WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RANDY HAMMOND, et al.,

Grievants,

v. **Docket No. 05-DOH-336(B)**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS and
DIVISION OF PERSONNEL,

Respondents.

DECISION

In July of 2005, numerous grievances were filed throughout the state by various employees of the Division of Highways ("DOH"), as the result of pay increases that were granted to certain employees of the agency located in Jefferson, Morgan and Berkeley Counties of West Virginia. After these grievances were appealed to level four, a prehearing conference was conducted on December 18, 2006, by Senior Administrative Law Judge Janis I. Reynolds, after which rulings were issued on various motions and discovery issues, by Order dated February 27, 2007. As part of those rulings, Judge Reynolds denied Grievants' motion to consolidate the various grievances and treat them as a class action, after the Grievance Board had grouped them according to DOH district. The instant grievance includes employees only from DOH District One, which includes Boone, Clay, Kanawha, Mason and Putnam Counties.

A level four hearing was conducted by Judge Reynolds in the Grievance Board's Charleston office on May 23 and 25, 2007. A large group of grievants belonging to the AFSCME union were

represented by Andrew J. Katz, Esquire, and the following individualgrievants represented themselves or groups of grievants: Brian Myers, Kenneth Nelson, Michael Priddy, Paul Myers, Randy Hammond, Wilbert Harless, Brian Kelly, and Harry Wazelle. DOH was represented by counsel, Robert B. Paul, and the Division of Personnel ("DOP") was represented by Karen O'Sullivan Thornton, Assistant Attorney General. The parties' fact/law proposals were filed on June 21, 2007. For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on January 10, 2008. (See footnote 1)

Synopsis

Grievants are employed in various classifications, chiefly in the Transportation Worker series, in DOH District One. In 2005, a pay differential was approved for certain workers in District Five, due to demonstrated recruitment and retention issues in that geographic area. The increase was confined to employees in the three counties of the Eastern Panhandle, which has historically had different economic conditions from the rest of the state, due to its bordering of Maryland and Virginia and its close proximity to the Washington, D.C. area.

Grievants attempted to demonstrate that similar recruitment and retention issues existed in District One. However, the evidence offered did not establish the particular conditions that occurred in District Five had existed in District One during the same time period, particularly with regard to the panhandle counties' difficulty in obtaining qualified applicants interested in vacant positions. Accordingly, Grievants failed to prove discrimination, and the grievance must be denied. After a detailed review of the record, including the recording of the level four hearing and all exhibits introduced, along with various documents introduced below, the undersigned makes the following findings of fact.

Findings of Fact

1. Grievants are employed by DOH in District One in various job classifications, including Transportation Worker 1, 2, and 3 ("TW") and Transportation Crew Chief, Maintenance ("TCCMAIN").

2. District One includes the counties of Boone, Kanawha, Clay, Mason and Putnam.

3. District Five includes Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral and Morgan Counties. Morgan, Berkeley and Jefferson Counties are known as and commonly referred to as the

"Eastern Panhandle" portion of West Virginia. This area borders the states of Virginia and Maryland and is less than two hours' driving distance from Washington, D.C.

4. When positions become vacant, DOH posts the vacancy and requests a "register" from DOP. The register is actually entitled "Personnel Certification," and includes the top ten percent of the qualified applicants who have successfully tested and had their names placed on the state's register for a particular job classification.

5. Beginning in 2002, county and district managers began complaining that there was a shortage of applicants for DOH positions in Morgan, Jefferson and Berkeley Counties, which worsened over the next two years. During 2004, it became apparent that, when a vacancy occurred in the Eastern Panhandle counties, the DOP register frequently contained very few applicants. In addition, when the applicants on the register werecontacted to schedule interviews, most were not interested or did not appear for the interview.

6. The DOH positions for which there were insufficient applicants were in the TW 1, 2, and 3 classifications.

7. Some examples of the results of DOH's attempts to fill vacant TW 2 positions in the Eastern Panhandle during this time period are as follows:

April 7, 2004 _ three TW 2 positions posted in Berkeley County, only one was filled. The original register contained 14 names, additional names were requested, and 4 more were provided. Only 5 applicants lived in Berkeley County, and some lived in very distant counties, such as Fayette. Results were as follows:

7 failed to reply to invitation to interview

1 failed to report for the interview

3 declined the interview

1 declined the offer of employment

Applicant selected was an internal candidate

August 26, 2004 _ two TW 2 positions posted in Morgan County. The original register contained only 9 names, including the two individuals residing in the distant counties of Cabell and Summers. Results were as follows:

3 failed to reply to invitation to interview

1 failed to report for the interview

5 individuals interviewed

2 applicants selected

October 8, 2004 _ two TW 2 positions posted in Berkeley County and only one was filled. The original register consisted of only 11 applicants, so no additional applicants were available. Results were as follows:

7 failed to reply to invitation to interview

2 failed to report for the interview

1 declined the interview

1 external applicant was selected

October 29, 2004 _ one TW 2 position posted in Jefferson County. The register contained only 7 applicants, no additional applicants were available, and two lived in the distant counties of Cabell and Summers. Results were as follows:

5 failed to reply to invitation to interview

2 interviewed

1 selected

8. For the four postings set forth above, there were a total of 23 actual applicants certified for the eight posted positions. Many of the applicant names were contained in multiple registers, reducing the actual number of applicants.

9. During this same time period of 2004 and early 2005, DOH conducted research regarding the availability of private sector employment for which DOH workers may qualify and apply, and they compared wages. It was concluded that the average entry wage for TW 2s and 3s was $8.48 per hour, while the average private sector wage for similar work was $10.42 per hour. The average salary of these workers at DOH was $12.51 per hour, while the corresponding average private sector rate was $15.85 per hour for comparable positions. (See footnote 2) Classified advertisements in a Martinsburg newspaper for early 2005 also included positions, for which DOH workers would be qualified, that offered wages of $17 to $20 per hour.

10. Due to concerns that a significant recruitment and retention issue in the TW series of jobs was occurring in the Eastern Panhandle, on May 13, 2005, DOH submitted a “Pay Differential & Retention Incentive Proposal” to the DOP. The proposal requested a 25% pay differential (increase) for TW 1, 2 and 3, TCC, Transportation Crew Supervisor1 and 2, and Highway Administrator 2. In addition, it was requested that incumbent employees in the affected classifications be granted a 15% salary adjustment (increase). The classifications of TW 1, TCC, TC Supervisor 1 and 2, and Highway Administrator were included because these classifications were considered to be within the career path of the TW series.

11. Effective July 1, 2005, DOP approved the requested 25% special hiring rate and a 15% pay adjustment for current employees in the selected job classifications, with the exception of the Highway Administrator classification, noting that the agency has greater flexibility in setting salaries for positions in that classification.

12. In approving the requested pay increases, DOP's Review Summary of DOH's proposal noted “[w]e have seen similar recruitment problems for other agencies in these counties due to the generally better economic climate and the proximity to higher paying jobs in the nearby states of Maryland and Virginia.” Level IV, Resp. DOH Exhibit 7.

13. District One employs more people than most other DOH districts in the state. During 2004, in the TW series and Crew Chief classifications, there were 374 employees in District One and 248 employees in District Five. Level IV, Union Gr. Exhibit 4.

14. For the entire year of 2004, within the relevant classifications, 79 vacancies occurred in District One, while there were 39 total vacancies in District Five, with 19 of those being in the three counties which received the pay differential. Level IV, Union Gr. Exhibit 3.

15. Certification lists for posted TW positions in District One in 2004 show that a typical register would contain at least 30 names, and in many cases the total certification would contain more than 100 names. 16. When vacancies occurred in District One in 2004 and early 2005, even after a register was requested, on many occasions interviews were not conducted and applicants were not contacted. Some of these positions may have been reposted at a later date.

17. Although many vacancies occurred in District One during the relevant time period, management in those counties did not complain to DOH officials that positions could not be filled or that there was any shortage of applicants for posted vacancies.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A- 6. (See footnote 3) "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievants contend that it was discriminatory for only the Eastern Panhandle counties to receive the pay increases at issue, and they believe that they have demonstrated thatsimilar, if not worse, recruitment and retention problems existed in District One. However, as will be discussed below, Grievants' evidence fails to establish that similar conditions existed in their area, particularly regarding sufficient numbers of applicants for positions.

However, as a preliminary issue, Respondents have alleged that many of these grievances are untimely, in that the pay increases for the Eastern Panhandle employees took effect on July 1, 2005, and the ten-day statutory time limit for filing would have expired on July 18, 2005. Indeed, it is undisputed that numerous grievants and, in fact, the vast majority from District One did not file on or before that date. (See footnote 4)

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997).

As to when a grievance must be filed, W. Va. Code § 29-6A-4 provides, in pertinent part:

> Before a grievance is filed and within 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, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally

notified of the decision being challenged. *Kessler, supra. See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4 (a similar provision in the education grievance statute), stating "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."

Grievants contend that all of their claims were filed in a timely fashion, because the alleged discrimination is ongoing, in that each time a paycheck is issued to an employee who received the increase, the grievable event has occurred again. However, the one- time salary increase which was granted to the Eastern Panhandle employees was a single grievable event, not a continuing practice within the meaning of the statute. As discussed in *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R- 416R (Sept. 6, 2005), “continuing 'damage' flowing from a past decision of the employer” is separate and distinct from a “continuing practice” as set forth in the grievance statute. In that case, this Grievance Board held that the employer's decision to place a particular job classification in a particular pay grade, while continuing to affect grievants' salaries, was “a salary determination that was made in the past, a discrete event with lasting effects,” which did not constitute a continuing practice. “[W]hen a grievant challenges a salary determination which was made in the past, . . . this 'can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot beconverted 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).' *Nutter v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-630 (Mar. 23, 1995).” *Young v. Div. of Corr. and Div. of Personnel*, Docket No. 01-CORR-059 (July 10, 2001).

Therefore, because no evidence was presented by Grievants which would excuse or explain the filing of grievances beyond ten days after the effective date of the increases on July 1, 2005, all grievances filed after July 18, 2005, are untimely. However, the claims of the remaining Grievants, who did file their grievances in a timely fashion, must be addressed.

The increases which gave rise to this grievance were granted pursuant to the provisions of DOP Rule 143 C.S.R. 1 § 5.4(f)4, "Pay Differentials":

> The Board, by formal action, may approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems,

> regionally specific geographic pay disparities, shift differentials for specified work periods, and temporary upgrade programs. In all cases, pay differentials shall address circumstances which apply to reasonably defined groups of employees (i.e. by job class, by participation in a specific program, by regional work location, etc.), not individual employees.

In the instant case, DOP approved the request for a pay differential for a specifically defined group of employees in a “regional work location” which had been identified as suffering a specific recruitment and retention problem. This Grievance Board has previously recognized that DOP has broad discretion to perform its administrative functions so long as it does not exercise this discretion in an arbitrary or capricious manner. *Crowder v. W. Va. Dep't of Tax & Revenue*, Docket No. 94-T&R-545 (Feb. 28, 1995). *SeeSmith v. W. Va. Div. of Corr.*, Docket No. 94- CORR-624 (Feb. 27, 1995). Further, the rules promulgated by DOP pursuant to its delegated authority are given the force and effect of law, and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *See Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980). Moreover, a government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). *See Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981); appeal dismissed, 454 U.S. 1131 (1982).

The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP's. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a mannercontrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir.

1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id*. (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Pay differentials have been used many times in the past to address specific recruitment and retention issues and have been upheld by this Grievance Board. *See Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518 (January 12, 1998); *Pishner v. Dep't of Health and Human Res.*, Docket No. 97-HHR-478 (May 21, 1998); *Rosanna v. Dep't of Health and Human Res.*, Docket No. 05-HHR-460 (Sept. 28, 2007). So long as the increase has a rational basis and is limited to "a reasonably defined group of employees," it must be upheld. *Travis, supra*.

Upon reviewing the portion of DOP's Rule providing for pay differentials in accordance with the legal standards set forth above, the undersigned finds that the special hiring rate and pay increase for the Eastern Panhandle employees was not arbitrary andcapricious and had a rational basis. The substantial evidence of record establishes that there was a significant recruitment and retention problem in the three counties identified, in that, as vacancies occurred, the number of applicants available to fill them was extremely limited. The conditions existing in the panhandle area, specifically the availability of private sector employment at higher wages, along with the general economic climate, severely affected workers' interest in applying for state positions. As explained by Jeff Black, DOH Human Resources Director, the situation was becoming critical and, absent some action, DOH was likely facing the possibility of having to hire private contractors to accomplish its work.

Contrary to Grievants' assertions, a similar situation did not exist in District One. Virtually every DOP certification sought for vacancies in District One contained multiple pages of available applicants, and in most cases dozens and dozens more were available. (See footnote 5) Despite the testimony of Dennis King, a retired Maintenance Engineer for District One, that there was “high turnover” within the TW classifications in 2004 and 2005, the evidence in this case does not prove that insufficient applicants were available or that positions went unfilled due to a lack of interested

applicants, as occurred in the panhandle counties.

The crux of Grievants' arguments in this case is that Respondents have engaged in discrimination. Code § 29-6A-2(d) defines "'discrimination'" as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievants continue to insist that they are similarly situated to the employees in the Eastern Panhandle and argue that their evidence supports this conclusion. Unfortunately, the undersigned found much of Grievants' evidence at level four to be irrelevant and non- probative to the issue at hand. They presented the testimony of an author of a 2007 report from the Rahall Transportation Institute, which had been requested by DOH's commissioner to study the issue of the aging DOH workforce. The report contained statistics regarding the number of DOH employees who would be eligible to retire in upcoming years, along with information and proposals regarding the replacement of these workers. In the instant case, Grievants contend that the information in the report which discusses the low salaries of DOH workers compared to people employed in the private sector, along with recruitment and retention issues, supports their argument that all DOHdistricts, specifically District One, have suffered from the same problems as District Five. However, as noted by the presiding administrative law judge, the charts in the report which supposedly depict recruitment and retention information for particular areas are unreadable, and the time frame of the report occurred after the 2005 pay differential was implemented. Accordingly, this report and the testimony regarding

it do not prove Grievants' case of discrimination.

Similarly, Grievants presented extensive testimony from Gary Stoors, a labor economist employed by AFSCME. Much of Mr. Stoors' testimony focused on the significant number of vacancies which occurred in District One in 2004, as compared to vacancies in District Five. Mr. Stoors also used information in the Rahall report discussed above to draw conclusions regarding the low percentage of applicants who normally respond when contacted about an open position, which was stated in that report as a general 30% for DOH positions statewide. He then used this information to surmise the number of applicants available for District One positions, which he believed would be significantly less than those available in the panhandle for the same time period. However, as discussed above, because of its time frame, information from the Rahall report is not relevant to the issues presented in this case, nor does it appear to focus its conclusions on any one area of the state.

As the evidence in this case clearly established, conditions vary in the various districts and counties. Moreover, Grievants submitted no conclusive evidence regarding the lack of available applicants for District One positions in 2004, nor evidence thatpositions remained unfilled due to lack of interest by qualified candidates. Indeed, it is undisputed that, as previously discussed, a typical applicant register for District One during 2004 contained numerous names, sometimes exceeding 100 available individuals, a far different situation from that which existed in the Eastern Panhandle. Moreover, while Grievants concentrated much of their focus upon the number of vacancies which occurred in their district in 2004, which was undisputedly more than those occurring in the three counties at issue, they have ignored the fact that District One employed many more people in the relevant classifications than District Five. In addition, the number of vacancies in and of itself does not establish a recruitment and retention problem, but perhaps only a retention issue, which is simply insufficient to prove that Grievants are similarly situated to the employees who received the increase. *See Rosanna*, *supra*.

Mr. Stoors also provided extensive testimony regarding the low salaries of DOH workers in District One as compared to the private sector. Similarly, individual Grievants testified regarding the ongoing problem of low pay and discussed how some DOH employees even hold second jobs in order to “make ends meet.” (See footnote 6) While it is obvious that DOH employees, as with so many state workers, are paid lower wages than the private sector offers, this was only one piece of the problems which culminated in the pay differential approved for the Eastern Panhandle. Competing

jobs from the private sectorwas isolated as a cause of the problem that had been identified -- an alarmingly low number of applicants interested in DOH employment in that area. As stated previously, Grievants simply have not proven that a similar situation existed in District One.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. Grievants have the burden of proving their grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6.

2. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997).

3. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged*. Kessler, supra. See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989)*.*

4. “[C]ontinuing 'damage' flowing from a past decision of the employer” is separate and distinct from a “continuing practice” as set forth in the grievance statute. *Blethen v. Dep't of Tax & Revenue*, Docket No. 03-T&R- 416R (Sept. 6, 2005). 5. Respondent has proven by a preponderance of the evidence that many of these grievances were not filed within the ten-day statutory time limit, and Grievants have offered no explanation as to why their late filing should be excused.

6. The grievable event in this case was the implementation of salary increases and a special hiring rate for certain DOH workers on July 1, 2005, which does not constitute a continuing practice.

7. The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994).

8. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential

ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

9. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 15, 2005).

10. "[T]he granting of a pay differential in order to address recruitment and retention problems, which is limited to a specific group of employees in a specific program, is within DOP's discretion and authority." *Kincaid v. Dep't of Health and Human Res.,* Docket No. 01-HHR-246 (June 14, 2002).

11. Grievants have failed to prove Respondents acted arbitrarily or capriciously, abused their discretion, that their actions did not have a rational basis, or that the pay differential granted to certain DOH employees was discriminatory.

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. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 3, supra)*. Neither the West Public 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.

Date: February 14, 2008

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DENISE M. SPATAFORE

Acting Deputy Chief

Administrative Law Judge

Footnote: 1

This is the date that most of the documentary portions of the file were received by the undersigned.

Footnote: 2

This information was obtained from records compiled by the West Virginia Bureau of Employment Programs, which is now Workforce West Virginia.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 4

Respondent DOH's Exhibit 8 at Level IV contains a listing of all District One grievants by filing date. According to that document, only 10 individuals filed grievances on or before July 18, 2005.

Footnote: 5

DOP's practice is to certify the top ten percent of available applicants for the particular job classification and usually provide approximately 20 additional names. If the agency exhausts the initial register, additional names are then provided by DOP from the total register.

Footnote: 6

It should also be noted that many people opt for state employment, in spite of lower salaries, in order to enjoy other benefits which some private employers may not offer, such as insurance, retirement, year-round employment, paid holidays, and vacation time. In addition, as one Grievant testified in this proceeding, after leaving DOH for a private employer, he was laid off after only two weeks; thus, state employment often offers job security not featured in similar private sector jobs.