THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEITHER BAISDEN, JR. and
MARK GRALEY,
Grievants,

v. **Docket No. 2009-0444-CONS**

DIVISION OF HIGHWAYS
Respondent.

DECISION

Grievants Keither Baisden, Jr. and Mark Graley filed a grievance against their employer, Division of Highways, on August 13, 2008. Their statement of grievance reads, "Pay inequity."

For relief, Grievants seek, "To be made whole."

A level one hearing was held on September 29, 2008, and this grievance was denied by a decision issued on October 1, 2008. Grievants filed an appeal to level two. Mediation was held on February 13, 2009. This grievance was then appealed to level three, and a level three hearing was held at the Grievance Board's Charleston office on May 29, 2009. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by Barbara Baxter, Esq. The parties desired to file proposed findings of fact and conclusions of law with the date for submission being July 8, 2009. Therefore, this case became mature upon the parties' filing findings of fact and conclusions of law.

Synopsis

Grievants assert they have been victims of discrimination because they did not receive a 15% pay raise when they were reclassified from a Transportation Crew Chief

(TCC Main) to a Transportation Crew Supervisor. Grievants aver that the Puccio memo barring discretionary pay raises is not binding on Respondent.

Respondent asserts this grievance is not timely. Respondent also argues Grievants did not move to a higher pay grade. Instead, upon reallocation, Grievants were moved to a lower pay grade, but did receive a small increase upon reallocation.

Grievants have failed to meet their burden in this matter. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievants are currently employed by Respondent as a Transportation Crew Supervisor 1 in District 1.

2. Grievant Baisden was reclassified from a TCC Main classification to a Transportation Crew Supervisor 1, as the result of the Division of Personnel reorganizing that specific classification.

3. Grievant Graley was a TCC Main and was reclassified to a Transportation Crew Supervisor 1, as the result of the Division of Personnel reorganizing that specific classification.

4. When Grievants were in the TCC Main classification they were paid hourly. When they were reclassified to Transportation Crew Supervisor, the Grievants were paid a salary.

5. The only pay raise given during this reclassification was to employees who were being paid under the minimum for their new pay grade.

6. Grievant Baisden was given a half-cent pay raise. (Level 1 Transcript. Pg. 9).[1]

Discussion

Timeliness

As a preliminary matter, DOH asserts this grievance is untimely. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

W.VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee

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[1]Grievant Graley did not testify at the lower level and did not testify at level 3. The undersigned was provided with no evidence as to what raise, if any, Grievant Graley was given.

> may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

Grievants contend they are within the required time period for filing this grievance, as they learned of the 15% pay increase others received within fifteen days of filing the grievance. Respondent did not provide evidence as to when this reallocation occurred. Therefore, Respondent's motion to dismiss based on timeliness must be denied.

Merits

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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 Grievants have not met their burden. *Id.*

Grievants assert they should have received a 15% pay increase due to the reclassification. However, Grievants presented no evidence at level three, and after reviewing the transcript from level one, it is clear Grievants did not present any evidence as to the pay grade they were in when they were classified as TCC Main, nor did they present any evidence regarding what pay grade they were in when they were reclassified to Transportation Crew Supervisor 1.

Respondent did provide testimony that the only raises given when the reclassification occurred were to those workers whose pay was under the minimum for the new pay grade.

In Grievants' proposed findings of fact and conclusions of law, they assert they received a 5% pay increase upon the reclassification. Grievants cite to testimony at level three from Margie Stover Withrow, District Manager for District 1 to support this assertion. However, after reviewing her testimony she does not provide information about the classification Grievants were in either prior to or after the reclassification. If anything, her testimony contradicts the assertions made by Respondent in its proposed findings of fact and conclusions of law in that Ms. Stover Withrow asserts Grievants may have moved up one pay grade. Yet, Respondent's attorney argues they moved down one pay grade.

Grievant Bailey contradicts the assertions made in Grievants' proposed findings of fact and conclusions of law because Grievant Bailey testified he received a half-cent pay increase whereas Grievants assert in the pleadings that they both received a 5% increase. To make matters more complicated, there was no testimony presented about Grievant Graley and what type of increase, if any, he received.

Grievants assert they were discriminated against because others were reallocated and were given a 15% pay raise. W. VA. CODE § 6C-2-2(d) defines discrimination as, "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."

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., 655 S.E.2d 52 (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 (2005).

Grievants compare themselves to Michael Stowers, a Transportation Crew Supervisor 1 at the Rock Creek Substation. Mr. Stowers testified at level 1 that he received a 15% pay increase upon being promoted. However, Mr. Stowers testified that he went from a Transportation Worker 3 to a Transportation Crew Supervisor 1.

Grievants also compare themselves to Stefen White, who was a Transportation Worker 2 and then received a promotion to a Transportation Crew Supervisor 1 with a 15% pay increase. Grievants are not similarly situated to Mr. Stowers or Mr. White. First, these two gentlemen were not involved in the mass reclassification. Mr. White and Mr. Stowers were promoted, instead of being moved into the classification because of reorganizing the classifications. Second, Mr. Stowers and Mr. White were in different classifications at the time of their reallocation.

Grievants have the burden in this matter, and in the absence of evidence that they were entitled to a pay increase upon reallocation, this grievance must be DENIED.[2]

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[2]Grievants asserted the Puccio memo prohibiting discretionary raises was not binding on the agency. Because there is very little evidence concerning whether Grievants were entitled to even a 5% pay raise, there is no reason to address the merit of the Puccio

Conclusions of Law

1. As a preliminary matter, DOH asserts this grievance is untimely. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. W.VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article."

3. Respondent did not meet its burden of proving this grievance is untimely.

4. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their 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

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memo.

(May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

5. 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., 655 S.E.2d 52 (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 (2005).

6. Grievants did not meet their burden of proof.

Accordingly, this 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 of the 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: January 28, 2010

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Wendy A. Elswick
Administrative Law Judge