HUSSEIN SHARIFPOUR,

Grievant,

v. **Docket No. 99-DOH-186**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION

Hussein Sharifpour (Grievant) alleges that he should have been selected for the position of Highway Engineer IV in District Six of the West Virginia Division of Highways (DOH). He seeks to either be placed in the position or to receive the same pay as the successful applicant for the position. The record does not reflect what proceedings occurred at levels one and two of the grievance procedure. A level three hearing was held on April 29, 1999, followed by a decision denying the grievance dated May 3, 1999. Grievant appealed to level four on May 8, 1999. After one continuance granted for good cause shown, a hearing was held in the Grievance Board's office in Morgantown, West Virginia, on July 8, 1999. Grievant represented himself, and DOH was represented by counsel, Timbera Wilcox. This matter became mature for consideration at the conclusion of the level four hearing, the parties having declined to submit written fact/law proposals.

The following findings of fact are made pursuant to a thorough review of the evidence of record.

Findings of Fact

1. Grievant is employed by DOH in District Six as an Engineer in Training II (EIT II).

2. Grievant does not have a Professional Engineer (PE) license.

3. On February 17, 1999, DOH posted a vacancy for a Highway Engineer IV (HE IV) in District Six.

4. Grievant and four other individuals applied for the HE IV position.

5. One of the minimum qualifications in the classification specification for HE IV is a PE license in West Virginia.

___6. Lloyd Adams has a PE license and was selected to fill the position.

7. Grievant's position as an EIT II is in Pay Grade 16, and Grievant is compensated within the salary range for that pay grade.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievant contends that he should have been selected for the HE IV position, because he performs all of the job duties of that position. He also contests Mr. Adams' qualifications to perform the duties required. DOH does not dispute that Grievant's duties may overlap with Mr. Adams', but contends that Grievant was ineligible to be placed in the position, because he did not have the minimum qualification of a PE license. Grievant admits that he does not have a PE license, but contends that his actual abilities qualify him for the position, and the possession of or lack of a particular license should not have beenconsidered. If he is not deemed to be eligible for the position, he believes he should receive the same compensation as Mr. Adams, because he believes he performs the same work for less pay.

The West Virginia Division of Personnel (DOP) is charged with establishing classification plans for state employees, pursuant to the provisions of W. Va. Code §29-6-1 et seq. DOP is also vested with the authority to determine the minimum qualifications for each job class. Division of Personnel Administrative Rule § 4 (July 1998). DOH and DOP have determined that a PE license is required for the higher engineering classifications within DOH, because the actual practice of engineering in West Virginia requires such a license. Grievant has offered no evidence which would indicate that this requirement is the result of any improper motive or action, nor that it is unreasonable. In general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164

(1985). This standard of entitlement to substantial weight applies when a grievant attempts to review DOP's interpretation of its own regulations and classification specifications to determine if DOP's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-052 (July 10, 1995). Nothing in the record indicates that a PE license is an unreasonable minimum requirement for the job classification at issue.

As to Grievant's contention that he should be paid the same salary as Mr. Adams, he alleges entitlement to “equal pay for equal work.” The "equal pay for equal work"doctrine is embodied in W. Va. Code §29-6-10, which states, in pertinent part:

> [The Division of Personnel is authorized to promulgate rules which provide for]... a position classification plan for all positions in the classified service... based upon similarity of duties performed and responsibilities assumed, so that... the same schedule of pay may be equitably applied to all positions in the same class... Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

This provision has been interpreted by the West Virginia Supreme Court of Appeals to not mandate identical pay for identical work. The Court determined that it does not violate the "equal pay" doctrine for employees within the same classification to be paid differing amounts, so long as those amounts are within the confines of the classification's pay scale. Largent v. W. Va. Div. of Health, 192 W. Va. 239 at 244-246, 452 S.E.2d 42 (1994). "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 ... specifically identifiable criteria that are reasonable and that advance the interests of the employer." Id. at 246.

Grievant does not contend that he is misclassified nor that his current salary is not within the appropriate range for Pay Grade 16. Accordingly, the equal pay doctrine is not applicable, because Grievant is attempting to compare himself with an employee in a separate classification in a different pay grade. If Grievant is appropriately classified, comparison to employees outside his own classification is irrelevant. Nevertheless, the pay range for Pay Grade 16 is $2,314 to $3765, while the range for Pay Grade 20, within which HE IVs are compensated, is $3,035 to $4,935. Grievant's monthly salary of $3,321is, therefore, within his own pay range and the pay range for an HE IV. Grievant has not proven entitlement to the same salary as Mr. Adams.

Finally, it must be noted for the record that, at the conclusion of the level four hearing in this matter, Grievant requested permission to introduce documentation which would allegedly show Grievant's daily duties and Mr. Adams' daily duties, presumably in an attempt to prove that they perform the same work. However, since Grievant agreed that he does not believe he is misclassified, neither his duties nor Mr. Adams' duties are relevant to this grievance regarding selection and equal pay. Accordingly, Grievant's request was denied, and he requested that the undersigned place these facts in this Decision.

The following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The Division of Personnel's interpretation of its own regulations and classification specifications is entitled to substantial weight, and a grievant challenging such must demonstrate that the Division of Personnel's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-052 (July 10, 1995). 3. Grievant did not prove by a preponderance of the evidence that the requirement of a Professional Engineer's license for the job classification of Highway Engineer IV was unreasonable, arbitrary and capricious, or an abuse of discretion.

4. So long as an employee is compensated within the pay scale for his proper classification, no “equal pay for equal work” violation has occurred. Largent v. W. Va. Div. of Health, 192 W. Va. 239 at 244-246, 452 S.E.2d 42 (1994).

5. Grievant is being compensated within the proper pay scale for his classification, so he has failed to prove any entitlement to a higher salary, based upon the evidence submitted in this grievance.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 28, 1999 _____

DENISE M. SPATAFORE **Administrative Law Judge**