THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ALLEN HUNTER,

Grievant,

v. **Docket No. 05-HHR-322R**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,

Respondent.

DECISION

Grievant filed this grievance against his employer, Department of Health and Human Resources ("DHHR") on June 23, 2005. He alleges DHHR engaged in discrimination, pay inequity, and unfair labor practice (See footnote 1) when he was forced to take a decrease in pay upon a voluntary demotion. For relief he seeks to be returned to his previous salary, including any raises, and to be made whole in every way.

This grievance was dismissed at the lower levels. A Level IV hearing was held on March 28, 2006, at the Grievance Board's Beckley office. Grievant was represented by Jeffery Pritt, Esq., and Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General. On May 19, 2006, the undersigned issued an Order dismissing the grievance as untimely. Grievant appealed to Greenbrier Circuit Court, and on August 22, 2006, the Court entered an Order reversing the undersigned's decision and remanding the case to the Grievance Board for further hearings on the merits. The parties then agreed further hearings would not be necessary and declined to file additionalproposed findings of fact and conclusions of law. This case became mature for decision on

September 11, 2006.

Issues and Arguments

Grievant asserts he was discriminated against when he was forced to take a pay decrease upon voluntarily leaving his position as a Protective Service Worker (pay grade 13) and accepting the position of Social Service Worker III (pay grade 12) in July, 2003.

Respondent argues the voluntary decrease in salary was its practice at the time Grievant accepted the new position. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant has been employed with the State of West Virginia for approximately fourteen years. (Stipulated by the parties).

2. On July 16, 2003, Grievant left his position as a Protective Service Worker and took a position as a Social Service Worker III, going from a pay grade 13 to a pay grade 12. (Stipulated by the parties).

3. Grievant voluntarily made this change.

4. By correspondence dated June 9, 2003, Respondent notified Grievant that as a result of his voluntary demotion, he would be assigned to a lower pay grade and would take a salary reduction.

5. On the same date, Grievant submitted a letter to John Najmulski, the Region IV Director, confirming he understood he was being assigned to a lower pay grade and would be receiving a 5% decrease in salary. (Stipulated by the parties). 6. At the time of Grievant's voluntary demotion, it was Respondent's practice to reduce an employee's salary 5% per pay grade upon a voluntary demotion unless the demotion was to an adoption or home finding position. During this practice, adoption and home finding positions were considered priority positions.

7. Grievant was not moving into a position Respondent deemed as a priority position.

8. This practice was merely an informal agreement between four Regional Directors and was never adopted as a formal policy. The practice only applied to the field staff the Regional Directors supervised and not to the employees working in the State office.

10. On or about June 8, 2004, Margaret Waybright, then Deputy Commissioner for the Bureau (See footnote 2), no longer required a 5% per pay grade reduction in salary for field staff, but decided to evaluate each employee on a case-by-case basis as required by Division of Personnel's

Rule 5.6.

11. Grievant's co-workers Melody Martin, Mike Horton, and Lisa Rose took similar voluntary demotions on October 1, 2004; April 1, 2005; and December 16, 2004, respectively. These employees' pay did not decrease. (Stipulated by the parties).

12. On June 23, 2005, Grievant discovered his co-workers were not required to take the 5% pay decrease when they took a voluntary demotion, and he initiated this grievance on that date.

13. Grievant's prior pay was within the range of a pay grade 12. (Stipulated by the parties).

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Grievant asserts he was discriminated against because he was required to take a 5% reduction in salary upon his voluntary demotion. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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,
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> ©) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has failed to make a *prime facie* case for discrimination. First, Grievant is not similarly situated to his fellow employees who took voluntary demotions, but did not receive a salary decrease.

To be similarly situated to fellow employees, a grievant mustshow the same practice was applied differently. Testimony from Ms. Waybright clearly explains the practice of DHHR at the time Grievant accepted the voluntary demotion and pay decrease was no longer the practice when his fellow employees accepted their voluntary demotion without a reduction in pay.

Second, the Grievance Board has addressed pay disparity issues with respect to promotional raises by holding a grievant is not similarly situated to an employee who was promoted and received a discretionary salary increase at a different time than the grievant's promotion to the same position. *Singleton v. W. Va. Dep't. of Health and Human Res*., Docket No. 95-HHR-490 (May 24, 1996). In keeping with that holding, grievants grieving salary reductions are similarly situated only to those employees who received different treatment within the same time frame.

This holding is based on the realization that practices and policies change as the needs of the organization changes. Agencies should be given the flexibility to amend past practices as circumstances warrant. In this case, around June 8, 2004, Respondent decided circumstances warranted a change in the practice of requiring everyone to take a 5% per pay grade reduction in salary. Discrimination cannot be applied forward. At the time Grievant accepted the voluntary demotion and reduction in pay, he was treated the same as others. Every employee Grievant compares himself to accepted a voluntary demotion after the change in the Respondent's practice. Therefore, Grievant is not similarly situated to those co-workers.

It should also be noted that Grievant's attorney has relied upon *Samples v. Dep't of Health and Human Res*., Docket No. 05-HHR-022 (Aug. 26, 2005). In that case the administrative law judge held that a "statewide policy" mandating a salary reduction wasnot consistently applied. This holding is contrary to the holding in *Moore v. Dep't of Health and Human Res*., Docket No. 05-HHR-260, (Dec. 16, 2005), a more recent decision of the Grievance Board. In *Moore,* it was held that "the evidence shows that there has never been a hard and fast rule at DHHR regarding voluntary demotion" and went on to say the grievant was treated consistently with other employees. Because evidence presented in *Moore* is consistent with the evidence presented in this case, *Samples* is expressly overruled to the extent that it holds Respondent engaged in discrimination with respect to voluntary demotions. This holding is clearly wrong.

The following conclusions of law help support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. In order to meet this burden, the Grievant must show:

(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,

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

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

3. To be similarly situated to fellow employees, a grievant must show the same practice was applied differently.

4. The Grievance Board has addressed pay disparity issues with respect to promotional raises by holding a grievant is not similarly situated to an employee who was promoted and received a discretionary salary increase at a different time than the grievant's promotion to the same position. *Singleton v. W. Va. Dep't. of Health and Human Res*., Docket No. 95-HHR-490 (May 24, 1996). In keeping with that holding, grievants grieving salary reductions are similarly situated only to those employees who received different treatment within the same time frame.

5. *Samples v. Dep't of Health and Human Res*., Docket No. 05-HHR-022 (Aug. 26, 2005), is expressly overruled to the extent that it holds there was a statewide policy mandating salary reduction that was not consistently applied.

6. Grievant failed to prove a *prime facie* case of discrimination.

Accordingly, this grievance is hereby **DENIED**.

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, and 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 appealpetition 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: November 9, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Grievant did not claim favoritism.

Footnote: 2

Ms. Waybright eventually became Commissioner of the Bureau for Children and Families.