BOBBY D. ROACH and .

PAUL C. MINTON, .

.

Grievants, .

. v. . DOCKET NO. 94-DOH-232

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION/DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

Bobby D. Roach and Paul C. Minton (Grievants) are employed by the West Virginia Department of Transportation in the Division of Highways (DOH or Respondent) as Bridge Safety Inspector II's. Grievants initiated separate grievances which were denied at Levels I and II. Thereafter, their grievances were consolidated for hearing at Level III. Following a Level III hearing on April 13, 1994, their consolidated grievance was denied by DOH Commissioner Fred VanKirk on May 27, 1994. Grievants then appealed to Level IV where an evidentiary hearing was held in this Board's office in Charleston, West Virginia on July 27, 1994. DOH did not appear at the hearing and Grievants were allowed to proceed ex parte. Thismatter became mature for decision on August 18, 1994 upon receipt of timely post-hearing submissions from both parties. (See footnote 1)

BACKGROUND

The facts in this case are essentially undisputed. As a result of a statewide reclassification project, Grievants began receiving the new minimum pay rate for Bridge Safety Inspector II, $1539 per month, on November 16, 1993. Prior to reclassification, Grievants had received pay increases in

accordance with a DOH policy on "NICET (See footnote 2) Bridge Maintenance Certification Implementation" dated February 9, 1988. G Ex 1 at L III. That DOH policy was implemented "[t]o encourage inspectors to become certified, thereby improving the quality of engineering services provided." G Ex 1 at L III. Under that policy, a one step merit increase was awarded to employees who successfully completed the DOH Bridge Inspector's Certification and NICET examinations for Bridge Safety Inspectors at their current level. This policy was revised in 1990, deleting the provision for salary advancements for passing the NICET examination, thereby limiting such merit salary increases to those who pass the DOH certification course. G Ex 3 at L III.

Consistent with the above-described DOH policies, Grievants obtained NICET and DOH certifications, thereby receiving theestablished incentive pay increases. Largely due to those increases, Grievants Roach and Minton were respectively being paid $1527 and $1467 per month. Another Bridge Inspector II, Royce Daugherty, was receiving $1351 per month. Mr. Daugherty had not passed either the NICET or DOH certifications nor had he received any pay increase for such certification. Grievant Roach also has two and one-half year's more experience as a Bridge Inspector than Mr. Daugherty while Grievant Minton has one and one-half year's greater experience.

The statewide reclassification project resulted in assignment of the Bridge Safety Inspector II classification to a higher minimum pay grade. Thus, Grievants and Mr. Daugherty were all placed at the minimum pay level of the new pay range for Bridge Inspector II upon implementation of the reclassification scheme in DOH. Consequently, all three employees are now being paid at the same rate, $1539 per month.

DISCUSSION

Grievants argue that assigning all Bridge Safety Inspector II's to the lowest rung on the pay ladder for their grade effectively revoked the merit raises they previously received for taking the initiative to obtain the certifications encouraged by their employer. DOH responds by noting that this result is wholly consistent with explicit guidance in the Division of Personnel's regulation governing this action:

> When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum are assigned to the new minimum.

Div. of Personnel Administrative Rules, Series I (Amended), § 5.04(f)2a(1) (1993).

Grievants do not argue that DOH does not have certain discretion under the above-cited Personnel regulation. However, they contend that DOH abused its discretion by revoking either an explicit or implied promise established through its own written policies that Grievants would be compensated above the entry level for their classification in exchange for their extra effort in obtaining the certifications desired by DOH. Moreover, Grievants argue that paying them the same as other employees in their classification with less experience and inferior qualifications is detrimental to their morale.

Although Grievants have identified a legitimate employee morale problem from a human resources perspective, the evidence of record falls short of establishing any violation of law, rule or regulation. In particular, Grievants have not shown that any other employee in their classification of employment, since implementation of the reclassification project, has been awarded a certification-based pay raise resulting in a similarly situated employee receiving greater pay for performing equal work. Thus, Grievants have not established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d). See Vandevander v. W. Va. Div. of Highways, Docket No. 93-DOH-505 (July 29, 1994); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (April 13, 1993).

Moreover, the record indicates that DOH has thus far applied this policy uniformly so that similarly situated employees are being paid the same, without regard to seniority or certifications that are not specifically required to hold the classification in question. Thus, the disparate treatment identified in Casto v. W. Va. Dept. of Pub. Safety, Docket No. 91-DPS/RJA-350 (July 2, 1992), is not present here.

Other than arguing fundamental fairness, Grievants have not cited any particular statutory or regulatory provision nor any rule of law which has been violated by the Respondent's actions in this matter. This Grievance Board has previously recognized that pay anomalies may occur despite proper adherence to the Division of Personnel's classification and pay plans and that such inequities do not establish a violation of law. See, e.g., Colesante v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-004 (Apr. 27, 1993); Loomis v. W. Va. Div. of Human Serv., Docket No. 91-DHS-172 (Feb. 27, 1992). Thus, while the undersigned is sympathetic to Grievants' concerns that they have been unfairly relegated to the same salary as a peer with less experience and credentials, this situation is not so inequitable as to constitute an abuse of discretion or an arbitrary application of an

otherwise lawful regulation.

Consistent with the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievants are presently employed by DOH as Bridge Safety Inspector II's at a monthly salary of $1539.

2. In accordance with written DOH policies intended to encourage employees in Grievants' job classification to obtain NICET certification and/or DOH certification as bridge safety inspectors, Grievants obtained one or both certifications.

3. Consistent with its written policies, DOH awarded merit pay increases to Grievants for obtaining the certifications referenced in Finding of Fact Number 2, resulting in Grievant Roach receiving a monthly salary of $1527 and Grievant Minton receiving a monthly salary of $1467.

4. Prior to reclassification, another Bridge Inspector II who had not passed either of the examinations referenced in Finding of Fact Number 2, Royce Daugherty, was receiving a monthly salary of $1351. Mr. Daugherty has two and one-half year's less experience as a Bridge Inspector than Grievant Roach and one and one-half year's less experience than Grievant Minton.

5. Subsequent to reclassification, Grievants and Mr. Daugherty were similarly placed at the minimum pay level of the new pay range for Bridge Safety Inspector II so that all three are receiving the amount of monthly pay stated in Finding of Fact Number 1.

CONCLUSIONS OF LAW

1. In order to prevail, Grievants must prove the allegations of their complaint by a preponderance of the evidence. Rumbaugh v.W. Va. Dept. of Transp., Docket No. 94-DOH-034 (July 25, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. DOH's action placing Grievants at the minimum pay level of the new pay range for Bridge Safety Inspector II is consistent with the Division of Personnel's regulation governing the statewide reclassification project. See Div. of Personnel Administrative Rules, Series I (Amended), § 5.04(f)2a(1) (1993).

3. Under the circumstances present here, DOH's action in placing Grievants at the minimum pay level for Bridge Safety Inspector II's so that they are compensated equally with a Bridge Safety Inspector II who has not obtained the same certifications as Grievants and who has less experience

as a Bridge Inspector than Grievants, is not inconsistent with any law, rule or regulation applicable to the compensation of state employees. In fact, Respondent's action is in compliance with the Division of Personnel's rules at § 5.04, supra. See generally, Colesante v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-004 (Apr. 27, 1993).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: November 29, 1994

Footnote: 1At Level III, Respondent DOH found that Grievant Roach's grievance was untimely submitted to Level I. Grievants presented evidence at Level IV tending to show that this delay was excusable. See G Ex 2 at L IV. Inasmuch as the Respondent did not address this issue in its post-hearing submission, this defense is deemed to have been waived.

Footnote: 2National Institute for Certification in Engineering Technologies.