GEORGE JENKINS,

Grievant,

v. **Docket No. 03-DEP-154**

DEPARTMENT OF ENVIRONMENTAL PROTECTION/

OFFICE OF MINING AND RECLAMATION,

Respondent.

D E C I S I O N

Grievant, George Jenkins, filed this grievance against his employer, Respondent, the Department of Environmental Protection/Office of Mining and Reclamation ("DEP"), . The statement of grievance reads:

> That the DEP hired a geologist in the Philippi office at a much larger salary than myself. Since I (1) overs[ee] this geologist's work[,] (2) all the more difficult permit applications have been re-assigned from the Philippi office to me in Nitro[,] (3) I occupy the position of senior permit geologist for all of OMR and, (4) all the field geologist's [sic] have to defer to me as far as policy interpretation, etc., I find that it is inequitable for a person occupying a position that is directly oversighted [sic] and guided by me to be making a much larger salary. I also note that I have more total time at the state, a more advanced degree, a larger work load, etc.

As relief Grievant sought:

> That my salary be advanced to one (1) salary increment greater than the Philippi geologist's entry salary, which is the highest geologist's salary in the DEP. Since I directly overs[ee] the field geologist's work and handle all the toughest applications, my salary should be commensurate with my position. I also ask for interest on the salary requested from the date of the grievance. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

FINDINGS OF FACT

1. Grievant has been employed by DEP since May 1992. He is classified as a Geologist III, and

is assigned to the Nitro office of the Office of Mining and Reclamation ("OMR") He is considered by OMR to be the Lead Geologist in the Nitro office. Other geologists employed by OMR throughout the state defer to Grievant on policy interpretation, and he performs quality review checks of their work to assure that they have complied with laws, regulations, and policies.

2. Grievant applied for a vacancy in OMR's Nitro office in 2002, and was transferred to that position in April 2002. He was a Geologist III prior to and after his transfer. His salary was increased by 10% when he was transferred, and he accepted the offered salary. The salary increase was labeled a merit increase. Grievant's salary is $43,380.00 per year.

3. Although Grievant is to receive a merit increase, DEP cannot advance his salary at this time due to a freeze on merit increases. 4. Jeff McClure was hired by DEP in August 2002, to fill a posted Geologist III position in OMR's Philippi's office, at an annual salary of $48,000.00. Mr. McClure had previously worked for DEP in the Philippi OMR office, from August 1992 through May 2001, and when he was hired in August 2002, it was a reinstatement. When Mr. McClure resigned his employment with DEP in March 2001, he was a Geologist III, and his salary was $39,696.00. He then accepted employment with the U.S. Department of Agriculture as a Geologist.

5. The salary offered to Mr. McClure to return to DEP was a result of various factors. Mr. McClure's position had not been filled after he resigned in 2001, and the Philippi office was very far behind in its work, and was delinquent on the geology reviews of NPDES applications. Brenda Zickefoose, Permit Supervisor in the Philippi OMR office, believed the office was in dire need of a Geologist to fill the position. Mr. McClure had the background and experience to start to work on permit reviews immediately. In addition, Mr. McClure was making more than $48,000.00 per year in his federal job.

6. There are two Geologist III's in the Philippi OMR office, and they are considered by DEP to be Lead Geologists. There are five other employees in the Philippi OMR office who are Geologists. Three of those employees work in the field, and have been reluctantly pulled in from the field on occasion to work on permit reviews on a part- time basis.

7. The Geologist III classification is in a pay grade 16. The salary range for a pay grade 16 is $29,160.00 to $53,952.00.

DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant argued DEP violated the Division of Personnel's Pay Plan Implementation Policy Number 12, Item 32a, when it hired Mr. McClure at a salary higher than his and that of other Geologist III's employed by DEP, in that no review was made of pay equalization prior to the hiring of Mr. McClure. He felt his qualifications were far superior to those of Mr. McClure, and DEP could have paid a lesser salary to someone else. Inasmuch as the record does not reflect the qualifications or salary requirements of the other two applicants for the position, or that Grievant was aware of this information, it does not appear that Grievant's assertion that DEP could have hired someone else who could perform the duties of the position for less money has any factual basis. Grievant also asserted that the Philippi OMR office did not need to hire another Geologist as it already employed seven Geologists, and the workload in that office did not compare with the workload in other OMR offices with fewer Geologists.

DEP pointed out that state employees in the same classification need not receive the same level of pay. It argued Mr. McClure's salary was appropriate, as it was the result of market forces, qualifications, and experience, and that it had no authority to raise Grievant's salary at this time.

Grievant's argument is in the nature of “equal pay for equal work,” in that he and Mr. McClure hold the same classification, but their salaries are different. While Grievant is understandably upset that Mr. McClure is making more money than he, both employees are being paid within the pay range established for a Geologist III.

> The West Virginia Supreme Court of Appeals held that "employees who are performing the same tasks with the same responsibilities should be placed within the same job classification", but a state employer is not required to pay these employees at the same rate. [Largent v. West Virginia Division of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994),] at Syl. Pts. 2 & 3. Additionally, 128 C.S.R. 62, § 19.4 states any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .". As noted by the West Virginia Supreme Court of Appeals in Largent, pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Id. at 246.

Emigh, et al., v. Dep't of Health and Human Resources, Docket No. 99-HHR-408 (May 31, 2000).

Grievant based his claim upon a violation of the Division of Personnel's Pay Plan Implementation Policy, Policy DOP-P12, which provides, in pertinent part:

A. Appointments above the minimum salary established for a classification may be made at the discretion of the appointing authority and in accordance with the following standards.

1. When making appointments above the minimum salary, the appointing authority may pay an increment of up to 10% above the minimum salary, up to the market rate, for each 6 months of pertinent experience or equivalent pertinent training above the minimum qualifications for the class. This applies to all job classifications except those job classifications specifically excluded by official action of the State Personnel Board.

2. At the request of the appointing authority, the Director of Personnel may authorize an original appointment above the market rate of the classification, not to exceed the maximum rate, if it has been established that the classification is critical to the agency's mission and that the market rate is insufficient for recruitment of applicants. The rate shall be determined according to the formula of up to 10% above the minimum salary, up to the maximum salary, for each 6 months of pertinent experience or equivalent pertinent training above the minimum qualifications for the class.

   a. Documentation: Requests for appointment above the market rate shall be submitted in writing to the Director of Personnel. The request shall include the salary rate requested, the scope of recruitment difficulty (i.e. statewide, regional, local), turnover data, description of recruitment efforts, organizational chart with salaries and qualifications of current employees, and other such information as may be requested by the Director.

   b. Review: The Director of Personnel shall evaluate the request and related documentation as a basis for approval or disapproval of the request.

3.

> Internal Equity: The appointing authority shall be responsible for assuring that original appointments above the entry rate are applied in a consistent manner with due consideration to the salaries and relative qualifications of incumbent employees in the same classification.

(Emphasis added.) An “original appointment,” as is referred to in the above provisions, is defined in the Division of Personnel's Rule 3.62 as:

> Initial employment of an individual into the classified service as a result of selection from a certification of names from a register established by open competitive examination or from a preference register.

Although Respondent did not point this out, the undersigned cannot ignore the fact that Mr. McClure's employment was not an “original appointment.” Mr. McClure was employed by DEP before, and his re-employment was a “reinstatement,” not an “original appointment.” “Reinstatement” is defined by the Division of Personnel's Rule 3.82 as:

> A type of re-employment of a former permanent classified employee.

The Division of Personnel's Rules have a separate section setting forth how the salary for a person who is reinstated is determined, providing as follows:

> 5.8. Pay on Reinstatement - The salary for an employee who is reinstated shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, asdetermined by the Director, may be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize reinstatement at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class, or where the reinstated employee's last salary as a classified employee was above the market rate.

As Mr. McClure's employment was not by “original appointment,” the provisions of the Pay Plan Implementation Policy relied upon by Grievant were not applicable to his employment. No evidence was presented that the provision relating to the salary upon reinstatement was violated, and Lowell Basford, the Division of Personnel's Assistant Director in charge of classification and compensation,

testified that Mr. McClure's hiring was approved by the Division of Personnel, and was made in compliance with Personnel's rules.

Grievant's assertion that the Philippi OMR office did not need to hire another Geologist and that Mr. McClure had few duties, was not supported by the evidence. Grievant's assertions were apparently based upon his review of information from a computer generated report, rather than upon his personal knowledge of the work of that office. Grievant has no supervisory responsibility for the Philippi OMR office, nor is he responsible for making staffing decisions for that office. He performs quality review checks of Mr. McClure's work on permits, but he is not Mr. McClure's supervisor, and has no personal knowledge of Mr. McClure's daily work activities. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' Rice v. Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). See W. Va Code § 18-29-2(a); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Viski, Sypolt, and Cool v. Preston County Bd. of Educ., Docket No. 99-39-271 (Nov. 30, 1999).

While DEP would like to pay Grievant more money, its hands are tied. The Division of Personnel's Rule 5.9 outlines when a state employee's salary may be increased, providing as follows:

> (a) Basis - All salary advancements shall be based on merit as evidenced by performance evaluations and other recorded indicators of performance.
>
> (b) Eligibility - Salary advancements are limited to permanent employees.
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> (c) Amount - Salary advancements are limited to a maximum established and subject to change by the State Personnel Board, and shall not cause the new salary to exceed the maximum of the pay grade to which the employee's class is allocated. The State Personnel Board shall establish the maximum for salary advancements by policy on implementation of the pay plan [i.e. as of 5/1/94, no more than 10% in any 12-month period] as specified in subsection 5.2. of this rule.

Grievant received a 10% merit increase in April 2002, and was not eligible under this rule to have his salary advanced again until April 2003. While DEP would like to increase Grievant's salary by 10% now that he is again eligible for a merit increase, it has been unable to do so because of the freeze on

such salary increases. DEP has done all that it can to increase Grievant's salary.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). 2.

> The West Virginia Supreme Court of Appeals held that "employees who are performing the same tasks with the same responsibilities should be placed within the same job classification", but a state employer is not required to pay these employees at the same rate. [Largent v. West Virginia Division of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994),] at Syl. Pts. 2 & 3. Additionally, 128 C.S.R. 62, § 19.4 states any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . .". As noted by the West Virginia Supreme Court of Appeals in Largent, pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." Id. at 246.

Emigh, et al., v. Dep't of Health and Human Resources, Docket No. 99-HHR-408 (May 31, 2000).

3. The Division of Personnel's Rules and Policies on “original appointments” did not apply to Mr. McClure's reinstatement.

4. Grievant did not demonstrate that any law, rule, regulation, or policy was violated when Mr. McClure was hired at a salary of $48,000.00.

5. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' Rice v. Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). See W. Va Code § 18-29-2(a); Ball v. Dep't of Highways, Docket No. 96- DOH-141 (July 31, 1997).” Viski, Sypolt, and Cool v. Preston County Bd. of Educ., Docket No. 99-39-271 (Nov. 30, 1999).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 12, 2003

Footnote: 1

This grievance was filed on January 21, 2003. Grievant's supervisor responded on January 30, 2003, that he was without authority to grant the relief requested. Grievant appealed to Level II, and the second-level supervisor likewise responded on February 28, 2003, that he was without authority to grant the relief requested. Grievant appealed to Level III. A Level III hearing was held on April 24, 2003, and the grievance was denied at Level III on May 26, 2003. Grievant appealed to Level IV on June 2, 2003. A Level IV hearing was held on July 15, 2003. Grievant represented himself and DEP was represented by Steven Dragisich, Esquire. This matter became mature for decision upon receipt of Respondent's written argument on August 15, 2003.