WADE SAMPLES, JR.,

Grievant,

v.

Docket No. 05-HHR-105

DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

The grievant, Wade Samples, Jr. ("Samples"), makes a claim of discrimination against his employer, respondent Department of Health and Human Resources ("DHHR"), for compelling Samples to accept a reduction in pay when he transferred to a lower job classification. Samples asserts that other DHHR employees were permitted make similar transfers without suffering a reduction in pay. He requests the following relief:

1 1. Reinstatement of previous salary prior to April 1, 2004 when classified as a Protective Service Worker.

2 2. Reimbursement of pay difference from April 1, 2004 to time of resolution of grievance.

3 3.
Explanation of how other employees making similar transfers to Social Service Worker II positions were able to maintain their current salary.

And to be made whole in every way. The grievance evaluators at Levels I and II lacked authority to grant this grievance, which was filed on November 5, 2004. A Level III hearing (See footnote 1) was held on March 25, 2005. (See footnote 2) The Level III decision, issued April 1, 2005, denied Samples' grievance on the grounds that he had failed to make a *prima facie* showing of discrimination.

An appeal to Level IV ensued. The Level IV hearing was held on May 11, 2005, in the hearing room of the West Virginia Education and State Employees Grievance Board ("the Grievance Board") in Beckley. Samples represented himself. DHHR was represented by Landon R. Brown, Senior Assistant Attorney General. This case matured for decision at the conclusion of the hearing.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Samples is a DHHR employee assigned to the Bureau for Children and Families ("BCF").

2 2. In January 2004, Samples was working as a Protective Service Worker, pay grade 13, when he successfully applied for a position as a Social Service Worker II in the Nicholas District of Region Four. This position is a pay grade 11.

3 3. Prior to his interview on February 10, 2004, Samples was informed that he would be required to accept a ten percent reduction in salary if he wanted to take the voluntary demotion to Social Service Worker II.

4 4. Samples informed his supervisor, Joan Hudnall, that it would be financially difficult for him to accept a ten percent pay cut. She prevailed upon Regional Director Jason Najmulski, (See footnote 3) and was authorized to offer Samples a five percent reduction.

5 5. In a form letter, dated February 17, 2004, from Mary Ann Dean ("Dean"), Community Services Manager of the Nicholas District, (See footnote 4) Samples was informed that

[i]n accordance with the WV Division of Personnel Administrative Rules Section 5.06 [sic], Pay on Demotion, you are hereby demoted from your duties as a Protective Service Worker, pay grade 13 to Social Service Worker II, pay grade 11. Technically, this action constitutes a demotion without prejudice and will be effective April 1, 2004.

Gr.Exh.1 at IV.

6 6. In pertinent part, the Division of Personnel's Administrative Rule 5.6, which sets forth the policy for “Pay on Demotion,” provides that the “appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted if the employee's pay rate is within the pay range of the job class to which the employee is demoted.”

7 7. Dean's form letter further advised Samples that, as a result of his voluntary demotion, his salary would be reduced “from $2160.00 per month to $2052.00 per month.” Gr.Exh.1 at IV.

8 8. The range for pay grade 13 is $1,982 per month through $3,666 per month.

9 9. The range for pay grade 11 is $1,730 per month through $3,200 per month.

10 10. The salary Samples was making at pay grade 13 ($2,160 per month) fell into the overlap between pay grades 11 and 13 (meaning that it fell between $1,982 and $3,200).

11 11. On February 17, 2004, Samples was presented with, and asked to execute, another form letter that had been prepared by Dean's office. Gr.Exh.2 at IV. In pertinent part, this letter contained the following:

> I understand the policy in relation to my demotion, without prejudice, from a Protective Service Worker to a Social Service Worker II. I also understand . . . that I will received [sic] a 5% decrease in my monthly salary. This action is in relation to Division of Personnel Pay Plan Implementation Policy.

Gr.Exh.2 at IV.

12 12. The previously prepared letter, which was executed by Samples, also contained a statement acknowledging that Samples was aware of his “right to file a grievance within 10 days of the effective date of this action.” Gr.Exh.2 at IV.

13 13. Samples accepted the new position, along with the reduction in pay, based on an understanding that there was a statewide policy requiring such a reduction in pay for all DHHR employees who voluntarily moved into a job classification with a lower pay grade.

14 14. Samples assumed his new duties as a Social Service Worker II on April 1, 2004.

15 15. On October 28, 2004, Samples learned that another DHHR employee, Burless Waldron, (See footnote 5) had accepted the same voluntary demotion from Protective ServiceWorker to Social Service Worker II in the Putnam District but had not suffered a reduction in pay. Tr.6, 7. This change took effect July 1, 2004. Gr.Exh.10 at IV.

16 16. Samples subsequently learned that there was another DHHR employee, Carmen “Bea” Spurlock, in the Cabell District, who had transferred from a Social Service Worker III to a Social Service Worker II position without any reduction in her pay. Tr.7. This change took effect October 16, 2004. Gr.Exh.10 at IV.

17 17. In the Putnam District, DHHR employee Rickey Spurlock moved from Protective Service Worker to Social Service Worker III, effective January 16, 2005, without a reduction in salary. Gr.Exh.10 at IV.

18 18. Another DHHR employee, Christina Sorrent, transferred from a position as a Child Protective Service Worker to a position in the Regional Adoption/Homefinding Unit [Resp.Exh.3 at IV], with no change in pay. Gr.Exh.10 at IV. This transfer took effect in January 2001. Resp.Exh.3 at IV.

19 19. On November 5, 2004, Samples filed this grievance at Level I.

20 20. On or about November 9, 2004, Samples conferred with his supervisor, Joan Hudnall. Both at the time Samples applied for and accepted the position as a Social Worker II and at the time of his conference with her, Samples' supervisor, Joan Hudnall, believed that there was a statewide policy in place that required Samples to accept a reduction in pay, despite the voluntary nature of his demotion.

21 21. BCF decided to change its practice so that, with a demotion without prejudice, “there would be no reduction in pay.” Tr.15. This decision, which was made on or about June 8, 2004, took effect immediately. Resp.Exh.7 at III. In an e-mail that wasforwarded by Joan Hudnall, dated December 17, 2004, it was reported that this change was “not retroactive.” Gr.Exh.11 at IV.

22 22. An affidavit from Commissioner Margaret Waybright, dated May 5, 2005, addressed the circumstances of Christina Sorrent's transfer without a reduction in pay. Resp.Exh.3 at IV. Commissioner Waybright referenced a policy that had been brought about through agreement of the BCF's Regional Directors in the 1990's. (See footnote 6) The basic thrust of the “agreement was to reduce the salary of any employee took a position of lessor [sic] classification thus less responsibility by five percent per pay grade,” with the exception of employees who were moving into positions that were “considered a priority to fill.” Resp.Exh.3 at IV.

23 23. According to Commissioner Waybright, the position into which Ms. Sorrent moved was considered a priority position. Resp.Exh.3 at IV.

24 24. The underlying policy, to which Commissioner Waybright referred in her affidavit, was dated September 15, 1998. Resp.Exh.2 at IV. It was intended to be a statewide policy, and exceptions were to be discussed with the other Regional Directors. Resp.Exh.2 at IV.

25 25. During her telephonic testimony at Level IV, Commissioner Waybright testified that "mainly the reason we stopped taking money when we demoted staff was because it was not applied uniformly over, not only our Bureau, but the Department, and we really felt we were penalizing our staff[.]"

Discussion

This is not a disciplinary grievance. Therefore, Samples bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code St. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Samples has brought this grievance upon a claim of discrimination. Discrimination is defined 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(d). This same definition is found in the statutes relating to education employees. W. Va. Code § 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

When Samples successfully applied for his new position as a Social Service Worker II, he was expressly told that he was required to accept a reduction in pay pursuant to a statewide policy. Samples indicated that the reduction in pay was a hardship so the amount was reduced from a ten percent pay cut to a five percent pay cut.

Under the Division of Personnel's Administrative Rule 5.6(a), DHHR had the discretion to allow Samples to retain the pay grade 13 salary he was earning as aProtective Service Worker when he moved to the pay grade 11 position of Social Service Worker II. This was because his pay grade 13 salary of $2,160 per month fell within the range of salaries available in pay grade 11. In other words,

the Division of Personnel's “Pay on Demotion” rules did not require that Samples suffer a salary reduction when he voluntarily moved to the Social Service Worker II position. It was discretionary with his employer.

Pursuant to the discretion afforded DHHR under the Division of Personnel's Administrative Rule 5.6, DHHR had developed an internal policy in the late 1990's that required a five percent reduction per pay grade when an employee voluntarily moved from one BCF position into another BCF position that had a lower classification. However, during her Level IV testimony, Commissioner Waybright acknowledged that this policy was not statewide. In fact, she stated that it was not being applied uniformly either within DHHR or within BCF. Such inconsistent application makes it hard to consider this purported policy a policy at all.

While there is no suggestion that anyone in BCF consciously made misrepresentations to Samples regarding the existence of a statewide policy requiring a pay reduction when he accepted the Social Service Worker II position, it is clear from Commissioner Waybright's testimony that no such statewide policy was actually in effect. Commissioner Waybright's candid admissions that this purported policy was not being applied consistently within BCF or DHHR support Samples' claim of discrimination. Because the policy itself already contained an exception for positions that were “considered a priority to fill,” it can be concluded that the inconsistency in application was not related to job duties. This means that the similarly situated prong of the discriminationtest is met. The admission from the head of BCF that the purported policy was not being applied across the board satisfies the preponderance standard and provides the necessary predicate for affording Samples the relief he seeks.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Samples bears the burden of proving the elements of his grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).”

Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. Pursuant to the Division of Personnel's Administrative Rule 5.6(a), DHHR had the discretion to decide whether to reduce Samples's salary when he voluntarily chose a demotion to Social Service Worker II, since his salary as a Protective Service Worker also fell within the salary range for a Social Service Worker II.

4 4. Commissioner Waybright's admissions that the purported statewide policy that mandated a salary reduction as a concomitant of a voluntary demotion was not being applied consistently within BCF or DHHR establish, by a preponderance, that BCF andDHHR were engaging in discrimination, within the meaning of West Virginia Code section 29-6A-2(d), when it applied the purported policy to Samples.

5 5. Because Samples was misinformed that the reduction in pay policy was being applied uniformly, the form letter executed by Samples, in which he acknowledged that he would receive a reduction in salary when he took the Social Service Worker II position, does not fall within the exception to discrimination that arises when an employee agrees, in writing, to the difference in treatment that would otherwise constitute discrimination. W. Va. Code § 29-6A-2(d).

6 6. There is no evidence to suggest that applying the reduction in pay policy to Samples was in any way related to his job responsibilities, so this statutory exception to a finding of discrimination is inapplicable. W. Va. Code § 29-6A-2(d).

7 7. The reduction of Samples salary upon his voluntary demotion to Social Service Worker II was discrimination, within the meaning of West Virginia Code section 29-6A-2(d).

Accordingly, this grievance is **GRANTED**. DHHR is **ORDERED** to place Samples in the same position he would have been in financially if his salary had not been reduced when he assumed the position of Social Service Worker II in April 2004. Such “make whole” relief shall include, without limitation, back pay, plus interest at the statutory rate.

Any party 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 West Virginia Code section

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.

Date:

August 26, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the transcript of the Level III hearing shall appear as "Tr._."

Footnote: 2

The grievance was initially dismissed at Level III as untimely. After an appeal to Level IV, the grievance was remanded to Level III for proceedings on the merits.

Footnote: 3

By the time of the Level IV hearing, Jason Najmulski had been promoted to the position of BCF's Deputy Commissioner.

Footnote: 4

She was subsequently promoted to Regional Director.

Footnote: 5

His name appears, incorrectly, as "Slaughter" rather than "Waldron" on page 6 of the Level III transcript.

Footnote: 6

Commissioner Waybright adopted her affidavit during her telephonic testimony at Level IV.