BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

LAURA BROYLES,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. MPC-09-187
	)	
OFFICE OF JUVENILE AFFAIRS,	)	
	)	
Appellee.	)	

FINAL ORDER

This matter came on for hearing before Jami J. Fenner, Administrative Law Judge, on October 5, 2010, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant Laura Broyles appeared in person and represented herself. Appellee Office of Juvenile Affairs ("OJA") appeared through its counsel, Wayne L. Johnson, and through the party-representative, Cynthia Hollier.

Appellant is a permanent, classified employee of OJA, appealing from the denial of an internal agency grievance alleging discrimination in relation to her pay. More specifically, Appellant alleged in her grievance and alleges in this appeal that OJA is violating the Equal Pay Act by failing to compensate her with equal pay for equal work.

The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted and heard argument from the parties. After receiving all evidence and closing arguments, the undersigned closed the record on October 5, 2010.

Upon consideration of the record, the undersigned Administrative Law Judge issues the following findings of fact and conclusions of law pursuant to 74 O.S. § 840-6.7(B).

FINDINGS OF FACT

Appellant, a female, has worked for OJA since October 1999. On February 7, 2005, OJA

promoted Appellant to the position of Programs Manager, Level II, with a pay of $3,306.82, which was approximately 11.3% more than the salary she was receiving at the time of the promotion.

On March 3, 2009, Appellant filed an Internal Agency Grievance (Exhibit 4) alleging OJA is discriminating against her by compensating Dennis Luman and John Wall, the two males in Appellant's division who also hold the position of Programs Manager II, significantly more than OJA compensates Appellant. OJA assigned an investigator, EEO/Affirmative Action Officer Mike Heath, to investigate Appellant's allegation.

Mr. Heath issued a written report (Exhibit 5) on March 17, 2009, finding Appellant's allegation was "not confirmed," although "a slight disparity" exists between the percentage of increase Appellant received upon promotion, 11.3%, and the increases received by Mr. Luman and Mr. Wall upon their promotion to Programs Manager II – 12% and 12.5% respectively.[1] Accordingly, Mr. Heath recommended the Executive Director, Robert E. "Gene" Christian, raise Appellant's salary 1.2%, retroactive to February 7, 2005. On March 20, 2009, Appellant appealed the grievance findings (Exhibit 8) to Mr. Christian and again asserted she was not receiving equal pay for equal work. Mr. Christian denied the appeal on April 13, 2009, (Exhibit 9) and found Mr. Heath's findings were "correct."

Appellant filed this appeal on April 22, 2009, claiming the raise recommended by Mr. Heath still "does not result in equal pay for equal work as there is a $301-$324 monthly pay difference with the raise." Appellant received the 1.2% raise on August 1, 2009, but it was not retroactive as Mr. Heath had suggested.

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[1] Significantly, Mr. Heath testified he had no training in or knowledge of the Equal Pay Act, did not investigate a possible violation of that Act, and his investigation was limited to whether there was a violation of Title VII.

The evidence showed Appellant did not receive equal pay for equal work on jobs requiring equal skill, effort and responsibility. Appellant's supervisor, Anna Marie Kelly-Stockley, testified Appellant and Mr. Luman perform essentially the same duties and their jobs require the same skills. According to Ms. Kelly, Mr. Luman believed Appellant should be receiving the same salary as Mr. Luman. Appellant failed, however, to present sufficient evidence to establish her duties and job circumstances were substantially the same as Mr. Wall.

Nonetheless, because Appellant met her burden of showing OJA pays Mr. Luman more than it pays Appellant for equal work, the burden of persuasion shifted to OJA to show a permissible reason for the disparity. In its Memorandum of Authorities filed October 4, 2010, OJA argued employees of the State are under a "merit system which imposes a seniority system." OJA also referred to several factors that courts have found constitute "a factor other than sex" for purposes of the Equal Pay Act ("EPA"). Thus, it is unclear on which exception to the EPA that OJA is relying to explain the disparity between Appellant's pay and Mr. Luman's pay. Regardless, it is clear the disparity is not due to a "merit system" – that is, a system based on performance or merit. Nor does OJA claim Mr. Luman has a higher rate of pay due to better performance.

Likewise, it is clear Mr. Luman's higher rate of pay in the Programs Manager position is not the result of a bona fide seniority system. OJA's witness, Cynthia Hollier, explained that, under the state compensation system, relatively new employees may end up making more than their supervisors. This situation would not be possible if those with more seniority always received higher rate of pay. Thus, seniority alone clearly does not explain the disparity.

Accordingly, the question is whether OJA proved the disparity is the result of any factor other than sex. Ms. Hollier further testified the factors that often determine pay in state service

are length of service coupled with "moving around" and timing of legislative raises. She said "moving around" is the biggest factor. These factors may explain the higher pay Mr. Luman and Mr. Wall had prior to their promotions to the position of Programs Manager II. These factors do not explain, however, the "disparity," as determined by OJA's investigator, in the percentage of increase received by Appellant and that received by Mr. Luman and Mr. Wall upon promotion to the Programs Manager II position.

In addition to this unexplained disparity, the evidence showed OJA failed to follow its own policy and the Merit Rules in establishing the pay of Appellant, Mr. Luman and Mr. Wall. Although, as required by OAC 530:10-7-14(b)(1), OJA has a policy, which sets forth criteria for determining pay upon promotion or career progression (Exhibit 2), OJA presented no evidence to show it complied with the policy. To the contrary, Marvin Hill testified he was not aware the factors in the policy had been considered. He said it is his preference to simply pay the minimum required, although he is not the one who determines pay. Moreover, it is apparent OJA did not consider "internal pay equity issues" in setting the pay of the three positions in question. OJA had the discretion to raise Appellant's pay 20% at the time of her promotion, but instead chose to raise it by a smaller percentage than it raised the pay of Mr. Luman, who already was making more than Appellant. Additionally, Mr. Wall became a Program Manager II after Appellant did; yet, he also received a higher percentage increase than Appellant. Other evidence also indicated the management at OJA did not care about "equity issues."

Mr. Hill further testified the human resources division told him what to pay Mr. Wall upon his promotion and Mr. Wall received more because he was going to be supervising someone. However, the individual he was going to be supervising had moved from Appellant's supervision to Mr. Wall's supervision. Considering all the evidence and the credibility of the

witnesses, OJA failed to show the disparity in Appellant's pay as a Programs Manager II is the result of a factor other than sex.

Based on the record, Appellant met her burden of proof that a violation within the Commission's jurisdiction occurred by OJA's failing to compensate Appellant with equal pay for equal work. OJA failed to meet its burden that this failure was due to a factor other than sex.

CONCLUSIONS OF LAW

1. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.

2. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.

3. The burden of proof was on Appellant to show by a preponderance of the evidence that a violation within the Commission's jurisdiction occurred. 74 O.S. § 840-6.6; OAC 455:10-9-2(f)(2).

4. The Oklahoma Personnel Act prohibits state agencies from discriminating against employees with respect to employment in state service on the basis of gender and other protected classes. 74 O.S. § 840-2.9(A).

5. The Rules of the Merit System of Personnel Administration ("Merit Rules") require an appointing authority to "adopt objective written criteria for the amount of salary advancements on promotion or career progression," and such criteria must be "consistent with state and federal statutes prohibiting discrimination." OAC 530:10-7-14(b)(1).

6. Appellee concedes it is subject to the federal Equal Pay Act ("EPA"), 29 U.S.C. § 206(d).

7. The EPA provides:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1).

8. The EPA is one of two ways an employee may assert compensation discrimination; the other theory is intentional discrimination on the basis of sex under Title VII. *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006). Unlike Title VII, however, the EPA does not require proof the employer acted with intent and "has been described as imposing a form of strict liability on employers who pay males more than females for performing the same work." *Id.*

9. To prove a violation of the EPA, a person must show (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances. *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 409 (10th Cir. 1993) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)).

10. If the employee carries the burden of showing the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden of persuasion shifts to the employer to show the disparity is justified by one of four permissible reasons. *Corning Glass Works*, 417 U.S. at 196; *see also Mickelson*, 460 F.3d at 1311. "These reasons are: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; (4) a disparity based on any factor other than sex." *Tidwell*, 989 F.2d at 409 (citing 29 U.S.C. § 206(d)(1)).

11. Appellant met her burden of proof that Appellee failed to compensate Appellant with equal pay for equal work. She established a *prima facie* case under the EPA.

12. Thus, the burden of persuasion shifted to Appellee to establish the disparity in Appellant's pay was justified under one of the Act's four exceptions, which Appellee failed to do.

13. When a violation within the Commission's jurisdiction has occurred, the presiding official shall "[d]irect the appointing authority to take the necessary corrective action," and "[r]eport the finding to the appropriate authorities for further action." 74 O.S. § 840-6.6(B). "Corrective action shall be confined to issues submitted for decision and shall be consistent with applicable laws and rules and limited to actions specifically granted to the Oklahoma Merit Protection Commission and the presiding official . . . ." *Id.*

14. The Merit Rules permit an equity-based pay adjustment "when employees are significantly underpaid relative to other employees performing the same or similar duties." OAC 530:10-7-26.

15. The Merit Rules provide an appointing authority generally shall set an employee's salary upon promotion at no more than 20% of the employee's salary prior to the promotion. OAC 530:10-7-14(b)(2). The undersigned is not limited by this section in ordering corrective action. Nonetheless, had Appellee relied on factors other than sex in setting Appellant's pay and considered equitable factors, as required by its policy, the maximum Appellee could have increased Appellant's pay upon promotion would have been 20%, which would have brought her much closer to Mr. Luman, who was performing substantially the same duties as Appellant. Thus, an increase in Appellant's pay of a total of 20% beginning on February 7, 2005, is the "necessary corrective action." The 20% shall include the equity-based pay adjustments given on

October 1, 2006, and August 1, 2006, rather than be in addition those equity-based adjustments. The cost of living raises shall be in addition to the 20% increase.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal alleging discrimination in relation to her pay is **SUSTAINED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellee shall increase Appellant's salary by a total of 20% retroactively beginning on February 7, 2005, and the cost of living increases shall be added to and based upon the higher salary.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, upon this Order becoming final, it shall be forwarded to the Oklahoma Human Rights Commission.

Signed this 15th day of October, 2010.

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Jami J. Fenner
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 N.W. 58th Street
Oklahoma City, OK 73112