

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT: 06388-01S
DCR DOCKET NO.: EL11WG-46100-E
DECIDED: JUNE 14, 2005

JEANNETTE T. GABRIEL,

Complainant,

v.

**NEW JERSEY DEPARTMENT
OF TREASURY,**

Respondent.

**ADMINISTRATIVE ACTION
FINDINGS, DETERMINATION
AND ORDER**

APPEARANCES

William J. Courtney, Esq. for Complainant

Sudha V. Raja, Deputy Attorney General, for Respondent (Peter C. Harvey, Attorney General of the State of New Jersey, attorney)

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Jeannette Gabriel (Complainant), alleging that her former employer, New Jersey Department of Treasury (Respondent), unlawfully discriminated against her because of her sex in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.¹ On May 2, 2005, the Honorable Jeff S. Masin, Administrative Law Judge (ALJ), issued an initial decision²

¹Complainant's Verified Complainant initially included an age discrimination claim as well, but that claim was abandoned prior to the start of the hearing.

²Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Ex.C" and "Ex.R" shall refer to Complainant's and Respondent's exhibits, respectively, admitted into evidence at the administrative hearing; "CE" shall refer to Complainant's exceptions to the initial decision, and "RE"

dismissing the complaint. Having independently reviewed the record and the ALJ's decision, the Director adopts the ALJ's initial decision dismissing the complaint.

PROCEDURAL HISTORY

On August 1, 2000, Complainant filed a verified complaint with the Division alleging that Respondent discriminated against her by paying her less than similarly situated males in violation of the Law Against Discrimination. At Complainant's request, on September 26, 2001, the Division transferred the case to the Office of Administrative Law (OAL); a prehearing conference was held on February 20, 2002; and a Prehearing Order was issued by Honorable Robert S. Miller, ALJ, on February 27, 2002, which docketed a schedule of procedural matters. Judge Miller retired, and all subsequent matters at the OAL were handled by ALJ Masin. Hearings commenced on January 12 and 13, 2004; however, discovery issues and scheduling conflicts caused substantial delays, and the hearing was concluded on August 5, 2004. The attorneys filed post-hearing briefs on January 31, 2005, and responses to those were received March 16, 2005. The record closed on that day. Complainant filed exceptions to the initial decision on May 19, 2005, and Respondent filed a reply on May 25, 2005.

THE ALJ'S DECISION

Legal Standards

In his initial decision issued on May 2, 2005, the ALJ dismissed Complainant's claim, finding that sex/gender was definitively not a factor in determining the salary offered or paid to Complainant, but rather, her salary was determined by her level of experience in areas considered important to her work by Respondent (ID 17). The ALJ concluded that Respondent had established by a preponderance of the credible evidence that the wage disparity between Complainant and her male comparators was the result of a "factor other than sex" and was based on a legitimate non-discriminatory reason, that is her relative experience, and Complainant was unable to establish that such reason was mere pre-text. Ibid.

shall refer to Respondent's reply to Complainant's exceptions.

The ALJ first analyzed the standard for determining the existence of a *prima facie* case of gender discrimination based on wage disparity under the LAD. The ALJ first looked to Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89 (1990), wherein that Court established the standards for analyzing gender-based wage discrimination claims, and held that the burdens of production or persuasion are determined by whether the complainant was arguing that she was paid less than others performing “substantially equal work,” in which case the federal Equal Pay Act methodology is applicable or, instead, others performing “similar” work, in which case the Title VII McDonnell Douglas methodology is applicable (ID 2-3). Where the complainant establishes a *prima facie* case by demonstrating “that unequal pay was given for the performance of work that is substantially equal to that performed by male employees”, defendant must then prove that the wage disparity resulted from (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or, (iv) a differential based on any factor other than sex (ID 3, citing Grigoletti, supra at 109-110). Where the complainant has made a *prima facie* case by establishing a lesser degree of job similarity, the employer may rebut the *prima facie* case by proffering evidence of a legitimate non-discriminatory reason for the wage disparity. Thus, where the complainant establishes a *prima facie* case showing “similar work,” respondent only has a burden of production, but not of persuasion. The complainant retains the burden of persuasion, and to prevail she must prove that respondent’s legitimate non-discriminatory reason for the disparity in pay is mere pre-text for discrimination (ID 3).

Complainant’s Proofs

The ALJ then engaged in a thorough analysis of Complainant’s proofs which are summarized as follows: Complainant came to Respondent’s employ in February 2000 with a broad range of experience. Complainant holds a B.A. in Psychology, a J.D. from Antioch Law School, and has nine credits towards a Master’s Degree in Management. She has work experience as an investigator and for two County Prosecutors’ offices, as a stock broker, a certified elementary school teacher, and as a self-employed horse breeder and

trainer. She has also published a book and has served as a business consultant. In late 1997 Complainant worked part-time as a business advocate for Hillsborough Township, New Jersey. In late November or early December 2000 Complainant was interviewed by Emil Van Hook, the Deputy Director of Respondent's Local Government Budget Review Unit (LGBR). She asked the Deputy Director what the salary would be and he asked her what did she expect. Neither person answered the question then, but Deputy Director Van Hook told her that she had the "kind of background" they were looking for, and toward the end of that discussion the topic of salary was again addressed. Deputy Director Van Hook told her that the range was \$45,000 to \$55,000. On December 21, 1999, Deputy Director Van Hook called and offered Complainant a position starting at a salary of \$45,000 (ID 4). Complainant stated that she was disappointed, but Van Hook informed her that the \$55,000.00 salary level was only for "team leaders" and that everyone else on the team received \$45,000. Complainant claimed that based on the assertion that everyone but team leaders received \$45,000, she accepted the job and was told by Deputy Director Van Hook that the salary was not negotiable. Complainant began her employ with Respondent on February 14, 2000 (ID 4-5).

Complainant became aware of differences in salary at LGBR through discussions with Andrew Salerno and John Arnst. Complainant learned Salerno, who had been a bartender for the past six years and did not have a law degree, was receiving either \$58,000 or \$60,000 and that Arnst made the same amount. Complainant claims she had more experience and education than either of the men, and she listed in her complaint Robert Daniello as another male who was being paid a higher salary than she was. In mid-March 2000 Complainant complained to team leader Matt LeCook regarding the salary discrepancies, but he offered no remedy. Complainant then approached the Business Administrator for the LGBR, Ralph Condo, and talked regarding the wage disparity between herself and her male counterparts and stated that Van Hook had informed her that they were all making the same salary. Two to three days later, Condo informed Complainant that he had pulled up information on all the hires for the LGBR and that "all were making \$45,000, the exact same as you." However, he refused to allow Complainant to examine the information

personally, citing confidentiality concerns (ID 5). In a request for admission directed to Respondent by Complainant's attorney, Condo admitted that he told Complainant that all those who had her position started at a salary of \$45,000 (ID 5).

Complainant next complained to Joanne Palmer, who had replaced Deputy Director Van Hook, regarding the salary disparity but Palmer did not offer to investigate the situation. Complainant then approached the Director of the LGBR, Mr. Mahon, regarding the disparity in pay as well as the false information relayed to her. He told her he was aware of the discrepancies and would work to address the situation, and he informed Complainant that the agency did not really have a salary scale. Mr. Mahon later told Complainant that he had spoken to persons in Treasury, and "part of the problem is that you accepted the job;" and that nothing could be done to deal with the problem "right now." He further advised her that an adjustment to her salary could only be made on her anniversary date in February and he did not know if it would be possible then. (ID 6-7). Complainant alleges that Mahon admitted that he was aware of the pay discrepancies, and that he never told her she was less qualified for the job of municipal auditor than her male comparators, or that she needed more education or experience (ID 6). Complainant was "very discouraged and upset" because she had complained all the way up the supervisory ladder and she received no satisfactory response. Complainant remained in Respondent's employ until September 2000, and she then became an 8th grade teacher in Flemington, NJ, at salary of \$39,000. One year later she was employed at a high school in Plainfield, NJ at a salary of \$51,000, and for the year 2002-2003 she earned \$52,200 (ID 7).

The ALJ noted that Complainant was hired at a salary of \$45,000 to serve as a "Team Member" of a "Local Budget Review Team," whose mission was to conduct municipal and school budget reviews state-wide. Complainant's appointment to the position was approved by the Department of Personnel on January 31, 2000. Two other males were hired as Team Members for the same purpose at the same time, Mssrs. Arnst and Salerno, and were paid \$58,125 and \$60,000, respectively. A third comparator, Robert Daniello, was hired after Complainant for the same job at a higher salary (ID 8).

The ALJ found that Complainant, Salerno and Arnst were each hired within a short time of each other as team member of an LGBR team charged with the responsibility of performing budget reviews on a statewide basis (ID 8). The ALJ also found that the working conditions that each LGBR municipal review team member worked under were the same, the efforts each was expected to engage in was also the same, and the skills that each was required to bring to the group were the same, or at least “substantially similar.” While the education of each member varied, all were required to be “well educated” with college degrees, and members often had graduate or professional school degrees of one sort or another, and there was no evidence of a distinction in the responsibility between team members (ID 8).

As such, the ALJ concluded that Complainant established a *prima facie* case under the more stringent EPA standard by showing that the positions held by Complainant and her male comparators were substantially equal. Thus, the ALJ stated that in accordance with Grigoletti, supra, 118 N.J. 89 (1990), the burden of persuasion shifted to Respondent to demonstrate by a preponderance of the credible evidence one of the four defenses recognized in equal pay claims (ID 9).

Respondent’s Proofs

Douglas Joseph Ianni was the manager of human resources in several units during Complainant’s tenure at LGBR and he recommended the salaries for employees at the LGRB to Ralph Condo. The final salary decision rested with the Department of Personnel and its Commissioner. The auditors working for the LGBR were unclassified, and Mr. Ianni looked to the Department of Treasury to try to find comparability between positions there and the auditor positions in the LGRB (ID 9). The initial recommendation of a salary scale provided that team members would receive a low salary of \$41, 600 and a high salary of \$84,500, but the recommended range was between \$45,000 and \$62, 500 (ID 9 - 10). Mr. Ianni discussed that the high end of the Team Member recommended range (\$62,500) was applicable after four to five years on the job. Noting the difficulty with awarding increases to the LGBR employees if they remained in classified titles, Mr. Ianni recommended placing all classified employees on leave from their career titles and placing them in the

unclassified Municipal Auditor title, allowing **salaries to be set at management's discretion.** (Bold in the original and the Initial Decision). A second draft of the salary scale was then developed which listed Team Members salaries as "recommended starting and 5th year salary at \$45,000 - \$62, 500." The description indicated that the starting salary would be \$45,000, with annual performance increases of \$4,375 recommended, and after 5 years of employment, a Team Member would be paid \$62,500 annually based on an outstanding evaluation (ID 9-10).

Mr. Ianni testified that the recommended starting salary scale could be set at \$45,000 for all Team Members, or the range could provide the parameters for setting salaries, taking into account experience brought to the job. However, the ALJ noted that there is no indication in his draft document about the impact of experience brought to the job relative to the establishment of the starting salary for a team member. Mr. Ianni also testified that there was no set salary scale for unclassified personnel at the LGBR, and acknowledged that not all Team Members hired entered at \$45,000. (ID 10). He testified that if two employees had the same experience and education yet were paid different salaries, he might question it, but the ultimate decision rested with LGBR (ID 10 -11).

Ralph Condo served as Chief of Administrative Services in the Department of Treasury during Complainant's tenure. The LGBR, formed in 1994, was a unit in which Treasury employees would assist local governmental units in finding inefficiencies which unnecessarily increased operations costs. The unit's approach was to review operations and auditing, and participation was voluntary for both municipal programs and school districts. Condo testified that when the program enlarged from six persons to sixty-five, he was told to hire new personnel within ninety days. This rapid expansion caused some new hires to be generalists, while others brought special experience or background to the job. Condo was involved in establishing a salary scale, and he worked with Lou Getty, the Director of LGBR later replaced by John Coughlin, with assistance from Douglas Ianni in the HR unit. Condo characterized the salary scales prepared by Ianni as "a guide, not a policy." The scales were approved by the director of the LGBR. A separate

document (R-4) was prepared by Condo for the use of the agency’s deputy directors when they conducted interviews. (ID 11). This document added the yearly differences from starting salaries for the different levels of team participants, and added that unique talents could get more (ID 11 - 12). Condo received applications, provided a copy to the director and two deputy directors, and qualified applicants were invited to appear for an initial interview with deputy director Mr. Van Hook on the municipal side, and then deputy director Mr. Mahon on the school side. After an interview, a sheet would be filled out by the interviewer, listing any unique circumstances, comments, impressions, and the applicant’s resume would be attached. Condo would verify that the document was completed, and the recommendation for hire would be sent to the director and then the application and resume would be sent to Ianni. This process was utilized in the hiring of Complainant. Her status sheet (R-6) listed her juris doctorate degree, a comment that she appeared sure of herself, analytical, and that she would make a good interviewer due to her background. Complainant’s sheet also noted that she had not had a heavy municipal administration background, but that she should learn quickly, and authorized her hire at \$45,000 (ID 11 - 12).

Condo acknowledged that not all new hires for team member positions were equally paid, and such factors as whether the prospective employee was coming from state service or from outside employment, current pay, and importantly, any unique experience the applicant brought to the Unit were taken into consideration when determining the pay scale of prospective employees. Condo noted that the LGBR was looking for persons who had auditing and/or municipal or school board experience. Condo also testified that the New Jersey Conference of Mayors preferred that persons sent out to perform budget reviews were not mere auditors, but were persons who had the day- to- day experience of running a municipality, utilities authority or police department (ID 12). As such, persons with experience in planning, police or fire work, and with utilities authorities were considered to have unique experience for the job, either as a team member or a team leader. This interest in individuals with these backgrounds was not written down, nor did the pay scale specifically mention that certain types of experience could result in higher starting salaries, but the ALJ noted that this is in fact what occurred (ID 12 - 13).

Condo testified that in the hiring of Antz, the latter served as the administrator for the Borough of Stanhope for thirteen years and the City Manager of Fulton, Kentucky for three years. Regarding the hire of Salerno, at the time of his application he was a financial advisor, but he also previously served as the city administrator for the City of Pleasantville in Atlantic County for over ten years. Mr. Daniello served as a division commander for the Cherry Hill, New Jersey Police Department. According to the ALJ, Condo's testimony substantiated the fact that each of Complainant's comparators brought a unique experience and perspective that Complainant's background did not offer. Accordingly, the salary disparity was due to the unique experience each comparator brought to the LGBR rather than because they were men, as alleged by Complainant. Similarly, Gary Gardner, an attorney like Complainant, who was hired on the same day as she, was offered a salary of \$61,000 which matched his then current salary as the Clerk/Administrator of the City of Linwood, Atlantic County, a position he held since 1993. Among women who were hired by LGBR, Patricia Ickes started as a team member at a salary of \$60,000 because she previously served as director of facilities and transportation for several school districts for a period of many years, and therefore brought that unique experience that Respondent rewarded with higher starting salaries (ID 13). However, on the same day that Ickes was hired, Natalie Reed (Cotton) also started as a team member at \$45,000 (ID 13). The ALJ noted that her past experience as a program development assistant at the Department of Education did not offer any unique experience and the offer of a lower salary was reflective of that.(ID 13 - 14). Another female, Ms. Volponi, who started two months prior to Complainant at a starting salary of \$58,125, had a Master's Degree and experience as a township planner. The LGBR had limited experience with planning issues among its staff and thus Volponi offered something extra and her compensation reflected that. Another male, Thomas Hunter, who had no specific experience either at the municipal or school level, was a CPA with experience in the healthcare field, an area of importance for the LGBR in its review of budgets and operations and one in which it had limited expertise. He was paid \$58,125 (ID 14).

ALJ's Discussion & Analysis

The ALJ noted that because Complainant has established a prima facie case of gender-based

discrimination in an equal pay claim based on equal work performed, Respondent bears the burden of proving by a preponderance of the credible evidence that the differential in pay was not the result of gender discrimination, but was due to a seniority system, a merit system, a system that measures quantity or quality of productivity, or for “any other factor other than sex.” Here, Respondent asserts that the differential in pay is due to reasons other than the sex of its employees. Specifically, Respondent, in determining whom to hire as new team members for the LGBR and their respective salaries, took into account and relied heavily upon work experience in local government and/or municipal utilities, or certain healthcare or insurance backgrounds (ID 14). Respondent claimed that this unique experience was important because (1) this sort of hands on experience gave applicants a better understanding of how government operates; and (2) it gave the team members credibility among the local bodies audited. Respondent contended that both males and females with this sort of unique experience were hired at enhanced salaries that were generally several steps up the ladder on the pay scale. Conversely, both males and females without the unique experience that these others offered were hired by LGBR at salary levels lower on the scale. The ALJ found that the reasons asserted by Respondent were reasonable and credible, and further found that Condo’s testimony as to the motivations for these factors was credible. Further, the ALJ noted that the documentary evidence reflecting the varied backgrounds of candidates and the pattern of hiring practice was consistent with Condo’s explanation (ID 15).

The ALJ stated that Complainant successfully demonstrated that she was hired for the same job as were her male counterparts Arntz and Salerno, but for less than they received. However, the ALJ concluded that Respondent presented significant credible evidence that the experience possessed by some of those hired to serve as team members, in the same capacity as Complainant, was of a nature deemed advantageous to the workings of the review teams, and Arntz and Salerno as well as other hires possessed this sort of valued experience. The ALJ commented that though Complainant had a law degree and a varied work history, she did not have the type of work experience deemed by the LGBR to be valuable, thereby warranting a higher salary. While Complainant did have some part-time work experience as a business advocate for a municipality, Mr. Condo did not believe this experience qualified as unique, while other women hired did

bring such unique experience to the LGBR, and were compensated commensurate with males with similar backgrounds. Moreover, other males who did not have the unique experience and were hired prior to Complainant were paid the same lower wage as Complainant (ID 15-16). The ALJ stated that although Complainant believed her law degree conferred some superior value to the unit, the LGBR did not assess it as such. However, the LGBR did assess a law degree coupled with the sort of experience deemed particularly valuable as meriting a higher wage, as was the case with Mr. Gardner who was hired on the same day as Complainant at salary of \$61,000. Women who possessed the valued experience the LGBR sought also received enhanced compensation. (ID 16)

Accordingly, the ALJ concluded that the documentary and testimonial evidence was quite clear and persuasive that the role of experience in municipal government, local school districts, or the fields of health care or insurance influenced the decision regarding Complainant's wage at the LGBR as a team member, and that sex/gender was definitively not a factor in such determination. The ALJ also found that Complainant's salary was determined by her level of experience vis a vis the type of experience deemed by the LGBR as particularly important to its mission. Thus, the ALJ concluded that Respondent established by a preponderance of the credible evidence that the wage disparity between Complainant and her comparators, namely, Arntz, Salerno, and Daniello, was the result of a "factor other than sex." Applying the more traditional McDonnell Douglas analysis, the ALJ also concluded that the wage disparity was attributable to a legitimate non-discriminatory reason, and Complainant failed to establish that this reason was a pretext for discrimination. Therefore, the ALJ dismissed Complainant's complaint (ID 16 - 17).

COMPLAINANT'S EXCEPTIONS

First, Complainant maintains that the Conclusions and Decision issued by the ALJ are inconsistent with the evidence presented at the hearing. Complainant asserts that she presented undisputed credible direct evidence of sex-based wage discrimination, but the ALJ failed to give proper weight to this evidence or apply the correct standards for evaluating proofs based on direct evidence. The proof Complainant contends constitutes direct evidence is her testimony that several of Respondent's managerial employees, who were

decision makers with the power to address salary discrepancies, acknowledged that there were gender disparities relating to salaries at the LGBR, and that those employees failed to take any action to remedy the discrimination (CE 4).

Specifically, Complainant cites her testimony relating to her conversations with DeCook, Condo, Mahon, Ianni, and Palmer. Complainant testified that when she complained to DeCook, Team Leader, of the pay disparity between men and women, he did not offer to investigate the matter. Complainant states that because neither DeCook nor Van Hook testified at the hearing, Complainant's direct evidence of discrimination was not refuted. (CE 1-2).

Second, Complainant asserts that Ralph Condo, Office Administrator of LGBR, never said the pay scale was based on experience, background, or any factor other than gender, and subsequently told her that all of the people that were hired before her and after her were making \$45,000, the same as Complainant. Complainant maintains that the ALJ relied too heavily on Condo's testimony since he lied in his Request for Admission by saying all Team Members made the same salary, and then admitting to wage disparities at the hearing (CE 2 -3). Complainant also contends that Joanne Palmer, successor to Van Hook as Deputy Director of LGBR, acknowledged that gender discrimination existed in the salaries at the LGBR, saying "J.T., men make more than women...that's the way it is." Palmer also did not say the disparity was based on education, experience or background, and did not offer to investigate the matter (CE 3). Complainant also cites as direct evidence her testimony that Robert Mahon, Acting Director, also told her he was aware of discrepancies in salaries between men and women (CE 4).

Citing McDevitt v. Bill Good Builders, Inc., 175 N.J. 519 (2003), Complainant argues that because she presented direct evidence of discrimination, the ALJ applied the incorrect burden of proof when he failed to shift the burden to Respondent to prove that it would have made the same decision absent the discriminatory motive (CE 6). Complainant maintains that although the ALJ correctly stated that she established a prima facie case of gender discrimination, the ALJ erred when he found that she failed to establish pretext because the burden of proof then shifted to the Respondent to prove by a preponderance of

the credible evidence that the differential in pay was due to any factor other than sex (CE 7-8). In the alternative, Complainant contends that she demonstrated that Respondent's reasons for the pay disparity were pretextual through evidence that other employees were treated more favorably than she in that Complainant had a higher degree than her male comparators, and they all had similar experience levels. Therefore, Complainant argues that her complaint should not have been dismissed (CE 8 - 9).

RESPONDENT'S REPLY

In its reply, Respondent asserts that Complainant's claim should be dismissed because the state proved by a preponderance of the competent and credible evidence that the LGBR did not violate the Law Against Discrimination. Citing N.J.S.A. 52:14B-10(c), Respondent asserts that 1) the DCR may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless the record yields a determination that the findings are unreasonable or unsupported by competent and credible evidence (RE 2 - 3); and 2) Complainant, relying merely on her own testimony, did not support her exceptions with supporting reasoning and documentation as required by N.J.A.C. 1:1-18.4(b)(2)(3) (RE 3).

Respondent also asserts that its witnesses testified that the criteria used to establish team members' salaries are 1) specific experience in school or municipal district, 2) unique experience in a specialized area such as police, fire, insurance, or hospital, and 3) the applicant's current salary. Additionally, auditors who were transferred from a classified to unclassified position but who had no direct or unique experience were paid according to the salary scale. (RE 4-5). Respondent maintains that Complainant's law degree was not a factor in determining Complainant's salary, and she did not possess the requisite skills for which the LGBR awarded a higher starting salary. Respondent contends that it satisfied the burden of production by introducing evidence which successfully rebutted Complainant's prima facie case by offering a legitimate non-discriminatory reason for the employment action, and Complainant was unable to prove by a preponderance of the evidence that Respondent's proffered reason was merely a pre-text for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), citing McDonnell Douglas Corp. v. Green, 411 U.S. at 804; Anderson v. Exxon Co., 89 N.J. 483, 491 (1982) (RE 5-6). In sum, Respondent asserts that LGBR

paid the same salary to other female and male employees who did not possess the direct or unique work experience of working with a school district or municipality in a manner which lent to the mission of the LGBR (RE 6 -7).

THE DIRECTOR'S DECISION

The Director's Factual Findings

The Director adopts the ALJ's factual findings with the following clarifications. Based on the evidence presented on Complainant's direct case, the ALJ found that Complainant and her comparators, Mr. Salerno and Mr. Arntz, were each hired within a short time of each other, and Mr. Daniello was hired a short while after. Each was hired as a member of an LGBR team charged with essentially the same responsibility of performing budget reviews on a statewide basis. The ALJ noted that there was no documentary or specific testimonial evidence which distinguished the exact role each was to play other than as a team member. The ALJ further found that the conditions under which each member of the LGBR review team worked were the same, the efforts each was expected to demonstrate was the same, and the skills that each was required to bring to the team were "substantially similar." The ALJ noted that though the education of each member differed, all were required to be "well educated" with college degrees, and some members had graduate or professional school degrees and worked in the field as needed. The evidence proffered at the hearing yielded no distinction in the responsibility between team members. The Director accepts these clear factual findings.

Though the ALJ made no specific findings as to Respondent's proofs, he did detail the relevant testimony of Douglas Ianni, the human resources manager during Complainant's tenure at the LGBR, and Ralph Condo, Chief of Administrative Services in the Department of Treasury at that time as well. Under N.J.S.A. 1:1-18.6(b), the Director may reject or modify findings of fact, but must clearly state the reason for doing so. Upon thorough review, the Director finds no reason in the record to reject or modify any of the ALJ's findings of fact, and further finds that there exists sufficient basis to adopt the ALJ's review of the pertinent proofs as factual findings. Specifically, the Director finds that the salary scale developed by Ianni determined the starting salaries for men and women applicants at the LGBR, and that the "unique municipal

experience” was a credible factor on which to award a higher starting salary. The Director also finds that Complainant’s interview sheet reflected that Respondent had noted she did not possess the relevant municipal experience and, therefore, her offering salary was consistent with other applicants who did not possess the unique municipal experience. The ALJ found that the various reasons asserted for the salary differentials are reasonable and credible, and that Condo’s testimony specifically relating to the motivations for hiring and pay decisions was also credible. The ALJ also found that the documentary evidence reflects the varied backgrounds of candidates and that the pattern of hiring was consistent with Condo’s testimony. Therefore, the Director adopts the ALJ’s finding that although the role of experience in municipal government, local school districts, or the fields of healthcare or insurance was not specifically identified in writing as factors to be considered in determining salary offers, the testimony and the documentary evidence is clear and persuasive that this was a factor in determining starting salaries for applicants at the LGBR.

The Legal Standards and Analysis

The LAD

The LAD prohibits discrimination based on sex. N.J.S.A. 10:5-1 to-42. In Grigoletti v. Ortho Pharmaceutical, 118 N.J. 89, 97 (1990), the New Jersey Supreme Court acknowledged that it has looked to federal law as a key source of interpretive authority, and has generally applied the analytical framework for Title VII claims enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to gender discrimination claims brought under the LAD. The Court, however, has not hesitated to depart from this methodology when appropriate. Grigoletti, supra at 107. Thus, the Court held that in an LAD claim based on the payment of unequal wages for the performance of substantially equal work, the standards and methodology of the federal Equal Pay Act, 29 U.S.C. 206(d) (“EPA”), should apply. Id. at 109-110. A gender-based wage discrimination claim based on a lesser degree of job similarity will trigger the McDonnell Douglas analysis. Id. at 110. Hence, it is the degree of similarity between the jobs held by the female complainant and male employees that determines whether the McDonnell Douglas analysis or the EPA analysis is appropriate. Grigoletti, supra at 100.

A complainant first bears the burden of establishing a prima facie case. A complainant can do this either by meeting the more rigorous EPA burden of proving that the employer paid unequal wages for "substantially equal" work, or meeting the more lenient burden of proving that the employer paid unequal wages for "substantially similar" work. Grigoletti v. Ortho Pharmaceutical, supra at 109-110. "Substantially equal" work requires "equal effort, skill, and responsibility which are performed under similar working conditions." Grigoletti, supra at 102. Where the complainant meets the proof standards for "substantially equal" work, the burden of proof shifts to the employer to prove one of four affirmative defenses provided under the EPA, specifically, that the wage disparity is the result of (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any factor other than sex. Here, Respondent asserts that the wage disparity was based on a factor other than sex. Acceptable factors for paying a female employee less than a male employee for substantially equal work include education, experience, prior salary, or any other factor related to performance of the job. Dubowsky v. Stern, Lavinthal, Norgaard & Daly, 922 F. Supp. 985, 990 (D.N.J. 1996), citing 29 U.S.C. §206(d)(1)).

Where a complainant's proofs do not satisfy the more rigorous "substantially equal" standard, but show work that was "substantially similar," the more traditional McDonnell Douglas analysis applies and the burden of production, rather than the burden of proof, shifts to the employer to articulate a legitimate non-discriminatory reason for the salary differential. Evidence of any of the four EPA affirmative defenses will satisfy this requirement. If the employer articulates such a legitimate non-discriminatory reason for the wage differential, the burden shifts back to the complainant to prove that the employer's articulated reason was a pretext for sex discrimination. Grigoletti, supra at 110.

Substantially Equal Work

Applying these standards, the Director adopts the ALJ's conclusion that Complainant established a prima facie case of gender-based wage discrimination under the more stringent EPA test (ID 9). The ALJ found that there was no evidence of a distinction in responsibility between team members, (ID 8-9), and concluded that Complainant had successfully shown that she was hired to do the same job as her male

comparators Arntz and Salerno (ID 15). Additionally, Respondent's witness, Ralph Condo, testified that all team members did essentially the same type of work (ID 12). The Director therefore accepts the ALJ's finding that Complainant and her male comparators, Salerno, Arnst and Daniello, performed substantially equal work.

³ Moreover, Complainant has demonstrated that she was paid an annual salary of \$45,000, while her male co-workers Arntz and Salerno were paid \$58,125 and \$60,000, respectively, as team members for the LGBR. As such, Complainant has met her *prima facie* burden and the burden of persuasion now shifts to Respondent to prove that the differential was based on one of the four defenses provided under the EPA.

Respondent asserts that the wage disparity was based on a factor other than sex. Specifically, Respondent contends that in determining what to pay new team members for the LGBR, it factored in and relied heavily on work experience in local government and/or for municipal utilities, and certain healthcare or insurance backgrounds. Though this was not written down, the evidence submitted, specifically the resumes of several individuals and the testimonies from Ianni and Condo, bears this out. Arntz was an administrator for the Borough of Stanhope for thirteen years and before that served as city manager for Fulton Kentucky for three years. Salerno served as the city administrator in the City of Pleasantville in Atlantic County for over ten years. Daniello served as division commander for the Cherry Hill, New Jersey Police Department. All three candidates possessed the unique experience and perspective of having worked for a municipality in a capacity that would further the objective of the LGBR. This quality was valued by Respondent as well as the mayors who, as potential subjects of LGBR review, had expressed a preference for auditors that had "day to day experience" running a municipality (ID 12). Additionally, Respondent matched the current salary of Gary Gardner (\$61,000), an attorney like Complainant, but who served as Clerk/Administrator of the City of Linwood, Atlantic County, for over six years. Although Thomas Hunter, whose starting salary was \$58,125, had no specific expertise at the municipal or school level, he was a CPA with experience in the healthcare

³This comparison focuses on the job held by the male and female, not the skills and qualifications of the employees holding those jobs. Brock v. Georgia Southwestern College, 765 F.2d 1026, 1032 (11th Cir.1985) .

field, which the LGBR deemed important to its overall mission since it had limited expertise in that area and Hunter's knowledge was relevant to the operation of municipalities and schools. Aside from being male and being offered a salary higher than Complainant, all these employees had something else in common: they each possessed that unique municipal experience or specialized expertise which was of particular value to the mission of the LGBR. Men without this unique experience were hired at the same salary as Complainant: Lou Kaniecki, hired in October 1999, and Bob DeRenzo and Joe Smurlo, each hired August 16, 1999, all received a salary of \$45,000 (ID 16). None of these men had the valued experience for which the LGBR was willing to pay a higher salary. Patricia Ickes, on the other hand, was hired at \$60,000, a salary comparable to the aforementioned males, because she had that unique municipal experience, as she served as director of facilities and transportation for several school districts over a period of many years. Nancy Volponi, another woman who was hired prior to Complainant, was offered a salary of \$58,125 because she had experience as a township planner. However, like Complainant and the three other men hired at \$45,000, another female employee, Natalie Reed Cotton, was offered \$45,000, because her prior employment was as a program development assistant at the Department of Education and the LGBR deemed her background as generally beneficially, but it did not bring to the Unit that "unique experience" or expertise which warranted a higher starting salary.

Significantly, the ALJ found the reasons asserted by Respondent for the salary differentials quite reasonable and credible, and particularly found Mr. Condo's testimony regarding the motivations for hiring and pay decisions to be credible (ID 15). Indeed, the ALJ characterized as "quite convincing" Respondent's testimony and documentary evidence establishing that experience in municipal government, local school districts, or in the fields of healthcare and insurance, and not Complainant's gender, were the factors that determined the pay scale for LGBR team members (ID 16-17). It is well settled that the Director must give due deference to findings based on the ALJ's credibility determinations of witnesses since it is the ALJ who, having heard the live testimony of the witnesses and observed their demeanor, is in a position to judge the credibility of those witnesses on particular issues. Clowes v. Terminix International, Inc., 109 N.J. 575, 587-588 (1988); see also, S.D. v. Division of Medical Assistance and Health Services, 349 N.J. Super. 480, 484

(App. Div. 2002). As such, the Director adopts the ALJ's conclusion that Respondent has established by a preponderance of the evidence that the wage disparity between Complainant and her comparators Arnstz, Salerno, and Daniello was attributable to a factor other than sex (ID 17). Specifically, the wage disparity was to compensate those males and females who brought that unique municipal or specialized experience which the LGBR deemed an enhancement to its overall mission as it related to performance of the job of municipal auditor.

Substantially Similar work

Because Respondent has met the more burdensome standard of proof to overcome a *prima facie* case of gender-based wage disparity for substantially equal work, the Director finds that such evidence would also meet the less stringent burden of production necessary to overcome a *prima facie* claim of unequal pay for substantially similar work. Moreover, for the reasons stated above, Complainant has failed to show that Respondent's articulated legitimate non-discriminatory reasons for the wage disparity were a pretext for discrimination under a McDonnell Douglas analysis.

Director's Response to Complainant's Exceptions

In her exceptions, Complainant argues that the ALJ applied the incorrect burden of proof because she presented undisputed direct evidence of gender discrimination, shifting the burden to Respondent to prove that it would have made the same decision absent the discriminatory motive (CE1, 6-9). In support of this contention, Complainant relies on her undisputed testimony that Team Leader De Cook, Deputy Director Ms. Palmer, who succeeded Van Hook, Chief of Administrative Services Condo, and Acting Director Mahon all acknowledged that there existed wage disparities between male and female employees at the LGBR and failed to address the situation. The Director finds that the evidence relied upon by Complainant does not constitute direct evidence of discrimination and, even if it does, would not compel a different legal analysis from that applied by the ALJ in his initial decision.

When determining whether direct evidence has been presented, a court must consider "whether a statement made by a decision maker associated with the decision making process actually bore on the

employment decision at issue and communicated proscribed animus.” McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 528 (2003), citing Fakete v. Aetna, Inc., 308 F.3d 335 (3d Cir. 2002). The proofs if true must demonstrate not only hostility toward members of the employee’s class, but also a direct causal connection between that hostility and the challenged employment decision. McDevitt, supra at 528. Complainant testified that Team Leader DeCook acknowledged that there were discrepancies in the salaries between men and women, but indicated he had nothing to do with salaries (CE 2). After a thorough review of the record, the Director finds no evidence to demonstrate that DeCook was a decision maker or had any input into the decision making process, and Complainant offered no evidence to prove otherwise. Similarly, the alleged remarks of Deputy Director Palmer that “men make more than women” do not meet the McDevitt standard for direct evidence because Palmer succeeded Van Hook and did not occupy a decision making status at the time of Complainant’s hire and salary offer. Hence, even if her remark reflected discriminatory animus, there can be no causal connection between that animus and the challenged employment decision.

Complainant asserts that Acting Director Mahon acknowledged that he was aware of discrepancies in salaries between men and women, and again offers this as direct evidence of gender discrimination. Again, there is no evidence that Mahon, who was a deputy director for the school district side of the LGBR Unit at the time Complainant was hired, had any influence over Complainant’s starting salary since she was interviewed and recommended by Van Hook. Thus, there is no direct causal connection between those statements and the decision to pay her a lower salary. See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). Significantly, even if the statements attributed to Palmer and Mahon acknowledged that there was a general pay disparity between men and women at the LGBR Unit, they cannot be fairly construed to acknowledge that women were paid less because of their gender, or that Respondent had a policy of intentionally paying women less. Complainant’s reliance on remarks made by Condo is misplaced since, by Complainant’s admission, Condo had insisted that all Team Members were paid the same.

Nevertheless, even if Complainant had presented direct evidence of gender discrimination, the legal analysis of her claim would be unaffected because the ALJ properly shifted the burden of proof to Respondent

to prove one of the four EPA affirmative defenses once Complainant established a prima facie case of gender-based wage disparity. While the “substantially equal work” wage disparity analysis and the direct evidence standard may require different proofs for establishing prima facie discrimination, both standards place the ultimate burden of proof on Respondent once Complainant has met her burden of presenting a prima facie case. Thus, Complainant’s insistence that the ALJ should have required Respondent to prove an affirmative defense misses the mark since that is precisely what the ALJ did.

Complainant also argues in her exceptions that the ALJ accorded undue weight to Condo’s testimony in light of an inconsistency between his response to a request for admissions and his hearing testimony. Under N.J.S.A. 52:14B-10(c), the Director may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious, or unreasonable or are not supported by sufficient competent or credible evidence in the record. The ALJ specifically found that the reasons Condo asserted for the challenged salary differentials were quite reasonable and credible, and the motivations for hiring and pay decisions were also credible. The ALJ substantiated his credibility determination by stating that the documentary evidence supported the assertions made by Condo. Therefore, although the Director acknowledges that Respondent’s replies to Complainant’s inquiries were at times unresponsive and incomplete, Complainant has provided the Director insufficient basis to disturb the ALJ’s credibility findings which are well supported by the documentary evidence. ~~The Director~~ finds that the proofs submitted by Respondent, analyzed under either a “substantially equal” work theory or a direct evidence analysis, were sufficient to prove that Respondent offered some team members who possessed unique municipal experience a higher starting salary. Respondent’s substantive and objective proof, the testimony of witnesses and the resumes of individuals with and without the unique municipal experience, as well as the corresponding salary offers, are sufficient to overcome Complainant’s prima facie case.

Finally, Complainant contends that her qualifications, particularly her advanced degree and other evidence that she was treated less favorably than her male co-workers, establishes that Respondent’s proffered

reasons for the wage disparity were a pretext for discrimination. The Director will rely on the ALJ's credibility assessments and the objective evidence offered into the record to determine that the reasons offered by Respondent, i.e., that new hires were offered salaries commensurate with the relevant work experience that the LGBR deemed an enhancement to the overall mission of the LGBR, were credible and sufficient to meet Respondent's burden of proof. Though Complainant possessed a law degree, a higher degree than her male comparators, the LGBR did not value that degree to the same extent as municipal experience or certain other expertise. Therefore, the Director finds that the ALJ properly dismissed Complainant's complaint.

CONCLUSION AND ORDER

For the reasons discussed above, the Director adopts the ALJ's initial decision and hereby dismisses Complainant's complaint.

DATE: June 14, 2005

J. FRANK VESPA-PAPALEO, ESQ.,
DIRECTOR

JFVP:GL:CC/jh