Va. Dept. of Transportation Employment Form 504 for Rebecca Hughart, effective June 22, 2000.

Ex. 2 -

W. Va. Div. of Personnel Register for Transportation Worker I, effective March 24, 2000.

DOP Exhibits

Ex. 1 -

November 19, 1999 letter from David Tincher to Rebecca Hughart.

Ex. 2 -

WV-11 Personnel Action Form for Rebecca Hughart, approved November 29, 1999.

Ex. 3 -

WV-11 Personnel Action Form for Rebecca Hughart, approved December 8, 1999.

Ex. 4 -

WV-11 Personnel Action Form for Rebecca Hughart, approved May 3, 2000.

Ex. 5 -

W. Va. Div. of Personnel Candidate Summary for Rebecca Hughart.

Ex. 6 -

W. Va. Div. of Personnel Personnel Transaction Card for Rebecca Hughart.

Ex. 7 -

Receipt for Certified Mail sent to Rebecca Hughart.

Ex. 8 -

Notice of reduction-in-force, signed by Rebecca Hughart, David Tincher, and George Hampton, dated November 18, 1999.

Ex. 9 -

W. Va. Div. of Personnel Pilot Salary Schedule, October 1, 1998.

Grievant's Exhibits

Ex. 1 -

Facsimile from Marilyn Kendall to Ernie Larzo, dated May 3, 2001, with attached personnel action forms for Rebecca Hughart.Ex. 2 -
Consolidated Public Retirement Board Statement for Rebecca Hughart, dated March 19, 2001.

Testimony

DOH presented the testimony of Jeff Black and Joe Smith. Grievant testified in her own behalf and presented the testimony of Scott Padon, Virgil DiTrapano.

FINDINGS OF FACT

I find, after a careful review of the evidence of record in this matter, the following facts have been proven by clear and convincing evidence.

1. Grievant was employed by the Department of Administration in the Operations Section of the Purchasing Division (“the Print Shop”) from May 2, 1977, until November 30, 1999, as a Duplicating Equipment Operator II.

2. On November 18, 1999, the State Personnel Board approved a reduction-in- force for the Print Shop, to be effective November 30, 1999. Grievant, along with the other employees in the Print Shop, were notified by David Tincher, Director of the Purchasing Division, on November 19, 1999, that they would be laid off, effective November 30,1999. Mr. Tincher's letter informed Grievant that the Print Shop was being taken over by the Division of Corrections, and that she could accept an offer from Corrections of “a 90-day temporary appointment and a 30-day emergency appointment,

which provides for approximately five (5) months of employment." Mr. Tincher also informed Grievant that, if sufficient monies were generated by the Print Shop, she would be offered a permanent reinstatement to a classified service position at the end of the temporary period. DOP Ex.

1. 3. Grievant acknowledged in writing that she had been informed of the reduction-in-force, and accepted the offer by Corrections of a 90-day temporary appointment, along with a 30-day emergency appointment, for a total period of five months, to begin December 1, 1999. DOP Ex. 8.

4. At the time of her layoff from the Print Shop, Grievant was compensated at the rate $11.32 an hour, or approximately $23,500.00 per year.

5. During Grievant's temporary appointment with Corrections, she remained in the same classification and received the same rate of pay she had when she was laid off from the Print Shop. Grievant's temporary appointment with Corrections terminated on May 30, 2000.

6. Two days later, on June 1, 2000, DOH hired Grievant as a Transportation Worker I - Crafts Worker. This was an original appointment from the preference list of the civil service register, a position she attained because of her seniority at the Print Shop at the time of her layoff. DOH Ex. 2.

7. Initially, Grievant's rate of pay with DOH was $7.16 per hour, and she was considered a "new hire", having been selected from the preference register for civil service employees.

8. Grievant's position at DOH requires an 8th grade education. Grievant has a high school diploma, and was given credit for her four years of additional schooling beyond the requirement for the position. Specifically, she was given 5% above the minimum for every six months experience or schooling, resulting in a salary 40% above the minimum for her pay grade. 9. Grievant filed a grievance over her rate of pay. Jeff Black, Director of Human Resources for DOH, did not believe Grievant's starting pay was appropriate given her years of service with the State, and agreed to adjust her pay upwards to a rate of $8.74 per hour or $1,514.94 per month, within the range established for the Transportation Worker I classification ($14,893-$26,562).

10. In determining Grievant's rate of pay, Mr. Black looked at what other employees in the Transportation Worker I classification were making, and believed $8.74 was a compromise that would not affect the morale of the other workers with more experience and seniority than Grievant. The $8.74 figure falls just below the mid-point of the pay grade for Transportation Worker I. Mr. Black testified that to go above the mid point, he would have had to make a special request to DOP. The only exceptions allowing new hires to come in above the mid-point are recruitment and retention

problems. That was not the case in this instance, and Mr. Black did not feel he could make a good faith argument to DOP to hire Grievant above the mid-point range. To have hired Grievant at her former rate of pay would have placed her near the top of the pay grade range for Transportation Worker I.

11. Grievant was not “transferred” from Corrections because she was not a permanent employee at the time DOH hired her. DOP Ex. 3; G. Ex. 1; DOP Ex. 8.

12. Grievant had no prior work experience with DOH.

DISCUSSION

Grievant initiated this grievance alleging her prior work experience with the Print Shop was not properly taken into consideration when establishing her rate of pay withDOH. Grievant believes her starting rate of pay should have been at least equal to her rate of pay when she was last employed with the Print Shop. Grievant's belief is based in part upon an assumption that she was “transferred” from Corrections to DOH, as opposed to being a “new hire.”

As noted above, Grievant prevailed in her claim that DOH defaulted in processing her grievance on this matter. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a level four hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Myers v. W. Va. Dept. of Health and Human Resources, Docket No. 00- HHR-392D (Mar. 30, 2001); Parsons v. W. Va. Div. of Corrections, Docket No. 99-CORR- 056D (July 19, 1999).

The language of W. Va. Code § 29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the case when the employer did not timely respond to the complaint. Friend v. W. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-346D (Nov. 25, 1998). To rebut the presumption, a respondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Myers, supra; Lohr v. W. Va. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999). Clear and convincing evidence is “[t]hat measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to allegations sought to be established; it is intermediate, being more that mere preponderance, but not

to theextent of such certainty as is required beyond a reasonable doubt as in criminal cases." Fred C. Walker Agency, Inc. v. Lucas, 215 W. Va. 535, 211 S.E.2d 88 (1975).

Grievant's factual assumption that she was "transferred" from Corrections to DOH is clearly wrong. Respondents' documentation proves by clear and convincing evidence that Grievant was not a permanent employee of the State of West Virginia at the time DOH hired her, but was serving in a temporary appointment assigned to the Corrections' Print Shop, and further, that Grievant was aware of and had acknowledged her reduction-in- force and subsequent temporary appointment. See DOP Exs. 2-4, 6, 8. Respondents argue that, because Grievant was a new hire at DOH, they are limited by DOP's Administrative Rules to setting Grievant's salary at the mid-point of the Transportation Worker I pay grade.

DOP's Administrative Rule 5.4(b)(1998) provides as follows, with respect to salaries for new hires:

> b) Entry Salary - 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.

Mr. Black testified there are no recruitment or retention problems in the Transportation Worker I classification, and he could not in good faith make that plea to the State Personnel Board on behalf of Grievant. Therefore, he was limited in adjusting hersalary to the mid-point of the pay grade, which he did in recognition of her years of experience with the State.

CONCLUSIONS OF LAW

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a level four hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Myers v. W. Va. Dept. of Health and Human Resources, Docket No. 00- HHR-392D (Mar. 30, 2001); Parsons v. W. Va. Div. of Corrections, Docket No. 99-CORR- 056D (July 19, 1999).

2. The language of W. Va. Code § 29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the case when the employer did not timely respond to the complaint. Friend v. W. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-346D (Nov. 25, 1998). To rebut the presumption, a respondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Myers, supra; Lohr v. W. Va. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

3. Clear and convincing evidence is "[t]hat measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to allegations sought to be established; it is intermediate, being more that mere preponderance, but not to theextent of such certainty as is required beyond a reasonable doubt as in criminal cases." Fred C. Walker Agency, Inc. v. Lucas, 215 W. Va. 535, 211 S.E.2d 88 (1975).

4. Respondents have proven by clear and convincing evidence that Grievant's factual assumption that she was "transferred" from Corrections to DOH is clearly wrong, and that she was, in fact, a new hire at DOH.

5. Respondents have proven by clear and convincing evidence that because Grievant was a new hire, they were limited by law in setting her salary at DOH at the mid- point of the pay range for the Transportation Worker I classification.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 2, 2001