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DENISE PHILLIPS

v.

Docket No. 91-T-289

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE and
WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/
DIVISION OF PERSONNEL

DECISION

Grievant, employed by Respondent West Virginia Department of Tax and Revenue (Tax) as a Chief Tax Examiner (Chief), alleges that Tax discriminated against her by not giving her a 10% merit increase in April 1991 and by promoting another employee to Chief in 1986 prior to her own promotion. The grievance was denied at the lower levels,¹

¹At Level III Grievant charged, more broadly than her statement of grievance, that she has been systematically discriminated against in that throughout her tenure as a Chief at Tax her salary has been lower than other Chiefs'. While she makes no such charge at Level IV and therefore apparently has abandoned it, it is noted that in any case the evidence failed to support it; Grievant's submission of the differing salaries of the Chiefs, without more, is insufficient to make a prima facie showing of discrimination, particularly since, while not all the other Chiefs have been Chiefs as long as Grievant, they all have been employed by Tax from nine to twenty years longer than Grievant and all Chiefs, including Grievant, are in the same paygrade, albeit at different steps of that paygrade. Compare Largent v. W.Va. Dept. of Health, Docket No. H-88-012 (Sept. 15, 1989).

and appeal was taken to Level IV on July 8, 1991. A conference was held July 22 and the case was heard on August 27 and September 3. Grievant and Tax filed memoranda in October.

The basic facts regarding the first charge are not in dispute: Grievant is one of six Chiefs, who are in two groups of three each. Grievant's group is supervised by Tax Administrator Tom Raynes, who in turn is supervised by Assistant Director George Hall and Director Dan Taylor. Mr. Raynes's written recommendation for increases was that two of the Chiefs under his supervision, Grievant and Stephen Crouse, should be granted 10% merit increases. The other Tax Administrator recommended that one of his Chiefs, Jim Tincher, should receive a merit increase, also 10%. Mr. Taylor accepted all of the recommendations made by the two Tax Administrators except Mr. Raynes's recommendation regarding Grievant's increase, for Mr. Taylor decided to award her a 5% merit increase instead. Grievant asserts that she, the only female Chief, was discriminated against on the basis of sex.

It is well-settled that, in order to make a prima facie showing of discrimination under W.Va. Code §29-6A-4(a), a grievant must establish

- (a) that he (or she) is similarly situated, in a pertinent way, to one or more other employee(s);
- (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
- (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other

employee(s) and were not agreed to in writing by the grievant.

Holcomb v. W.Va. Dept. of Highways, Docket No. 89-DOH-398 (Oct. 31, 1989); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).² If a prima facie showing is made, it may be rebutted by the employer's offering a "legitimate, nondiscriminatory reason" for its action, and, if such rebuttal is successful, in order to establish his or her claim of discrimination the grievant must demonstrate by a preponderance of the evidence that the offered reason was mere pretext. Holcomb; Steele.

That Mr. Raynes's written recommendation of a 10% increase for Grievant was the only one relating to the Chiefs that was rejected, to Grievant's detriment, fulfills the first two elements. Tax argues as follows regarding the third element:

The modification cannot be shown as a different treatment unrelated to job responsibility. To the contrary, the fact that the modification was made was merely done to reflect the initial merit increase recommendation based upon the improvement Grievant had shown in her job responsibility.

Tax is referring to testimony of Mr. Raynes that he had originally and orally recommended a 5% increase for Grievant but changed it to 10% upon suggestion of Mr. Hall that a larger increase would help decrease the gap between

²Holcomb adopted the standards articulated in Steele, which involved a grievance of an education employee alleging discrimination under W.Va. Code §18-29-4(a)(1).

Grievant's salary and the other Chiefs'.³ Firstly, the argument does not properly relate to whether Grievant established the third element of her prima facie case, for that was readily fulfilled since Grievant's position and duties are the same as the other employees whose recommended merit increases were not lowered and she did not consent to that differing treatment. Secondly, there is no credible evidence supporting Tax's claim that Mr. Taylor lowered the amount of increase because of Mr. Raynes's original recommendation. Rather, Mr. Taylor's testimony establishes that he independently decided that Grievant was not entitled to the 10%; at Level III he even indicated that he had not remembered Mr. Raynes's initial recommendation until after the Level II conference.⁴ Only at Level IV did he make any mention of Mr. Raynes's original recommendation as a cause of his own action, once stating that he "went along" with a 5% increase. That testimony was unspecific and belated and was contradicted by his other testimony and is therefore given little weight. That other testimony of Mr. Taylor on why he reduced the formally recommended merit increase to 5% is critical for determining whether Tax rebutted the prima

³Whether or not such a consideration in awarding merit increases is proper is not at issue here and no comment is accordingly made thereon.

⁴Mr. Raynes was not even informed why his recommendation was not accepted; rather, he found out the cause during the grievance proceedings.

facie case, however, and, if so, whether Grievant nevertheless established discrimination.

At Level III Mr. Taylor testified,

Based on my feeling, that based on the merits of what we were looking at [at] that time..., I reduced it to a 5 percent.... [W]e were going primarily on merit and Denise is meritorious[;] she has improved over the past year or so and [we] felt that she did deserve something and that, therefore, we gave her a 5 percent increase.

Asked by Grievant⁵ whether he had given the same reason at Level II, he conceded that he had not, agreeing that he had told Grievant at that level that she had not been given the 10% recommended increase because she was too friendly with her employees and she needed to make more effort in terms of audit results, specifically that a certain "Maben" audit had taken too long.⁶ Grievant replied,

As far as the friendliness to the employees, you could offer no examples, and I suggested that it was the fact that I held meetings at my headquarters, which is my home, and you said, "Yes." Does that sound about like what you said?

⁵Grievant has represented herself throughout these proceedings.

⁶While the Level II proceedings were referred to as a hearing, apparently a conference was held, as required by Code §29-6A-4(b); accordingly there is no evidentiary record and no indication that any statements were under oath.

Mr. Taylor responded, "Yes, that is close enough," Tr. 8,⁷ and agreed that Grievant's headquarters are her home. The questioning continued,

- Q. How does being friendly affect my performance?
A. Well, I think you have to draw the line between being friends and being friendly. I think there is a fine line there, between a supervisor and the fellow employee.
Q. And you feel that I crossed over that line?
A. Yes.
Q. Why? By socializing, by buying presents for birthdays, by--
A. No, it is just observation.
Q. But you have no concrete--
A. No, no--
Q. Just your observations that I am too friendly?
A. Right.
Q. Let's go back to the Maben audit. Are deadlines given for completing audits?
A. At times. Not all times, no.
Q. Was there a specific deadline for the Maben audit?
A. No, not that I am aware of. In terms of specific deadline, no, but we wanted to get it done as soon as possible.
Q. Do you feel that I was directly responsible for causing the delays in the completion of the audit?
A. No.
Q. Did you approve Mr. Ra[y]nes for a two-step increase?
A. Yes.

Tr. 9-10. Asked by Tax's representative why he approved the 10% increases for Chiefs Crouse and Tincher and not for Grievant, Mr. Taylor replied,

Primarily, they both have a better general knowledge of the tax laws, and they have a more specific knowledge of certain tax laws, and they aggressively, in my opinion, supervise their employees in a manner that I agree with.

⁷All "Tr." references are to the Level III transcript. Unsubscribed quoted material is Level IV testimony. At the time of this decision there is no transcript of the Level IV hearing; accordingly there may be slight and inconsequential differences in quotations here given and those of such transcript, should one subsequently be prepared.

Tr. 16. Grievant further questioned Mr. Taylor, referring to what he had said at Level II:

- Q. You did not define friendly any more than just an attitude, is that correct?
- A. It is a perception on my part, right.
- Q. Would you say that you are friendly with your employees?
- A. I am friendly to a point, but I draw the line.
- Q. Do you socialize after hours with your employees?
- A. Maybe, not on a regular basis, and no, I wouldn't say that I socialize, no.
- Q. On the golf course, would you socialize?
- A. If you consider that socializing, yes.
- Q. In particular, is Mr. Crouse someone you golf with more than once or twice a year?
- A. Maybe once or twice a year, if you call that socializing.

Tr. 31-32.

At Level IV Mr. Taylor testified,

My original thoughts on the merit increase... were no increase, zero, and Mr. Raynes convinced me that Ms. Phillips had improved and was showing improvement and I went along with 5%.

He conceded that his Level II statements were not entirely consistent, explaining that "at Level II I really didn't think we'd get this far; I wanted to keep it on a friendly basis." He further explained,

What I'm trying to get at is that she really hasn't come across the line, in my perception, as to making that break between supervisor and employee.... She has improved; my original thinking of giving her none was that she had not been aggressive and a little too friendly and I decided she has improved.

Asked to explain what is "this step across the line," Mr. Taylor replied,

It's an observation I make and it's probably nothing that one can say one and one is two. It's just a gut reaction and just what I see and just what I hear that she hasn't or in the past she hasn't and I agree she has improved.

Asked if her style has had any effect on her supervisees, such as that they do not work as hard as others, he did not directly respond but stated that she was not seeing her supervisees enough and repeated that she did not have as good a knowledge of the tax law as the Chiefs awarded 10%. He stated that both Mr. Tincher and Mr. Crouse are better Chiefs than Grievant is, and, asked how Mr. Crouse is better,⁸ replied,

That nebulous thing of breaking over from a supervisor from employee. He's friendly with his employees but he's not friends. He takes an aggressive role in terms of knowledge of the tax laws.

Mr. Taylor explained his use of the term "aggressive role" by stating that Mr. Crouse finds out the problems with his supervisees and pursues an issue until he gets "an answer he can work with."

He presents his facts on an issue fairly well and, from a tax viewpoint, understanding the facts and how they relate to a specific instance are pretty important and, just from my observation, he does that as well as any of the supervisors. He has had to talk to employees because they get out of line and I think he handles it very well. He just presents himself as a manager both to his peers and to the managers as much or more than any of the others.

Mr. Taylor said Mr. Crouse so presents himself "much better" than Grievant. Asked if he handles problem employees better than Grievant, he replied, "Well, he's probably got more

⁸The testimony centered on comparing Grievant with Mr. Crouse because they share Mr. Raynes's supervision. That comparison is not critical, however, because of the finding, infra, that Mr. Taylor did not rely on Mr. Raynes's original recommendation.

problem employees than Ms. Phillips." Asked for specifics as to why he believed Mr. Crouse knew more tax law than Grievant, he stated, "Oh, I know of instances where her employees have called other supervisors," but conceded that such had occurred "pretty much in the past."⁹ The record was clear that such past practice was considered because merit increases had not been awarded for four or five years.

Tax's articulated reason for treating Grievant differently from Chiefs Crouse and Tincher was that she was not as good at her job as they were, clearly a "legitimate, nondiscriminatory reason," and so Grievant's prima facie case was rebutted. At issue then is whether a preponderance of the evidence established pretext.

While Mr. Taylor conceded that his reasons were not the same at Level II as they were at Levels III and IV, consistently at each level he stated that he considered Grievant's

⁹While Mr. Taylor's testimony is the only testimony that must be considered in determining why Grievant's merit increase was less than Messrs. Tincher and Crouse, it is noted that Mr. Hall's testimony was consistent with Mr. Taylor's, for he testified, in response to Grievant's question, "Why was my raise less?"

The obvious reason, the director reduced it. You haven't made the transition from employee to supervisor. Nothing really specific, it's just a perception I have and he has. I can't be specific.

Asked how is she not effective, he responded, "You're more akin to your employees than you are to management. Your allegiance should be to us rather than your employees." Asked about Grievant's handling of disciplinary actions, he stated, "You were reluctant and somewhat nervous. Perhaps 'reluctant' is too strong, 'apprehensive' is better."

management style lacking, at least in comparison to that of Chiefs Crouse and Tincher. At Level II Mr. Taylor labelled her style as "too friendly." At Level III he stated that part of the reason he denied Grievant the 10% raise was that she did not as aggressively as Chiefs Crouse and Tincher supervise her employees "in a manner that I agree with." At Level IV his testimony supports that her style may have been the sole basis for his decision. That is, he stated that his reason for giving Grievant the 5% raise was that she had "improved" and then made clear that the area in which he considered her to have improved was in her management style ("my original thinking of giving her none was that she had not been aggressive and a little too friendly and I decided she had improved") and, while he indicated other areas in which Grievant was not as good as the Chiefs Crouse and Tincher, he in fact did not indicate that those were his reasons for not giving her as high an increase. Indeed, it must be determined, consistent with that Level IV testimony, that Grievant's management style was at least the primary, and perhaps sole, basis for Mr. Taylor's decision. The other reason given at Level II, tardiness in processing audits, has no support of record and was essentially repudiated by Mr. Taylor himself. While he provided another reason at Level III, that Chiefs Crouse and Tincher are more knowledgeable of tax laws, that reason is not found to be credible, because it is inconsistent both with his testimony at Level IV and his statements at Level II.

Moreover, although this case is a close one, it is determined that Grievant did establish pretext. Mr. Taylor referred to his "feelings," "gut reaction," or "perception" and stated that he did not "agree with" Grievant's management style; he did not really articulate why Grievant's "friendly" style of management was not as acceptable as the style he was comfortable with, and, although he indicated that he disapproved of Grievant's having her employees in her home, which is concededly her headquarters, he denied that playing golf with his employees is even socializing, which, as Grievant argued, it clearly is. The evidence supports that, while Mr. Taylor sees no problem with managers socializing with their supervisees in an historically male way, such as golf, he does consider it "too friendly" when a manager socializes with her employees in an historically more feminine style. The record supports an inference that Grievant's style was viewed as inferior because it was not a traditionally masculine style of management.

That such an inference arises is important, but is not what is critical in determining that pretext was established. What is critical is that Mr. Taylor had no response when asked if Grievant's style has had any ill effect on her employees; although asked if her employees work less hard, for example, he provided no answer. Similarly, he was very vague on how Grievant is inferior in her ability to discipline employees. Accordingly, the record as a whole establishes that Grievant's management style was the primary

reason for Mr. Taylor's not granting the 10% merit increase, and that that reason was pretextual. This record accordingly supports that Grievant is legally entitled to the remainder of the 10% raise she was denied.¹⁰

Grievant's remaining charge of discrimination is not supported by the record, however. Grievant complains that she had been promised a promotion in early 1986 and had been told then that it would be delayed due to lack of funds but that Mr. Crouse's promotion was then effected two weeks before her own.¹¹ The simple fact of the matter is that Grievant failed to establish the first element of her prima facie case because the evidence failed to establish that she

¹⁰It must be noted that Mr. Raynes's initial recommendation of 5% may have been appropriate. However, that does not control the outcome here. Again, it is clear that, had not Mr. Taylor made his own conclusions, he would have accepted the formal recommendation of Mr. Raynes; that that recommendation may not have been appropriate therefore has no bearing here.

¹¹Grievant testified that she did not find out that Mr. Crouse's promotion had occurred prior to her own until she was researching her initial claim. Tax argued at the Level IV hearing that Grievant's second claim was untimely. The undersigned made a preliminary ruling that the claim would be timely because Grievant filed her claim immediately upon discovering the allegedly differing treatment. Tax was advised that it could further argue the issue post-hearing. No argument of untimeliness is made in Tax's brief; apparently the argument has been abandoned. In any case, the preliminary ruling was correct. See Holcomb.

There is one final troubling aspect to Grievant's second claim: it is uncertain whether this Grievance Board has jurisdiction over that claim since it can consider only "grievances arising on or after the effective date of this article [July 1, 1988]." Code §29-6A-11. It may therefore be improper to assume jurisdiction, as does this decision; however, the outcome would be the same if there is no jurisdiction.

and Mr. Crouse were "similarly situated." Grievant was not promoted at that time; rather, her change in classification was due to a reclassification required by the West Virginia Civil Service System (now the Division of Personnel). Only Mr. Crouse was promoted. Accordingly, the two changes to the same classification were due to entirely different procedures and no claim of discrimination can be based on the fact that those differing procedures resulted in Mr. Crouse's attaining that classification two weeks before Grievant.

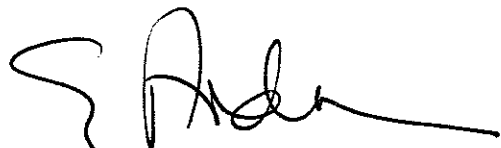
While the findings of fact and conclusions of law are contained in the foregoing discussion, the following is appropriate:

Conclusion of Law

Grievant established a prima facie showing of discrimination by showing that the formal recommendation that she receive a 10% merit increase was the only recommendation not accepted by Director Taylor. While such showing was rebutted by Tax's articulated reason that Grievant was not as good as the Chiefs whose 10% recommended merit increases were approved, a preponderance of the evidence established that Grievant was considered less capable because of her management style and that that reason was pretextual. Accordingly, Grievant established discrimination in being denied a 10% merit increase.

The grievance is accordingly **GRANTED** insofar as Grievant has established entitlement to the 10% merit increase. Tax is therefore ORDERED to provide her backpay so that she is compensated as if she had been awarded a 10% pay increase at the same time as were Chiefs Crouse and Tincher, to modify her personnel records to show a 10% increase, and to provide her any further benefits attendant to such increase. The grievance is otherwise DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
ADMINISTRATIVE LAW JUDGE

January 15, 1992