

FILED

May 9, 2012

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

The appellants in this case, DOH's District 1 employees, made a fundamental argument that they should have been given the increase in wages that their counterparts in District 5 received because they perform the same work. The appellants also argued that the Grievance Board and circuit court erred in finding that they were not similarly situated to the District 5 workers. Nevertheless, the majority's opinion rejects the appellants' arguments and affirms the decisions of the lower tribunals. Under the facts of this case, I am compelled to dissent.

“[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. West Virginia Div. of Corrs.*, 218 W. Va. 739, 744, 630 S.E.2d 49, 54 (2006). A careful review of the facts in this case clearly establishes that the appellants presented sufficient evidence to show that they were similarly situated with District 5 workers and were, therefore, entitled to be compensated with the wage increase given to District 5 workers. The appellants' expert, Gary Stoors, testified that he used the same criteria relied upon by DOH to demonstrate that District 1 suffered from

the same retention and recruitment problems that were found in District 5. In fact, Mr. Stoors's evidence showed that District 1 had an even greater retention and recruitment problem than District 5.

I find unpersuasive the reasons given by the majority of the Court for discrediting Mr. Stoors's findings. The simple-unchallenged fact is that DOH failed to perform a statewide assessment of recruitment and retention problems, and, instead, focused exclusively on District 5. If DOH had performed the statewide evaluation that Mr. Stoors performed, DOH would have realized that the recruitment and retention problem was a *statewide* problem. It is unfortunate that the majority has refused to recognize the legitimate claims of the District 1 workers, and additionally, those workers whose cases remain pending.

For the reasons stated, I respectfully dissent.