THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BETTY S. REDDEN,

Grievant,

v. **DOCKET NO. 05-BEP-395**

M. Paul Marteney

Administrative Law Judge

BUREAU OF EMPLOYMENT

PROGRAMS/UNEMPLOYMENT

COMPENSATION DIVISION, **Respondent.**

DECISION

Grievant Betty S. Redden filed this grievance on April 5, 2005, claiming disparate treatment compared to male Assistant Directors in relation to personnel transactions and salary. Her stated relief sought is to have her salary adjusted to the average of male assistant directors and a 11.25% retroactive salary increase for the period July 16, 1998 through August 15, 2004.

A level four hearing was held in the Grievance Board's Charleston office on April 12, 2006. Grievant was represented by counsel, Brent Wolfingbarger, and Respondent was represented by counsel, Kelli D. Talbott, Deputy Attorney General. The matter became mature for decision on May 19, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant contends she is discriminated against because her salary is lower than similarly-classified colleagues, even some who were hired at a later date. She claims both that her initial salary should have been higher, and that other employees received larger and more frequent salary advances than she did, as a result of discrimination. Respondentasserts Grievant's claims are untimely, and she has not been subjected to discriminatory treatment.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as the Assistant Director of Field Operations. Her position is classified as Employment Programs Manager 2 (EPM2). Having worked for Respondent since 1976, Grievant began working in her current position on July 16, 1998.

2. Grievant supervises or oversees approximately ninety employees, including all the managers and supervisors working in Respondent's field offices.

3. On or about October 1, 1998, Respondent hired Stephen Dailey to fill another EPM2 position, at an initial salary of $3,334 per month. At the time, Grievant's salary as a EPM2 was $3,020 per month. Mr. Dailey did not negotiate a starting salary that was above the minimum for the pay grade.

4. The Division of Personnel has placed the EPM2 classification in pay grade 20, with a salary range of $3,187 to $5,896 per month. This salary schedule was made effective July 1, 2002. There is no evidence of the pay grade 20 pay range prior to that date, but the parties do not contend Grievant's salary in 1998 was less than the minimum for the pay grade.

5. Daniel Light, Director of the Unemployment Compensation Division, is Grievant's supervisor. Mr. Light never completed any performance evaluations of Grievantor any other EPM2 under his supervision. Any discretionary salary advancements Grievant received were based on Mr. Light's recommendations.

6. Grievant's most recent salary advancement was a four percent merit increase in October 2004. At that same time, Mr. Dailey received a 2.25% increase.

7. On or about April 4, 2005, Grievant received an anonymous call suggesting she look at a comparison of her salary and her salary history as compared to her coworkers. She immediately had her husband go to the state Auditor's office to obtain the salary history of Grievant's coworkers, and then she filed this grievance.

8. Respondent has asserted this grievance is untimely at each prior level of the process.

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. (See footnote 1) Grievant advances a sex discrimination claim based on the disparity in pay between herself and similarly-situated male coworkers. "'Discrimination'

means 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." (See footnote 2) The West Virginia Supreme Court of Appeals has interpreted this definition of "discrimination" as limiting the jurisdiction of the Grievance Board to claims arising not from the status of the Grievant as a member of a protected class, butrather to claims founded on differences between similarly situated employees that are not attributable to their actual work duties.

In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" (See footnote 3) In order to establish a claim of discrimination, an employee must establish a *prima facie* case. The grievant must show by a preponderance of the evidence: (See footnote 4)

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. (See footnote 5) Previous decisions interpreting that provision have established 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. (See footnote 6) It is not discriminatory for employees in the same classification to be paid different salaries. (See footnote 7) Additionally, 128 W. Va. C. St. 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, 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." *(See footnote 8)*

Although the evidence clearly corroborates Grievant's factual allegations, the legal conclusions

she advocates are not supported by these facts. Grievant is paid within the pay grade range for her classification, as are her similarly-situated coworkers. Although the specific amounts of monetary compensation differ the fact that they are in the same pay range make them equitable. Based on the salary range rule promulgated by the West Virginia Supreme Court, Grievant has not met her burden of proving discrimination because she has not shown a difference in treatment with respect to her salary level as compared to similarly situated coworkers.

Grievant also alleges Mr. Daily and other EPM2's were favored by higher and more frequent salary advances. "Salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance." (See footnote 9) Although the overall level of Grievant's salary does not support a claim of discrimination, the various salary advancements awarded to Grievant as compared to those awarded to similarlysituated employees may indicate others were favored for reasons not related to the actual job responsibilities of the employees.

Timeliness is also a factor with Grievant's other argument. However, unlike an ongoing pay disparity claim as discussed above, each of the salary advancements made for Grievant and the other EPM2's is a separate event, from which continuing damage flows. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance. . . ." (See footnote 10) This is in contrast to Grievant's primary argument, that she is paid less because she is female. Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a “continuing violation,” so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred. (See footnote 11)

Respondent has asserted that Grievant's claims related to salary advancements are untimely. Timeliness is an affirmative defense, and the burden of proving the affirmativedefense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 12) A grievance must be filed with the immediate supervisor of the grievant “[w]ithin ten days

following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance." (See footnote 13) Prior to the level four hearing, Respondent filed a Motion to Dismiss and argued Grievant's claim was untimely. The undersigned issued an Order denying this motion, finding:

> W. Va. Code § 29-6A-4 contains the same discovery rule found in the education grievance procedure, which has been interpreted to mean that, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." *Syl Pt. 1, Spahr v. Preston Co. Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). However, "'As a general rule, where a state employee is aware of the facts constituting a grievable matter and delays filing, relief is limited to the ten-day period preceding the filing of the grievance.' *Hatfield v. W. Va. Alcohol Beverage Control Comm'n*, Docket No. 91-ABCC-052, 169 (Sept. 27, 1991)" *Davis v. Dep't of Public Safety*, Docket No. 01-DPS-609 (Sept. 13, 2002).
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> Although Grievant requests relief retroactive to 1998, any grievable actions that occurred from that date to ten days prior to the filing of the date of the grievance, that the grievant knew about, are untimely. "Each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred." *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297 (W. Va. 1995). Accordingly, if Grievant proves the allegations contained in her grievance, her relief will be limited to the period of ten days prior to the filing of her grievance.

Here as then, Respondent argues Grievant knew of each of her salary advances at the time they were made, and was never unaware that she did not receive performance evaluations that could be used to justify merit raises. (See footnote 14) Given that the disparate pay claim is unproven by the established facts, and is thus not useful in the timeliness analysis, Respondent's argument reemerges as a viable defense against the individual instances of each salary advancement decision.

Grievant argues the discovery rule applies to these incidences as well, since she did not learn that "Mr. Dailey's salary was repeatedly increased more frequently and at greater percentages" than her own salary, until she had her husband call the auditor's office in response to an anonymous phone call on or about April 4, 2005. Respondent counters that nothing prevented Grievant from making that call or seeking that information prior to the time she did, and that Grievant received her most recent salary advancement in October 2004. Respondent also argues it would be unfair and prejudicial to allow an employee to create her own discovery event by ignoring the availability of

information that could give rise to a grievance, and waiting to obtain that information long after the actual grievable event occurs.

Although not expressly stated, Respondent essentially claims that Grievant's claim is barred by the doctrine of laches. "'Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of publicfunds. Failure to do so constitutes laches.' Laches occurs when an individual sleeps on his rights or neglects to assert a right of which is aware." (See footnote 15) "For laches to attach, two elements must be established: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay." (See footnote 16)

This doctrine applies in this matter as a bar to Grievant's assertion of the discovery rule. Grievant admitted that the information she needed was just a phone call away, that she suspected the facts long before she got the anonymous suggestion to look at a salary comparison, and that the most recent raise she got that she asserts should have been higher was given far more than ten days prior to her filing a grievance. With respect to the individual salary advancements she received and that she claims were discriminatory, Grievant's claim is untimely and barred by the doctrine of laches. She did not exert due diligence in confirming her suspicions and an award in her favor dating back to each instance would unfairly prejudice Respondent. Because the discovery rule may not be applied to toll the Grievant's time limit for filing her grievance, this claim is untimely. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed." (See footnote 17)

The following conclusions of law support this discussion:

Conclusions of Law

1. In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore,

a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297 (W. Va. 1995).

3. The concept of "equal pay for equal work" is embraced by W. Va. Code § 29-6- 10. *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established 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. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *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 Res.*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-H-177 (May 29, 1992). It is not discriminatory for employees in the same classification to be paiddifferent salaries. *Thewes & Thompson v. Dep't of Health and Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

4. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code §29-6A-4(a). *See, Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726,] 391 S.E.2d 739 (1990)." *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July10, 2001); *Nutter v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). *See also Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000).

5. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing." If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed.

Lynch, supra.

6. A grievance must be filed with the immediate supervisor of the grievant "[w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or withinten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . ." W. Va. Code § 29-6A-4(a).

7. "'Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches.' *Maynard v. Bd. of Educ. of Wayne County*, 357 S.E.2d 246 (W. Va. 1987); *Buchanan v. Bd. of Directors/Concord College*, Docket No. 94-BOD-078 (Nov. 30, 1994).

8. Laches occurs when an individual sleeps on his rights or neglects to assert a right of which is aware. Black's Law Dictionary 435 (5th abr. ed. 1983)." *Gunnoe v. Raleigh County Bd. of Educ.*, Docket No. 03-41-084 (July 21, 2003). "For laches to attach, two elements must be established: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay. *Buchanan v. Bd. of Directors/Concord College*, Docket No. 94-BOD-078 (Nov. 30, 1994); *Dollison v. W. Va. Dept. of Emp. Sec.*, Docket No. 89-ES-101 (Nov. 3, 1989); *Maynard v. Bd. of Educ. of Wayne County*, 357 S.E.2d 246, 255 (W. Va. 1987)." *Scragg v. Wayne County Bd. of Educ.*, Docket No. 05-50-256 (Sep. 27, 2005).

9. Grievant's claim of pay disparity between herself and similarly-situated coworkers is timely as a continuing practice, but is unproven as she has failed to meet her burden of proving discrimination.

10. Grievant's claim that her salary advancements individually should have been greater is untimely, and her assertion of the discovery rule is barred by the doctrine of laches. For the foregoing reasons, this grievance is hereby **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, and such appeal must be filed within thirty 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.

August 22, 2006

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

Footnote: 2

W. Va. Code § 29-6A-2(d).

Footnote: 3

Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

Footnote: 4

White, supra; Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Footnote: 5

See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Footnote: 6

Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Footnote: 7

Thewes & Thompson v. Dep't of Health and Human Res./Pinecrest Hosp., Docket No. 02-HHR- 366 (Sept. 18, 2003).

Footnote: 8

Largent, supra; Jenkins v. Dep't of Environmental Protection/Office of Mining and Reclamation, Docket No. 03-DEP-154 (Sept. 12, 2003).

Footnote: 9

Ours v. Dep't of Transp./Div. of Highways, Docket No. 03-DOH-097 (Aug. 8, 2003).

Footnote: 10

Young v. Div. of Corr., Docket No. 01-CORR-059 (July10, 2001).

Footnote: 11

Martin v. Randolph County Bd. of Educ., 195 W. Va. 297 (W. Va. 1995).

Footnote: 12

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).

Footnote: 13

W. Va. Code § 29-6A-4(a).

Footnote: 14

Respondent's failure to provide Grievant with proper performance evaluations was not asserted as a ground for this grievance, so although it was discussed as support for Grievant's claim and there may be some merit to that claim, the issue will not be addressed further.

Footnote: 15

Gunnoe v. Raliegh County Bd. of Educ., Docket No. 03-41-084 (July 21, 2003).

Footnote: 16

Scragg v. Wayne County Bd. of Educ., Docket No. 05-50-256 (Sep. 27, 2005).

Footnote: 17

Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).