

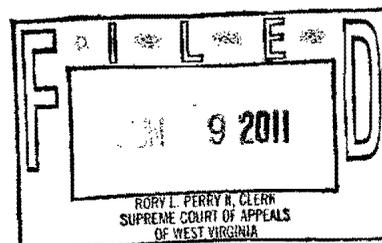
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0284

RANDY HAMMOND, et al.,

Appellants-Petitioners,

v.



Appeal from a final order of the  
Circuit Court of Kanawha  
County (08-AA-19)

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/  
DIVISION OF HIGHWAYS AND THE DIVISION OF PERSONNEL

Appellees-Respondents.

APPELLEES' BRIEF

WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION/DIVISION OF  
HIGHWAYS

BY COUNSEL,

A handwritten signature in cursive script that reads "Krista D. Black".

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## I. STATEMENT OF THE CASE

In late 2004 and early 2005, management of the Division of Highways (“DOH”) received numerous complaints about difficulties in attracting and retaining qualified transportation workers in the Eastern Panhandle area of the state. (R. 316). Transportation workers are the core of the DOH maintenance program, as they are the workers who perform important functions such as mowing, controlling vegetation, and removing snow and ice, all of which directly impact the travelling public. (R. 76-84). As a result of these complaints, the DOH Commissioner at that time directed the Human Resources Director, Jeff Black, to investigate the issue and determine what measures could be taken to attract and retain qualified workers in that area. (R. 335-336).

Mr. Black, the Human Resources Director at the DOH for 17 years, set forth to evaluate whether the complaints were valid and, if so, what could be done about them. (R. 314) His office evaluated recent personnel certifications to determine whether a sufficient number of qualified applicants in the transportation worker classification was present. (R. 93-94, 104-111, 315, 322-326). While adequate numbers existed in Grant, Hardy, Mineral, and Hampshire Counties, the numbers in Berkeley, Morgan, and Jefferson Counties were wholly inadequate. (R. 315). In fact, Mr. Black was “alarmed” by the lack of applicants on the Division of Personnel (“DOP”) registers in that three-county area. (R. 316).

When a vacancy occurs in state government, it may be filled internally, by someone who has completed a probationary period with any state agency in a civil service covered position, or it may be filled externally, by an applicant identified from a register of potential employees who have been deemed qualified, by the DOP, for the position at issue. (R. 322-326; *see generally* DOP Administrative Rule, 143 C.S.R. §§ 7-11 (2003)). Under the latter system, a state agency contacts applicants present on the DOP register to interview them for the job. Should the agency

exhaust the register without finding a suitable applicant, it may ask for additional names to be certified by the DOP. *Id.*

Mr. Black testified that, in his 17 years as the Human Resources Director, the situation leading to the pay differential and special hiring rate in the Eastern Panhandle was the *first time he could not get additional names* using the DOP process. (R. 325). He testified that internal applicants were not applying for these jobs, either. (R. 322). As a result, he was concerned that if action was not taken that effectively addressed the problems in the Eastern Panhandle, the DOH would have to contract out its maintenance functions in that area. (R. 352).

Mr. Black also attempted to determine the reason the numbers of applicants for state employment in this area were insufficient. (R. 325). In doing so, his office reviewed salary information from the Bureau of Employment Programs and local newspaper advertisements from the Martinsburg Journal. (R. 93-94, 98-103, 320). He concluded that it was likely that the salaries the DOH was offering in the Eastern Panhandle were insufficient to attract sufficient qualified applicants for the jobs. (R. 325).

Finding the complaints valid and surmising that the issues likely resulted from inadequate pay, Mr. Black proposed to the DOP that the hiring rate for incoming transportation workers be increased by 25% and that current employees in those classifications receive a 15% pay differential. (R. 93-113, 319). These actions are specifically contemplated in the DOP's legislative rule. *See* 143 C.S.R. § 5.4(f)(4) (2003). Mr. Black did not canvass the entire state for similar issues before making the Proposal, as he had not received complaints from other parts of the state, and as he had not seen similar issues in other parts of the state. (R. 401, 403).

Under the direction of Tim Basford, then the manager of the DOP section encompassing employee classification and compensation issues, the DOP conducted an independent review of

the Proposal. (R. 417). Mr. Basford holds a master's degree in Public Administration, and he has attended numerous seminars by the American Compensation Association. (R. 425). His unit is responsible for conducting salary surveys and developing pay plans for state employees. (R. 424). At the time of the grievance hearing, Mr. Basford had worked in classification and compensation issues at the DOP for 30 years. (R. 424-425).

Mr. Basford testified that the documentation submitted by the DOH was extensive and was more than what was typically submitted by state agencies in support of their requests. (R. 418). Mr. Basford's staff reviewed the Proposal, researching additional information to determine the DOP's position on the Proposal, for presentation to the State Personnel Board. (R. 417). Ultimately, his unit approved the Proposal, with the exception of the pay differential for the position of Highway Administrator 2. (R. 114, 422). Mr. Basford noted that he did not recall any instance in which a state agency submitted documentation for the entire state when requesting a geographically specific pay differential, (R. 423), despite that the pay differential mechanism had been in place since 1993. (R. 447). Mr. Basford noted that various other pay differentials had been implemented under DOP Administrative Rule, 143 C.S.R. §5.4(f)(4), including differentials for investigators, nurses, and others at specific locations across the state and within various agencies. (R. 418-421).

The State Personnel Board approved the Proposal for workers in the following classifications: Transportation Worker 1, 2, and 3; Transportation Crew Supervisor 1 and 2; and Transportation Crew Chief. (R. 114). Agreeing with the DOP's review and recommendation, it did not approve the pay differential for the position of Highway Administrator 2. *Id.* On July 1, 2005, approximately 84 employees received the increases. (R. 111-114).

All of the Appellants work in District One, which includes Charleston. (R. 116-123). Dennis King, a former acting District Engineer in that District, (R. 57-58), generally testified, pursuant to numerous leading questions, that he had complained of attraction and retention issues in his district during late 2004 and early 2005.<sup>1</sup> (R. 68-69). However, despite his supervision of the district personnel administrator, he could not specify a single hiring for any position that was difficult, nor could he specify a single person leaving to pursue employment<sup>2</sup> in the mines, which was the factor he identified as presenting a problem in Kanawha County. (R. 70, 80, 83-84, 87).

On cross examination, Mr. King admitted that the movement of DOH transportation workers from the DOH to the mines and back was cyclical in nature, as is construction work. (R. 87). He also conceded that he would defer to the personnel certifications on the issue of the sufficiency of applicants, given his inability to articulate any specific instances of attraction or retention issues in District One. (R. 84). As might be expected given the level of complaints emanating from District Five at the time, Mr. King agreed that District Five management repeatedly identified problems in the Eastern Panhandle for transportation workers; he confirmed that management was “very clear” in this regard. (R. 92).

Appellants called Gary Storrs, a labor economist employed by the union, to support their contention that attraction and retention issues in District One were as severe as those experienced

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<sup>1</sup> The presiding Administrative Law Judge (“ALJ”) repeatedly acknowledged that counsel questioning Mr. King was leading him significantly, to the point of commenting that counsel was “giving him the answer in the question.” (R. 60). The ALJ thus properly discounted Mr. King’s generalized testimony over that of other witnesses and documentary evidence in this case, as was her prerogative. Additionally, it should be noted that Mr. King was a retired disgruntled DOH employee at the time he provided his testimony in this case. The Appellee DOH requests that the Court take notice of the Decision of the West Virginia Public Employees Grievance Board, 2006 WL 3254457, Docket No. 06-DOH-020 (Oct. 20, 2006), which dismissed a grievance he filed over his *involuntary* transfer as moot after his voluntary retirement.

<sup>2</sup> While anecdotal at best, the testimony of J. L. Adkins illustrates that the grass is not as green in a private employment setting as employees in District One might think. Mr. Adkins left the DOH to perform concrete work at a higher wage, and only two weeks later, was laid off. (R. 123). He testified that he needed the benefits and insurance provided by a state employer. (R. 122). Similarly, Mr. Storrs’ testimony comparing the wages of employees of the West Virginia Parkways Authority is not helpful, as such employees are exempt from civil service and therefore lack the many of the protections and benefits enjoyed by DOH employees.

in Berkeley, Morgan, and Jefferson Counties. (R. 135). Mr. Storrs complained that the DOH's method of assessing attraction and retention was faulty, but then attempted to duplicate that very analysis in District One, primarily Kanawha County. (R. 139).

First, Mr. Storrs focused on "numerically the most absolute number of vacancies." (R. 168). For example, he testified that District One had more vacancies during the relevant time period, at 79, than did District Five, at 39. (R. 155, 157). The total number of vacancies is neither helpful nor relevant to evaluating attraction and retention, as it fails to account for the reasons such vacancies exist or for factors such as the total number of positions or the number of qualified applicants to fill those positions. For example, 10 vacancies in a 50-person organization would have a more detrimental effect on "getting the job done" as would 10 vacancies in a 100-person organization.

Second, Mr. Storrs focused on the number of qualified candidates on the DOP registers to fill vacancies. For example, Mr. Storrs asserted that 65 applicants to fill 52 positions was a more dramatic ratio than, for example, 12 applicants to fill 8 or 9 positions. (R. 197-198). This analysis contains a fatal error, as illustrated by Mr. Black's testimony, because, unlike in District One *no additional candidates were available to be certified in the three-county area at issue*:

[T]he biggest problem . . . is that if the list that we got was all there was, normally, if we exhaust the list that is given to us, we can go back to personnel and say, we've exhausted these, you know, give us more names, and they got another 50 people to send us or whatever.

But in this county they had no more people to send us. There were nine people for Jefferson County, nine people for Morgan County, and 18 people for Berkeley County. *There were no more.*

(R. 323) (italics added).

While total available applicants were alarmingly low in the three-county area that received the increases, the District One registers contained over 100 names:

Several of [District One's] registers for that same period of time, one of them showed eleven names was the top ten percent, which means there was 110 people on a register. Another one was 15 which meant there was 150 people on the register.

So they were sending us, in District 1, they were sending us 25, 30, 35, 40 names *and there were more beyond that*. If we exhausted those 35 or 40 names, we could go get even more names from them . . . .

(R. 326) (italics added).

Mr. Storrs made a critical, erroneous assumption in his calculations: He assumed that the names he saw on the District One registers were all the names available. This is simply not the case. For example, the "top ten" certification on R. 104 shows seven names. Only seven candidates were available for the job, and five of those seven did not reply to the DOH's request for an interview. Conversely, several of the District One "top ten" registers contained double-digit numbers of applicants. (R. 385). This indicated that the number contained therein represented only 10 percent of the available applicants. (R. 326). A "top ten" request would list a series of names and the request would indicate the percentage of the total applicant pool that the list represented. *Id.* To illustrate, a "top ten" request listing with 15 names with an indication that the 15 names equated to 10 percent of the applicant pool would mean that there were 150 applicants available. *Id.* If the agency failed to find a suitable candidate in the first 15 names supplied, it could request additional names from the DOP, up to 135.

Mr. Storrs was able to do the math, but he did not understand the state government register process to which he applied his calculations. Therefore, his calculations of the number of available applicants in District One were incorrect. (R. 314, 408-410).

Additionally, both Mr. Black and Mr. Basford were clear that they had not received complaints from other geographic areas and that they were the respective individuals in their organizations who would have received such complaints, had such complaints existed. (R. 401,

403, 448-449). Both testified that, based on their experience, no longstanding, severe issues existed in other parts of the state to warrant considering similar remedial measures elsewhere.<sup>3</sup>

*Id.*

Appellants are part of a larger group of transportation workers who filed grievances at different times but were ultimately consolidated into the *Hammond* caption; however, only the union-represented grievants appealed to the Circuit Court of Kanawha County and, ultimately, this Court. Numerous Appellants failed to file a grievance on or before July 18, 2005, R. 118-119, and no evidence was presented to excuse or explain this failure. All of the Appellants are paid pursuant to the Classification and Paygrade Schedule for their respective classifications. (R. 70-75, 116-117).

The underlying grievances were denied at Level Four by the Grievance Board. *Hammond et al. v. Dep't of Transp./Div. of Hys. and Div. of Personnel*, 2008 WL 701627 (W. Va. Educ. & St. Empl. Griev. Bd., Docket No. 05-DOH-336(B) (Feb. 14, 2008)). The grievants represented by the American Federation of State, County, and Municipal Employees Council 77 ("AFSCME") appealed to the Circuit Court of Kanawha County on or about February 29, 2008, where the Board's Decision was affirmed. The same group then filed a Notice of Appeal to the Supreme Court of Appeals of West Virginia on or about February 14, 2011.

Procedurally, this appeal is only a small part of the Eastern Panhandle salary grievances being defended by the DOH. Still pending at the Grievance Board level, held in abeyance pending the outcome of this appeal, are 10 additional grievances: one for each of the remaining nine DOH districts for transportation workers, and one for non-transportation worker DOH

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<sup>3</sup> Here, the DOH was proactive in addressing a specific salary problem. Rather than making their own complaints or statements of need to the agency which could then be evaluated, as in District Five, many employees attempted to jump on the proverbial bandwagon, resulting in enormous expense and lengthy litigation. It is truly unfortunate that employees did not proceed in a less antagonistic manner in resolving their own salary issues, as it is doubtful that management will attempt to address future situations proactively.

employees. Literally hundreds of employees are waiting for the guidance of this Honorable Court.

Judge Zakaib's Order disposes of the *Hammond* matter properly and provides guidance to the Grievance Board about how to handle the remaining grievances. More specifically, it directs that "given the lack of complaints in District One to upper-level DOH management regarding attraction and retention issues, it was unnecessary for the Grievance Board to have considered evidence of job postings, job advertisements, or work force data."

The simple, expeditious process envisioned by the West Virginia Legislature to resolve state employee grievances has been thwarted in this case. The administrative resources used to prosecute, defend, and adjudicate these matters have already been costly, and these expenditures will not end with this Court's Decision. Thus, the Court's Decision should be crafted to enable a summary resolution of the remaining 10 matters.

## II. SUMMARY OF ARGUMENT

All of the Grievants are paid pursuant to the Division of Personnel's ("DOP") Classification and Paygrade Schedule for their respective classifications. None of them work for the Division of Highways in Berkeley, Morgan, or Jefferson Counties. Despite these clear facts, they wish to receive a 15 percent pay differential.

Reversing the Circuit Court and granting such relief would be clearly improper for several reasons. Substantively, *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994) governs this case. Market forces are expressly noted in *Largent* as being a specific and recognized basis that will justify differences in pay. The increases proposed and implemented are specifically recognized in the DOP's legislative rule, 143 W. Va. C.S.R. §§ 3.65, 5.4(f)(4) (2003), as appropriate to address "regionally specific geographic pay disparities," and the increases were implemented in a defined manner.

Under the precedent of this Court, the Appellants are not similarly situated to the employees who received the adjustments, *See, e.g., Pritt v. West Virginia Division of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006); *Board of Education v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). In fact, they live and work in a different geographic area where market forces are different, and no complaints were received from their geographic area to warrant even the consideration of a pay differential and special hiring rate. As a result, their claims of favoritism and discrimination fail.

Further, the far majority of Appellants grievances were not filed within the 10-day statutory time period set forth by former *W. Va. Code* § 29-6A-4 (2004), rendering their initial grievances untimely. Consequently, the Circuit Court Order should be affirmed.

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a), as “the dispositive issue or issues have been authoritatively decided.” Additionally, to the extent that the Court may find otherwise, “the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.” W. Va. R. App. P. 18(a)(3), (4).

While it may be true, as stated in Appellant’s Brief at § VI, that the “issue of what constitutes ‘similarly situated’ employees is of statewide interest to all public employees,” this Court has already determined that to be a fact-based inquiry: “A similarly situated determination is necessarily factual in nature.” *Pritt v. West Virginia Div. of Corr.*, 218 W. Va. 739, 744, 630 S.E.2d 49, 54 (2006). The lower tribunals need only apply settled law to the underlying facts in this matter. Oral argument will not aid in this regard.

Should the Court deem oral argument to be necessary, Appellee Division of Highways requests oral argument pursuant to West Virginia Rule of Appellate Procedure 19.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

Judge Zakaib's Order affirming the Grievance Board's Decision in this matter was made after briefing and oral argument by the parties. Under the applicable statute, former *W. Va. Code* § 29-6A-7(b) (2004), the Board's Decision was appealable on the following grounds:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted abuse of discretion.

*W. Va. Code* § 29-6A-7(b) (2004).

“[G]rievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*.” *Cahill v. Mercer Co. Bd. of Educ.*, 208 W. Va. 177, 180, 539 S.E.2d 437, 440 (2000). Additionally, “[a] final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to governing law and based upon findings of fact, should not be reversed unless clearly wrong.” *Quinn v. W. Va. Northern Comm'ty Coll.*, Syll. Pt., 197 W. Va. 313, 475 S.E.2d 405 (1996). In reviewing a circuit court decision, the Supreme Court of Appeals of West Virginia “is bound by the same standards which the circuit court was obligated to follow in reviewing the Board's decision.” *Pritt v. W. Va. Div. of Corrections*, 218 W. Va.

739, 743, 630 S.E.2d 49, 53 (2006). Thus, to the extent the Board's decision is based upon a factual determination, it may not be reversed unless such determination is clearly wrong. *See id.*, 218 W. Va. 739, 743, 630 S.E.2d 49, 53 (2006).

## B. DISCUSSION

- 1. The Circuit Court properly concluded that the Division of Highways and the Division of Personnel acted within the authority granted to them by legislative rule and this Court's precedent when they granted a geographic pay differential to and implemented a special hiring rate for certain employees in Berkeley, Morgan, and Jefferson Counties due to demonstrated attraction and retention issues in those counties.**

Implementation of a pay differential and a special hiring rate for transportation workers in Berkeley, Morgan, and Jefferson Counties was both warranted by facts and permitted by legislative rule and the precedent of this Court. 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 rules promulgated by DOP pursuant to its delegated authority are given the force and effect of law, and they are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *See State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980).

The legislative rule promulgated by the DOP specifically grants the State Personnel Board the authority to take the actions at issue in this matter:

The [Personnel] 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.

143 W. Va. C.S.R. 1 § 5.4(f)(4) (emphasis added). Pay differentials have been used many times in the past to address specific recruitment and retention issues and have been repeatedly upheld by the Grievance Board. See *Travis v. Dep't of Health and Human Res.*, Docket No. 96-HHR-518, 1998 WL 65836 (Jan. 12, 1998); *Pishner v. Dep't of Health and Human Res.*, Docket No. 97-HHR-478, 1998 WL 305467 (May 21, 1998); *Rosanna v. Dep't of Health and Human Res.*, Docket No. 05-HHR-460, 2007 WL 3047597 (Sept. 28, 2007). So long as the increase has a rational basis and is limited to "a reasonably defined group of employees," it is properly upheld. *Travis, supra.*

Furthermore, this Court has specifically recognized the State's ability, as an employer, to apply differing rates of pay: "[I]t does not violate the principle of pay equity for the state to pay employees within the same classification differing amounts." *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 244, 452 S.E.2d 42, 47 (1994). In *Largent*, this Court expressly noted that the Legislature's intent was to maintain within the civil service system a certain degree of flexibility in setting employee compensation:

The *Code* establishes a multi-step pay plan and the implementing regulations set forth procedures to assist in determining where on that pay plan an individual employee can be placed. *This system allows some flexibility in the hiring process and aids the state in attracting quality people to public service. Moreover, this flexibility allows for fluctuations in market conditions* allowing the State to take into consideration other factors when hiring new employees such as the applicant's education and work experience. In short, *employees who are doing the same work must be placed within the same classification, but within that classification there may be pay differences if those differences are based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer.*

192 W. Va. at 246, 452 S.E.2d at 49 (emphasis added). Thus, the principle of equal pay for equal work is not implicated where differences in pay are based upon market forces or other specifically identifiable reasonable criteria that advance the employer's interest.

It is, in fact, market forces that negatively impacted the DOH's ability to attract and retain qualified transportation workers in the three-county area at issue. During 2004, it became apparent that, when a vacancy occurred in some Eastern Panhandle counties, the DOP register frequently contained very few applicants. (R. 316). In addition, when the applicants on the register were contacted to schedule interviews, most were not interested or did not appear for the interview. (R. 323, 378-381).

The Director of Human Resources, Jeff Black, evaluated recent personnel certifications to determine whether a sufficient number of qualified applicants in the transportation worker classifications were present. (R. 93-94, 104-11, 315, 323-326). Mr. Black was "alarmed" by the lack of applicants on the Division of Personnel ("DOP") registers in Berkeley, Morgan, and Jefferson Counties. (R. 316). Mr. Black testified that, in his 17 years as the Human Resources Director, this was the first time he could not obtain additional names using the DOP certification process. (R. 325) He testified that current state employees were not applying for these jobs, either. (R. 322). As a result, he was concerned that if action was not taken that addressed the problems in the Eastern Panhandle effectively, the DOH would have to contract out its maintenance functions in that area. (R. 352).

With the intent of identifying a solution to these problems, Mr. Black attempted to determine the reason the numbers of applicants for state employment in this area were insufficient. (R. 325). In doing so, his office reviewed salary information from the Bureau of Employment Programs and local newspaper advertisements from the Martinsburg Journal. (R.

93-94, 98-103, 320). Mr. Black ultimately concluded that the salaries the DOH was offering in the Eastern Panhandle were insufficient to attract sufficient qualified applicants for the jobs. (R. 325).

Because of these significant recruitment and retention issues, on May 16, 2005, the DOH submitted a Proposal to the DOP requesting the approval of a pay differential for certain defined groups of DOH employees in Berkeley, Jefferson, and Morgan Counties. (R. 93-113). The Proposal requested a 15% salary adjustment for employees in the transportation worker series and a 25% pay differential for incoming employees in those same classifications. *Id.*

The Proposal was reviewed by the Classification and Compensation unit at the DOP, managed by Tim Basford. (R. 417). Mr. Basford testified that the documentation submitted by the DOH was more detailed than what was usually submitted by state agencies. (R. 418). Mr. Basford's staff reviewed the Proposal, researching additional information to determine the DOP's position regarding the Proposal, for presentation to the State Personnel Board. (R. 417). His unit approved the Proposal, with the exception of the pay differential for the position of Highway Administrator 2. (R. 114, 422).

Neither Mr. Black nor Mr. Basford canvassed the entire state for similar issues before making or reviewing the Proposal, as neither had received long-standing, severe complaints in other areas.<sup>4</sup> (R. 314, 401, 403, 408-410, 448-449).

The State Personnel Board approved the Proposal for workers in the following classifications: Transportation Worker 1, 2, and 3; Transportation Crew Supervisor 1 and 2; and Transportation Crew Chief. (R. 114). Agreeing with the DOP's review and recommendation, it

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<sup>4</sup> Mr. Basford did not remember any time a state agency submitted documentation for the entire state when requesting a geographic pay differential, despite that the pay differential mechanism had been in place since 1993. (R. 423, 447).

disapproved the pay differential for the position of Highway Administrator 2. On July 1, 2005, approximately 84 employees received the increases. *Id.*

The DOP's legislative rule receives the force and effect of law and is presumed valid by law. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). Additionally, the DOP's determinations regarding the implementation of the special hiring rate and geographic pay differential relate to matters within its authority and expertise; these determinations are, therefore, entitled to substantial weight. Recognizing these truths, Appellants have failed to present any evidence, or even argument, that the DOP exceeded its authority in promulgating the Rule or in approving the Proposal.

*Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994) is dispositive of this case. Market forces are expressly noted in *Largent* as a specific and recognized basis that justifies differences in pay, and the geographic pay differential and special hiring rate were implemented properly pursuant to legislative rule, 143 W. Va. C.S.R. 1 §§ 3.65, 5.4(f)(4) (2003), to address "regionally specific geographic pay disparities."

The argument that market forces cannot be considered because the "similarly situated" analysis is employee-focused is a red herring. Note that Appellants do not ask the Court to overrule *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994) or to invalidate the pay differential portion of the DOP's Administrative Rule. However, the acceptance of Appellants' argument would necessarily require such drastic action, as it would effectively implement a uniformity requirement like that enjoyed by education employees. Appellants effectively claim that pay differentials granted pursuant to the DOP's Rule inevitably result in actionable discrimination. It follows that to rule for the Appellants necessarily requires the Court to overrule *Largent* and to invalidate the pay differential portion of the Administrative

Rule. Because *Largent* specifically permits differences in pay due to market forces, and the DOP Administrative Rule allows pay differentials for geographic pay disparities, the Circuit Court Decision should be upheld.

- 2. The Circuit Court properly concluded that the Appellants were not similarly situated to the employees who received the increases both because they work in a different geographic area and because no complaints of employee attraction and retention existed in their area to warrant the consideration of a pay differential.**

The Appellants are not similarly situated to the employees who received the adjustments. First, they live and work in a different geographic area where market forces are different, and second, no complaints were received from their geographic area to warrant even the consideration of a pay differential and special hiring rate, much less the implementation of one. *W. Va. Code* § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a discrimination claim under the grievance statute, 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. *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

The Supreme Court of Appeals West Virginia has reaffirmed the use of the similarly situated analysis in the discrimination inquiry as follows:

[T]he policy underlying uniformity and discrimination claims under the education statutes is to prevent discrimination against *similarly situated* education employees regardless of the basis for discrimination. The crux of such claims is that the complainant was treated differently than *similarly situated* employees[.] *Board of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 246, 605 S.E.2d 814, 818 (2004). Accordingly, a critical component of any discrimination claim is

the determination that the person or persons alleging improper discrimination are *similarly situated* to those allegedly receiving preferential treatment.

*Pritt v. W. Va. Div. of Corrections*, 218 W. Va. 739, 744, 630 S.E.2d 49, 54 (2006) (italics added). This is a fact-based inquiry. *See id.* at 218 W. Va. at 744, 630 S.E.2d at 54.

The very test outlined in this Court's precedent, including *Pritt v. West Virginia Division of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006) and *Board of Education v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004), retains the "similarly situated" analysis in a prong separate from the "job responsibility" inquiry. Necessarily then, "similarly situated" does not equate to new classification and new job duties. Rather, this is a fact-based inquiry that envisions a broader scope of review. Appellants' counsel so much as concedes that attraction and retention issues faced by the employer are legitimate considerations in this analysis, stating that "Since this problem was **more** severe in District 1 than in District 5 . . . this factor alone shows that the two groups of employees are similarly situated." Appellants' Brief at 22. Because Largent is dispositive of this case, the Circuit Court Order should be affirmed.

Before the pay differential and special hiring rate were implemented, the impact of regional market forces were investigated by both the DOH and the DOP. (R. 93-94, 98-103, 325, 417). The level of documentation submitted in support of the DOH's Proposal was greater than that typically submitted by state agencies. (R. 418). It is undisputed that the increases were based upon legitimate, documented complaints arising from management in District Five.<sup>5</sup>

The Appellants are not similarly situated to the employees who received the adjustments because they work in a different geographic area and because no complaints existed in District One to justify DOH considering a pay differential in that area. First, it is undisputed that the Appellants work for the DOH in District One, not in District Five. (R. 120-121). Second, there

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<sup>5</sup> In fact, one of Appellants' witnesses, Dennis King, confirmed that District Five management complained multiple times about difficulties attracting and retaining qualified employees and that their complaints were "clear". (R. 92).

was no reason to consider District One (or any other district) before submitting the Proposal or granting the pay differential to the District Five employees:

- The Director of Human Resources for DOH for 17 years, Jeff Black, had received no complaints from other parts of the state, including District One, regarding a lack of ability to attract or retain qualified employees. (R. 401, 403).
- The Manager of the DOP's section on employee classification and compensation, Tim Basford, who had worked in this area for DOP for 30 years, had likewise received no complaints from other parts of the state, including District One. (R. 448-449).
- As the individuals responsible for addressing attraction and retention issues for DOH and DOP, and in their nearly 50 years of combined experience in their areas, Messrs. Black and Basford were unaware of any significant, longstanding attraction or retention issues in other parts of the state, including District One. (R. 314, 401, 403, 408-410, 448-449).
- Because there were neither complaints nor knowledge of any similar issues in other parts of the state, there was no duty to canvass other areas of the state before proceeding with a solution for the three-county area.

As no attraction or retention problem existed elsewhere, no action was necessary elsewhere.

Appellants' attempts to demonstrate live issues of attraction and retention in District One, through Dennis King and Gary Storrs, fail. Substantively, the ALJ properly discounted the testimony of Mr. King, the former manager of District One, for several reasons. Mr. King was unable to recall even a *single* example of an attraction or retention problem in his District. (R. 70, 80, 83-84, 87). Additionally, he admitted that the movement of DOH transportation workers to mine employment was cyclical in nature, rather than a fundamental, severe problem. (R. 87). Procedurally, Mr. King's testimony was the product of illegitimate questioning designed to draw out the information sought by counsel for the union, as demonstrated by heavy leading of the witness, rising to the level that the ALJ commented on the same. (R. 60). And finally, at the time of his testimony, in May 2007, Dennis King was a retired, disgruntled employee, having been transferred involuntarily and having filed a grievance challenging his transfer. *See King v. WVDOT/DOH*, 2006 WL 3254457 (W. Va. Educ. & State Empl. Griev. Bd. Oct. 20, 2006).

Mr. Storrs' testimony suffers from basic misunderstandings about the DOP certification process. Mr. Storrs focused on raw numbers of vacancies and ratios of applicants to vacant positions. Neither are germane to this case. A comparison of the absolute number of vacancies in District One, which includes Charleston, to the number of vacancies in District Five, a rural area, is not helpful and is, in fact, misleading. Such a comparison fails to account for operational and administrative realities. For example, the number of positions available to perform the work is critical. Some organizations are small and lack the ability to reassign work to other employees. This is especially true in less populated, rural areas such as the three-county area at issue.

Similarly, Mr. Storrs calculated ratios of the number of available applicants for vacant positions in District One, as compared to similar ratios from District Five. He concluded that, for example, 65 applicants to fill 52 positions demonstrated a more severe problem with attracting employees than, for example, 12 applicants to fill 8 or 9 positions. This argument is specious. Mr. Black explained that when fewer than 10 applicants were present on a register, no more applicants were available. (R. 114). Literally, only 12 interviewees reported for 9 jobs in District Five. (R. 195).

In sharp contrast, the District One certifications regularly contained double-digit number of applicants. In some cases, more than 100 applicants were available for a single job. Often, additional names were available to be certified by the DOP. Mr. Storrs was unaware of this critical point or he would not have felt that 65 applicants were insufficient. In fact, the "25, 30, 35, [or] 40" applicants available for a *single* job in District One far exceeded the total number of applicants available for *nine* jobs in District Five.

The difference between the Division of Personnel certifications in District Five and District One is that the District Five certifications contained the names of all available applicants.

In District One, the certifications contained a subset of names from a much larger pool of applicants ready and waiting to be called to an interview. The severity of this problem was illustrated by Mr. Black's testimony that, in his 17 years at the DOH, this was the first time he had been unable to obtain additional names upon request. (R. 325).

Under the precedent of this Court, such as *Board of Education v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004) and *Pritt v. West Virginia Division of Corrections*, 218 W. Va. 739, 630 S.E.2d 49 (2006), Appellants are not similarly situated to the DOH employees who received the increase. They work in a different geographic area where market forces are different, and no complaints were received from their geographic area to warrant even the consideration of a pay differential and special hiring rate. As a result, their claims of favoritism and discrimination fail, and the Circuit Court's Order should be affirmed.

**3. The Circuit Court properly determined that many Appellants failed to file their grievances within the statutorily mandated time frame, thus barring any potential relief.<sup>6</sup>**

The Circuit Court correctly determined that all grievances filed after July 18, 2005 were untimely because the subject of the grievances was a specific administrative act occurring on a date certain rather than a longstanding policy of prohibited factor discrimination. *W. Va. Code* § 29-6A-4 (2004) required grievances to be filed no later than 10 working days after the occurrence of an event:

[B]efore 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.

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<sup>6</sup> It also appears that the Appellants lack standing to complain of at least, the special hiring rate. The Appellants suffered no injury in fact alone to the incoming pay structure.

The burden of proof is on an employer 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 an employer meets this burden, a 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).

The DOH raised the timeliness issue at the lower level of the grievance procedure and provided the tables in the Record to the Administrative Law Judge to prove that the far majority of the grievances were untimely. As is demonstrated in the Joint Appendix, only ten District One grievants, all represented by AFSCME, filed on or before July 18, 2005, which was 10 working days after the increases were granted. R. 118-119. At that point, the burden shifted to the grievants to explain why their grievances were not filed within the 10-day statutory time period. Having failed to meet this burden, the ALJ ruled, and the Circuit Court affirmed, the dismissal of those grievances as untimely. The current case, however, involves a single *act*-the inadvertent failure to include the teachers on a list-that caused continuing *damage*, i.e., the wage deficit. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice.

The administrative decision to grant the increases pursuant to the Proposal was a single, discrete act. In *Spahr v. Preston County Board of Education*, 182 726, 391 S.E.2d 739 (1990), this Court held that “continuing damage” flowing from a past decision of the employer is separate and distinct from a “continuing practice” for the purpose of the discovery rule. Likewise, the Grievance Board has rejected the “continuing practice” argument, not only in the matter below, but in other cases involving similar circumstances. *See, e.g., Clark v. Div. of*

*Natural Resources and Division of Personnel*, 2011 WL 2037592, Docket No. 2009-1066-CONS (W. Va. Pub. Empl. Griev. Bd. May 6, 2011). Therefore, under a clear reading *Spahr* and its progeny, all but 10 of the grievances involved herein are untimely.

The precedent cited by the Appellants for the proposition that a continuing practice is involved in this case is inapposite. Cases such as *Martin v. Randolph Co. Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995) and *West Virginia Institute of Technology v. West Virginia Human Rights Comm'n*, 181 W. Va. 525, 383 S.E.2d 490 (1989) involved protected class discrimination:

Unlawful employment discrimination in the form of compensation disparity *based upon a prohibited factor such as race, gender, national origin, etc.*, is a “continuing violation,” so that there is a present violation of the anti-discrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a *disparate-treatment employment discrimination complaint* based upon allegedly unlawful compensation disparity is timely brought if it is filed within the statutory limitation period after such compensation disparity last occurred.

195 W.Va. at 301, 465 S.E.2d at 403, Syl. pt. 2 (emphasis added).

This language is very specific in referring to an issue completely unrelated to the grievances here, *i.e.*, disparate-treatment employment discrimination based upon a prohibited factor such as race, gender, or national origin. Historically, prohibited-factor discrimination was a longstanding and often pervasive problem that was effectively institutionalized. As such, it could not be traced to a clearly discernible date, and the application of the “continuing violation” rule can be readily understood and justified as both a matter of simple fairness and as a means of addressing a significant societal problem that is resistant to resolution.

Clearly, a pay disparity that arises at an easily identifiable date, based upon a perceived need to address market forces in a particular geographic location, whether improperly granted or

not, has no relevant or practical similarity to prohibited factor discrimination. There has been no evidence supporting the existence of an existing geography-based prejudice among DOH administrative personnel. There was no salary structure carrying the indicia of past discrimination. To the contrary, the grievances relate to a specific change in salary that is readily identified and that expressly documented by the agencies involved. The enumerated grievances are clearly untimely, and no excuse or explanation has been provided to the Court for this delay. As such, the Circuit Court's Order must be affirmed.

## V. CONCLUSION

Because the DOP and DOH were well within their authority in addressing the severe recruitment and retention issues in the Eastern Panhandle transportation worker series, because the Appellants cannot show discrimination or favoritism, and because nearly all of the grievances were untimely filed, the Circuit Court Order should be affirmed.

Respectfully submitted this 9<sup>th</sup> day of June, 2011.

**WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION/DIVISION OF  
HIGHWAYS**

**BY COUNSEL,**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0284

RANDY HAMMOND, et al.,

Appellants-Petitioners,

v.

Appeal from a final order of the  
Circuit Court of Kanawha  
County (08-AA-19)

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/  
DIVISION OF HIGHWAYS AND THE DIVISION OF PERSONNEL

Appellees-Respondents.

CERTIFICATE OF SERVICE

I, Krista D. Black, do hereby certify that I have, this 9th day of June, 2011, served a true and accurate copy of **Motion to Complete and Supplement the Appendix and Appellee's Brief** by depositing a copy of the same in the regular United States Mail, postage prepaid, to the following:

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