WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VERA BUCKLAND,

Grievant,

v. DOCKET NO. 2008-0095-DOC

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

Vera Buckland ("Grievant") was employed as a Office Assistant III ("OA3") at the District IV office of the West Virginia Division of Natural Resources ("DNR") located in Beckley, West Virginia. (See footnote 1) She was hired into that position on June 1, 2005. On July 17, 2007, Ms. Buckland filed a grievance alleging discrimination and favoritism. Grievant claims that she did not receive a raise after working six months for the DNR. She asserts the raise was promised to her when she accepted employment with DNR. Grievant also claims that another employee, who was hired after her, received a significantly higher starting salary even though they were performing the same work and had similarexperience. The other employee works in the District II office which is located in Romney, West Virginia. (See footnote 2) Grievant seeks as a remedy "equal pay and all relevant back pay".

A level one hearing was held in Beckley, West Virginia on July 27, 2007. The hearing was recorded and transcribed. On August 10, 2007, the Director of the Division of Natural Resources, Frank Jezioro, issued a written decision denying the grievance. Both Grievant and DNR waived mediation at level two and the grievance advanced to level three. A level three hearing was held in the Charleston, West Virginia office of the Public Employees Grievance Board on May 9, 2008, before Administrative Law Judge Landon R. Brown. (See footnote 3) At the conclusion of Grievant's evidence, counsel for DNR moved that the grievance be dismissed, alleging that Grievant had failed to set forth sufficient facts to support her claim. The Administrative Law Judge took the motion under advisement and asked DNR if they wished to present any evidence. DNR declined and the hearing concluded. (See footnote 4) Proposed findings of fact and conclusions of law were received from Grievant on June 6, 2008. When the fact/law proposals from DNR were received on June 10, 2008, this matter became mature for decision. (See footnote 5)

SYNOPSIS

Grievant began work as an OA3 in the DNR Beckley office on June 1, 2005. After a period of time, Grievant discovered that another employee, hired as an OA3 in the DNR Romney office on October 1, 2006, was being paid a higher salary than she was. Grievant claims that the difference in pay constitutes discrimination or favoritism. However, Grievant was unable to demonstrate, by a preponderance of the evidence, that the difference in salaries was the result of discrimination or favoritism.

Additionally, Grievant avers that when she accepted the position with the DNR she was lead to believe that she would receive a five percent raise at the end of six months of successful employment. As a remedy, Ms. Buckland seeks “to receive equal pay and all relevant back pay”.

Grievant was assured of receiving a five percent raise at the end of a six month period by Larry Berry, the supervisor who conducted her interview. Unfortunately, Mr. Berry lacked authority to offer the raise. Only DNR Director Jezioro had authority to grant the raise. Additionally, on April 29, 2005, Governor Manchin issued a freeze on all discretionary raises, making it impossible for the Director to carry out the promise made by his subordinate.

The Grievance is denied.

The following findings of fact are based upon the record established by the hearings held at level one and level three.

Findings of Fact

1 1. Grievant was employed as an OA3 at the Beckley office of the DNR Wildlife Resources Section. She started to work in that position on July 1, 2005.

2 2. Grievant was interviewed for her position by the District Wildlife Biologist in the Beckley office, Larry Berry, and four other employees. Mr. Berry supervises seven employees in the Beckley office, including Grievant.

3 3. Mr. Berry consulted with Scott Warner (See footnote 6) and offered Grievant a starting salary of $17,400, which was ten percent above the minimum salary for the OA3 classification. He also indicated to Grievant that it was customary for DNR employees to receive a five percent raise after working six months for the agency.

4 4. Prior to the hiring of Grievant, Governor Manchin, through his Chief of Staff, issued a memorandum informing all Cabinet Secretaries that they were not to grant any discretionary salary

increases. The raise that was mentioned by Mr. Berry fell into this classification.

5 5. Grievant did not receive the five percent raise that was discussed at her interview after working six months for the DNR.

6 6. On October 1, 2006, Melissa Shockey began employment with the DNR as an OA3 in the Romney office. Her starting salary was $21,840. That starting salary was approximately $4000 more than the starting salary of Ms. Buckland. 7 7. The salaries paid to Grievant and to Ms. Shockey were both within the range provided for the OA3 classification. The present salary range for the classification is $15,816 to $29,268.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug.19, 1988). 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).

Grievant asserts that she was subjected to discrimination or favoritism because Ms. Shockey receives a higher salary than she does. To meet her burden grievant 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 she did not agree in writing to difference in treatment.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S. E. 2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged that this Board's cases have consistently held that the elements of discrimination and favoritism are essentially identical. *Frymier supra.* at 59*; Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*,

Docket No. 90-50-281 (Jan. 28, 1990). “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *White, supra*.

In *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court noted that W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent supra.* at Syl. Pts. 2, 3 & 4. The requirement is that all classified employees must be compensated within their pay grade. *See Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997); *Brutto v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-076 (July 24, 1996); *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). *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). 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." *Largent supra.* at 246.

In a letter to Grievant, dated March 16, 2007, Director Jezioro explained the difference in the starting salaries of Ms. Buckland and Ms. Shockey as follows:

Applicants applying for the Office Assistant III Romney position were selected using the division of personnel's register process similar to the Beckley position, however, the applicant pool for these two positions was different in the number of applicants, market area, level of experience, and level of related skills. These reasons for a difference in pay within the same pay classification are consistent with the *Largent* ruling. Grievant testified at length about her education and qualifications, which were impressive. However, she produced little actual evidence as to Ms. Shockey's qualifications or the employment conditions in the Romney office. Ms. Shockey told Grievant that she did not have any college credits but that was basically the limit of the factual comparison. Mr. Berry testified that he was employed in the Romney office twenty-five years ago. At that time, the Romney office assistant did roughly the same things that Grievant was doing in the Beckley office, except that the Romney office employees were less busy. While Mr. Berry's testimony was credible, it did not relate to the present situation in the Romney office or to the differences in the

applicant pools and the labor market in the two areas.

Additionally, there is no dispute that while their salaries are substantially different, Grievant and Ms. Shockey are both being paid within the appropriate pay grade for their classifications. The principle 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*, 192W. 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). It is not discrimination for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003). Grievant did not prove, by a preponderance of the evidence, that the difference between her salary and the salary of Ms. Shockey was the result of discrimination or favoritism.

Grievant's additional claim is that when she was hired she was promised a five percent pay raise after she worked six months for the DNR. (See footnote 7) Grievant seeks to receive that raise and back pay. Mr. Berry was unequivocal about his representations to Ms. Buckland at the interview. He assured her that she would receive a raise in salary of five percent after working six months with the DNR. Mr. Berry further asserts that he received authority from Scott Warner, in Charleston, to speak to Grievant about the raise. Respondent counters that neither Mr. Berry nor Scott Warner had authority to promise Grievant a salary adjustment and DNR is not bound by their representations.

This Grievance Board has discussed the issue of ultra vires acts at some length. Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95- HHR-297 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313,406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res*., Docket No. 99- HHR- 228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of*

Transp. and Division of Personnel, Docket No. 06-DOH-242 (January 31, 2007).

In the present case, Mr. Berry did not have the authority to assure Grievant that she would receive a raise after six months of service. He testified that subsequent to Grievant's six month service date, he requested a raise for her from the Director. That request was not granted. Clearly, he would not have made such a request if he had the authority to grant the raise on his own. It is difficult to determine what authority Mr. Warner held because his position was never identified. More importantly, it is undisputed that Governor Manchin had put a freeze on all discretionary raises in April of the year Grievant was hired. At that point, not even the DNR Director could have granted Grievant the raise discussed when she was hired. Grievant's frustration with not receiving the raise is understandable. By all accounts she had good reason to believe that she would receive it once her six month period ended. Unfortunately, Mr. Berry was unauthorized to offer the raise and DNR cannot be bound by his assurances. *Allen, supra.*

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va.Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug.19, 1988).

2. Within the context of the West Virginia Public Employees Grievance Procedure, "discrimination" means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees. W. Va. Code § 6C-2-2(d). "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee. W. Va. Code § 6C-2-2(h).

3. In order to establish either a discrimination or favoritism claim asserted under the grievance statute, an employee must prove:

(a) that 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 she did not agree in writing to the difference in treatment.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S. E. 2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).

4. The elements of discrimination and favoritism are essentially identical. *Frymier v. Higher Educ. Policy Comm.*, 221 W. Va. 306, 655 S. E. 2d 52 (2007); *Kincaidv. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). The crux of such claims is that the complainant was treated differently than similarly situated employees. *White, supra*.

5. It is not discrimination for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

6. Grievant failed to prove that the difference in her salary and the salary of Ms. Shockey was the result of favoritism or discrimination.

7. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division Of Personnel*, Docket No. 06-DOH-242 (January 31, 2007).

8. Larry Berry did not have the legal authority to assure Grievant that she would receive a raise after six months of employment with the DNR. Consequently, DNR is not bound by Mr. Berry's assurances made to Grievant.

According the grievance is DENIED

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the

West Virginia 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 ofthe appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 6, 2008

_____

WILLIAM B. MCGINLEY

Administrative Law Judge

Footnote: 1

William R. Valentino, Counsel for DNR, submitted a Notice of Separation and Renewed Motion to Dismiss on September 19, 2008. In that document he alleged inter alia that "Grievant, Vera Buckland, resigned her employment with the Division of Natural Resources and state government on September 5, 2008". Ms. Buckland's separation from employment notwithstanding, she would be entitled to backpay if she were to prevail on the merits of her claim. Therefore, the Renewed Motion to Dismiss on that ground is denied.

Footnote: 2

For ease and clarity the District IV office will be referred to herein as the Beckley office and the District II office will be referred to as the Romney office.

Footnote: 3

Grievant was represented by Fred Tucker, West Virginia State Employees Union, UMWA and DNR was represented by William R. Valentine, Esquire.

Footnote: 4

Counsel for DNR renewed his Motion to Dismiss alleging that Grievant failed to demonstrated that she was similarly situated to the Office Assistant III located in the Romney office. The issue of whether Grievant proved her case by a preponderance of the evidence will ultimately resolve this matter. Therefore, the undersigned declines to rule on the Motion to Dismiss and issues this decision to resolve all issues of fact and law.

Footnote: 5

This grievance was reassigned to the undersigned Administrative Law Judge for administrative reasons.

Footnote: 6

No testimony was offered as to Mr. Warner's title or where he works except that he was in Charleston.

Footnote: 7

On her level three appeal form, Grievant does not make mention of the raise issue or ask that she be given the raise as a remedy. The issue is addressed herein because it was raised on the original grievance form and dealt with at length at the level three hearing.