PAMELA HAYES,

Grievant,

v. **DOCKET NO. 01-DEP-580D**

W. VA. DEPARTMENT OF ENVIRONMENTAL

PROTECTION/DIVISION OF WASTE MANAGEMENT,

Respondent.

DECISION

On August 10, 1998, Grievant filed a grievance against her employer, Respondent W. Va. Department of Environmental Protection, Division of Waste Management (DEP) challenging a pending demotion on the grounds of gender discrimination. Her Statement of Grievance Reads:

> Grievant will be demoted on August 16, 1998. This demotion will result in a change of title and paygrade. Grievant has also been discriminated against as a result of her gender. This has resulted in a lower salary than similarly situated males.

As relief, she seeks:

> Grievant requests that her title and paygrade not be changed effective August 16, 1998. Grievant further requests that she be awarded all back pay as a result of the discrimination and mis-classification.

Because her grievance was essentially the same as one filed by Betty L. Ashley on August 11, 1998, the parties agreed that this grievance could be decided at Level III on the record developed in the Ashley case. However, although a Level III decision denied the Ashley case, no decision was ever issued on this matter. Grievant filed a default claim,and by Order Granting Default issued by the undersigned on January 25, 2002, it was found that Respondent had defaulted at Level III. Respondent timely filed a request for hearing to determine whether the remedy requested by Grievant is contrary to law or clearly wrong. At that hearing, held at the Grievance Board's Charleston Office on March 20, 2002, Paul Stroebel, Esq. represented Grievant, Shirley Skaggs, Esq., Assistant Attorney general, represented respondent and Robert Williams, Esq., Assistant Attorney General, represented the West Virginia Division of Personnel (DOP) (See footnote 1). The parties agreed to

submit their proposed findings of fact and conclusions of law by April 22, 2002 (See footnote 2) , whereupon the matter became mature for decision.

Respondent and Grievant expended much effort at the Level IV hearing, and at the Level III hearing in the Ashley grievance, attempting to relate Respondent's reorganization to the requirements for a federal Environmental Protection Agency (EPA) grant that partially funds some of the affected programs. Extensive evidence was adduced about the grant requirements. However, the undersigned finds no relationship between the EPA grant in question or any of the cited federal regulations applicable to the grant and the issues in this case. The EPA grant was simply an instrumentality used by the Grievant's employer, but the terms of the grant and the EPA itself exercised no control over the terms and conditions of Grievant's employment, her salary, classification or departmental organization. Accordingly, that evidence has been disregarded. Based on the underlying record, the undersigned Administrative Law Judge makes the following factual findings:

FINDINGS OF FACT

1. From 1986 to August 16, 1998, Grievant was the Assistant Chief of the Office of Waste Management, with oversight of three different programs.

2. In August, 1998, the Office of Waste Management was reorganized, creating a new Office of Environmental Remediation. As a result of the reorganization, Grievant's chain of command, duties and title were changed.

3. The parties stipulated that Grievant was reallocated from Environmental Resources Program Manager II (ERPM2) to Environmental Resource Specialist III (ERS3) and that her salary was consequently decreased from $40,056 to $39,432.

4. The reallocation was made based on a recommendation by Lowell D. Basford, Assistant Director for Classification and Compensation, West Virginia Division of Personnel. [Lvl. IV DOP Exh. 1]. Mr. Basford made his recommendation after reviewing Grievant's proposed revised duties and responsibilities.

5. Leslie Mullins, a male, was working prior to the reorganization as the program manager (classified ERPM 1) for the leaking underground tank program. That program was in the reorganization incorporated into the new Office of Environmental Remediation. His new position is assistant chief of the Office of Environmental Remediation, with oversight of the three programs

covered by that division, and his classification remained ERPM1.

6. Kenneth Ellison is the Division Director of the Division of Waste Management, and also was made the acting Chief of the Office of Environmental Remediation when that office was established.

DISCUSSION

The Order Granting Default previously entered in this matter served notice of default upon Respondent. "Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong." West Virginia Code § 29-6A-3(a)(2). This section creates a rebuttable presumption that Grievant has prevailed on the merits of her case by directing that, "In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance[.]" Id.

This presumption may be rebutted with "clear and convincing evidence that the basic facts underlying the asserted presumption are not true." Lohr v. Division of Corrections and Division of Personnel, Docket No. 99-CORR-157D (Nov. 15, 1999), or Respondent may simply show by a preponderance of the evidence that the relief requested is contrary to law or clearly wrong. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994). Williamson v. W. Va. Dep't of Tax and Revenue, Docket No. 98-T&R- 275D2 (Jan. 6, 1999). See also Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998). Because a successful rebuttal of the presumption would obviate the need to determine whether the remedy is contrary to law or clearly wrong, that issue will be addressed first.

Before determining whether Respondent has successfully rebutted, by clear and convincing evidence, that Grievant prevailed on the merits, the Statement of Grievance must be analyzed to determine exactly what the merits of the case are. In this matter, that is somewhat difficult to discern. It is important to note that this grievance was filed prior thegrievable events having taken place. Grievant cites both her pending demotion and salary discrimination as the two grievable issues. The Statement of Grievance unfortunately does not identify a specific characteristic of Grievant's demotion as being aggrieved or a law, rule or policy being violated. Similarly, grievant does not identify the similarly-situated males that should be used for salary comparisons, or whether the discrimination claim applies to her status before or after the anticipated demotion.

Although the grievance was originally premature, Respondent evidently did not object, and

Grievant was, as anticipated, demoted from ERPM2 to ERS3, with a consequent cut in pay from $40,056 to $39,432. In addition to the pay cut as a result of the change to a lower classification, Grievant also was denied a $756 salary adjustment granted by the Governor to all state employees just before the demotion, justified by Respondent by reliance on a section of the DOP Administrative Rule that applies to salary advancements. The demotion was based on her newly-assigned duties as a result of the reorganization of DEP, and was not merit- or performance-based.

At the time the grievance was filed, "demotion" was defined in the applicable DOP Administrative Rule as, "A change in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification." 143 CSR 1 § 3.27 (July 1, 1998) (See footnote 3) . The reasons given for the demotion were that Grievant's revised duties would no longer be consistent with her classification. Grievant simply states, “This demotion will result in a change of titleand paygrade.” While she does not state what aspect of the demotion is grievable, in her requested relief she characterizes the result as “mis-classification.” In addition. In the Ashley grievance, the record of which is relied upon in this grievance, Grievant's attorney argued the departmental reorganization that resulted in the reassignment of duties causing the demotion was in violation of the terms and regulations controlling the EPA grants (See footnote 4) used to partially fund the positions.

While Respondent presented substantial evidence that the EPA grant terms and regulations are immaterial to the question of whether the reorganization was improper, and further evidence that she is properly classified in light of her revised duties, these are issues of law. Successful rebuttal of the presumption, however, depends whether " the basic facts underlying the asserted presumption are not true." Lohr *supra*. The facts are not disputed - Grievant's department was reorganized, her duties were revised and she was demoted. Respondent did not meet its burden of providing clear and convincing evidence that these facts were not true.

Grievant's second issue, discrimination in salary compared to similarly-situated males, is likewise difficult to clarify. Because she does not identify whom the similarly- situated males are, whether her allegation is true or not cannot be determined without a great deal of inference from the evidence presented. The Ashley grievance identifies six other employees affected by similar duty reassignments as a result of the reorganization. Three males, Leslie Mullins, Alan Borstein and Mike

Stratton, maintained the same paygrade level. Two females, in addition to Grievant, Betty Ashley and Deborah Walkerwere moved to classifications in lower paygrades, while a fourth female, Terrie Sangid, was changed to a different classification with the same paygrade. Significantly, Mr. Mullins, who is an ERPM1 and oversaw one program before the reorganization, is now Grievant's supervisor, with oversight of the three OER working groups.

Because the evidence presented is tends to show a disparate treatment of the various employees as a result of the reorganization, it will be assumed that Grievant, in mentioning similarly-situated males, refers to males whose positions were affected by the reorganization. Again, Respondent presents no evidence that the above facts are not true, so the presumption stands that Grievant's post-reorganization salary is lower than the post- reorganization salaries of male employees whose duties were also revised.

Because Respondent failed to rebut the presumptions that Grievant was improperly demoted and that she is the victim of discrimination, it assertion that granting the relief requested would be contrary to law or clearly wrong must be considered.

Lowell Basford testified that it would be contrary to law to return Grievant to her prior classification because the current duties of her position were not those of an ERPM2. He further testified that if the duties of her position were, as a result of this grievance, made consistent with the ERPM2 classification, there would be nothing contrary to law nor clearly wrong about reallocating her back to ERPM2. The closest Respondent came to presenting evidence beneficial to its argument was a showing that it had chosen to assign different duties to Grievant's position, and that it would be unlawful to reclassify her as an ERPM2 while those are her only duties. While it would not be clearly wrong to order Respondent to undo its reorganization accommodate one individual, it would nevertheless be possible to reallocate Grievant back to her former classification and paygrade if she were assignedadditional duties consistent with that paygrade. No evidence was presented which would support finding that it would be clearly wrong to assign Grievant these additional duties.

"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." In this matter, Grievant alleged that in the assignment of duties following the reorganization, she was treated differently the male coworkers, and she is presumed to have proven this assertion. Respondent's counter assertion that no such discrimination

occurred is supported solely by the statement of Mr. Ellison that discrimination did not occur. While it is not apparent that the entire department was reorganized just to benefit its male employees, the evidence does suggest that the when the choices were made to revise the duties of the employees, males fared substantially better than females. Mr. Ellis' assertion to the contrary does not overcome the weight of the empirical evidence. Respondent failed to produce any evidence that equalizing Grievant's status with that of her male coworkers would be contrary to law or clearly wrong in light of the presumed discrimination.

Respondent did not present clear and convincing evidence that the facts underlying the grievance are not true, and so was not able to sustain its burden of proof to rebut the presumption that Grievant had prevailed on the merits. It is therefore presumed that Grievant's demotion was improper. Respondent likewise failed to rebut the presumption is discrimination, and so is presumed to have discriminated against Grievant. Respondent also failed to show that the remedy requested would contrary to law or clearly wrong in light of these valid presumptions.

The following conclusions of law supplement the above discussion:

CONCLUSIONS OF LAW

1. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong." West Virginia Code § 29-6A-3(a)(2). This section creates a rebuttable presumption that Grievant has prevailed on the merits of her case by directing that, "In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance[.]" Id.

2. "To rebut the presumption created in W. Va. Code §29-6A-3(a)(2), a respondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true." Lohr v. Division of Corrections and Division of Personnel, Docket No. 99-CORR-157D (Nov. 15, 1999).

3. Respondent failed to prove by clear and convincing evidence that the basic facts underlying the grievance are not true.

4. "When the employer asserts that the remedy received is contrary to law or clearly wrong, the employer must establish such a defense by a preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994)." Williamson v. W. Va. Dep't of Tax and

Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). See also Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

5. Respondent failed to prove by a preponderance of the evidence that the relief requested is contrary to law or clearly wrong. For the foregoing reasons, this grievance is hereby **GRANTED.** Respondent is **ORDERED** to restore Grievant's classification title and paygrade, after either restoring her previous duties or assigning her new duties consistent with the ERPM2 classification, to pay her back wages from the date of her demotion from ERPM2, including the July 22, 1998 salary adjustment she was denied as a result of the demotion. (See footnote 5)

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.

DATED: May 21, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Mr. Williams indicated at the Level IV hearing that the DOP had been joined in the case, but the undersigned finds no evidence of that action in the record.

Footnote: 2

Briefs were received by both parties on April 24, 2002, and Respondent also provided an unofficial transcript of the recorded proceedings.

Footnote: 3

The current Administrative Rule was made effective July 1, 2000, after the grievance was filed and had no effect on the events in question.

Footnote: 4

40 CFR Ch. 1, §31.30 (1996).

Footnote: 5

Although the issue was not raised, it should be noted that this salary adjustment was probably improperly denied in the first place. Respondent relied on § 5.8 of the DOP Administrative Rule, which controls "salary advancements," as its authority for denying the increase. The increase was actually a "salary adjustment" as defined by § 3.83, and by the terms of the executive order implementing the salary adjustment, applied to "all employees." [Lvl. III DEP Exh. 8].