DALIP SARIN,

Grievant,

v.

DOCKET NO. 02-DEP-234

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION and

WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Dalip Sarin, filed this grievance against his employer, the West Virginia Department of Environmental Protection ("DEP") on June 24, 2002:

> WVDMR has promoted two engineers from Engineer III to Engineer IV position raising their salary from $52,000/= to $65,000/= annually. Grievant has been working as Engineer IV since 1994. Grievant's salary is less than $55,000/=.
>
> Relief sought: Salary equity adjustment as a whole. (See footnote 1)

The grievance was denied at level one by Ken Politan on July 10, 2002. On July 17, 2002, Grievant's requested relief was denied by Matthew B. Crum, however, Mr. Crum did authorize a 10% merit increase for Grievant, effective September 1, 2002. A levelthree hearing was held on July 22, 2002, and the grievance was denied by Grievance Evaluator Jack McClung on July 24, 2002. Grievant appealed to level four on July 31, 2002, and a level four hearing was held on October 24, 2002 and December 17, 2002. This matter became mature for decision on January 17, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant

appeared in person and represented himself, DEP was represented by Steven Dragisich, Assistant Attorney General, and the Division of Personnel, which was joined as an indispensable party, was represented by Shirley Skaggs, Esq. and Karen Watson, Esq., Assistant Attorneys General.

SUMMARY OF EVIDENCE

See Addendum A.

Based upon a review of the testimony and documentary evidence of record in this matter, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed by DEP in its Division of Mining and Reclamation Office for approximately 13 years and has been classified as an Engineer IV since 1994.

2. Grievant was hired by the former Department of Energy in December 1989 as an Engineer III, with a yearly salary of $33,183.60, at what was then pay grade 27, step 3B of the civil service pay scale. (See footnote 2) 3. In October 1994, DEP was ordered at level three to reclassify Grievant to an Engineer IV as a result of a grievance he filed during the statewide reclassification project. Grievant's salary at the time was within the pay range for the Engineer IV classification, therefore, he was reclassified without any pay raise pursuant to DOP Administrative Rules. (See footnote 3)

4. Grievant has received seven merit raises during his tenure at DEP. (See footnote 4) Grievant's salary before September 1, 2002, was approximately $55,000 per year. (See footnote 5)

5. Michael William Reese was hired by DEP in 1989 as an Engineer III at pay grade 27, step 6E of the pay plan, at an annual base salary of $34,872 per year. LIV G. Ex. 24.

6. James Pierce was hired by DEP in 1987 as an Engineer in Training at pay grade 18, step 8E, at an annual base salary of approximately $25,104 per year.

7. Mr. Pierce has had five merit raises during his fifteen-year tenure at DEP, and in early 2002, was classified as an Engineer III, at an annual salary of $51,000. In 2002, DEP posted an Engineer IV position. Mr. Pierce applied for and was awarded the position, and received a salary increase to $65,000 per year. His new supervisor, Kenneth Politan, recommended the increase. 8. Mr. Politan based his recommendation for Mr. Pierce's pay increase from $51,000 to $65,000 on several factors. Under DOP's promotion rule, for every jump in pay grade, a 5% increase is given; Mr. Pierce

jumped two pay grades. In addition, Mr. Politan looked at Mr. Pierce's years of experience, work record, and the fact he had specific experience and qualifications for the position. Mr. Politan also considered the current market rate for engineers with similar experience and qualifications as Mr. Pierce. Finally, Mr. Pierce negotiated with DEP over his salary when he accepted the Engineer IV position.

9. Edward Wojtowicz was hired by DEP in 1979 as an Engineer I at pay grade 16, at an annual base salary of approximately $20,808.00.

10. Mr. Wojtowicz has had five merit raises during his twenty-three year tenure at DEP, and in early 2002, was classified as an Engineer III, at an annual salary of $49,440. In 2002, Mr. Wojtowicz submitted a position description form to DOP requesting reallocation to an Engineer IV position. DOP and DEP reallocated Mr. Wojtowicz and he received a salary increase to approximately $65,000 per year.

11. The increase in Mr. Wojtowicz' salary reflects the application of DOP's promotional rule which allows an increase of 5% per pay grade up to 15%, plus an additional increase for years of experience.

13. DEP has serious recruitment and retention problems for professional engineers.

15, DOP Administrative Rule § 5.5(a), “Pay on Promotion” states the following:

> When an employee is promoted, the employee's pay shall be adjusted as follows: (a) Minimum Increase - An employee whose salary is at the minimum rate for the pay grade of the current classification shall receive an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted. An employee whose salary is withinthe range of the pay grade for the current classification shall receive an increase of one increment, as established by the State Personnel Board, per pay grade advanced to a maximum of 3 pay grades, or an increase to the minimum rate of the pay grade for the job classification to which the employee is being promoted, whichever is greater, but in no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving the elements 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 § 4.21 (2000); Howell v. W. Va. Dept. of Health &

Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. This grievance presents an unfortunate circumstance. Grievant, with many years of experience, is paid less than co-workers within the same classification, some with less years of experience. Unfortunately, this is all too common within state government, especially in positions with serious recruitment problems. See Emigh, et al. v. W. Va. Dept. of Health & Human Resources, Docket No. 99-HHR-408 (May 31, 2000).

Grievant raises several issues with regard to the alleged inequity between his salary and that of his co-workers. He alleges a violation of DOP's Pay Plan, and maintains that the pay disparity demonstrates discrimination and favoritism. Grievant's allegations also can be viewed as a violation of the equal pay for equal work concept.

Grievant's argument that DOP's Pay Plan has been violated is misplaced. There are three documents at issue in this grievance, given the span of time. First is a Draft Pay Plan Implementation Policy which was issued in March 1994 for public comment on aproposed pay plan for the state classified service ("the Draft"). The Draft included the following language:

A.

> When making appointments above the minimum salary, the appointing authority may pay an increment of 3% above the minimum salary for each 6 months of pertinent experience or equivalent pertinent training above the minimum qualifications for the class.
>
> *1.*
>
> *No applicant shall be appointed at a salary rate exceeding the salary of current employees in the job class who have comparable training and experience.*
>
> *2.*
>
> *If recruiting difficulties necessitate appointments above the minimum as identified in A.1. above, then salary adjustments shall be made to that rate for current employees in the job class who have comparable training and experience.*

G. Ex. 18 (emphasis added).

As a result of the comment period, and other agency meetings on the proposed pay plan, a Pay

Plan Implementation Policy was adopted and became effective on May 1, 1994. The emphasized language that appears above did not make it into the final version of the Pay Plan Implementation Policy. See G. Ex. 6. Despite that fact, Grievant maintains the Pay Plan Implementation Policy was violated because his salary has not been adjusted to reflect recruiting difficulties and to take into account new appointments which result in higher salaries for employees within his job class. While the language in the Draft adequately addresses the problems which have been raised over and again before this Grievance Board with the pay plan structure, the fact remains that it was not part of the official Pay Plan Implementation Policy at any time, and thus there can be no violation with respect to that language. The good news for state employees is that the Pay Plan Implementation Policy was revised, effective January 1, 2002, to include the following language:

> 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.

LIV G. Ex. 7. The 2002 Pay Plan Implementation Policy also addresses market rate and the discretion of the appointing authority to make appointments above the minimum salary with consideration given to market rate, training, and experience. Id. However, that language was not part of the Pay Plan Implementation Policy at any time relevant to this grievance, and therefore, there has been no violation of the Pay Plan Implementation Policy.

It has been well-established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. .Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

Nevertheless, consistent with DOP's efforts in recognizing the importance of internal equity, when Grievant brought his alleged pay inequity problem to Matthew Crum, his Director, Mr. Crum took steps to alleviate Grievant's concerns. Mr. Crum authorized a 10% merit raise for Grievant for fiscal year 2002, the highest merit raise a state employee canreceive, and assured Grievant he would

attempt to get him a 10% merit raise in fiscal year 2003, as well. DOP's Administrative Rules have a cap of 10% on the total amount of merit raises a state employee can receive in one fiscal year.

Grievant also argues his pay inequity is the result of discrimination and favoritism, alleging adverse action has been taken against him because of his race, Indian. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” This definition encompasses all types of discrimination, including discrimination based upon race. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Section 29-6A-2(d), although it is noted that Grievant has a concurrent claim filed with the Human Rights Commission over the issue of racial discrimination. Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).

Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” In order to establish a prima facie case of discrimination and favoritism, Grievant must demonstrate the following:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once

Grievant establishes a prima facie case of discrimination, the burden shifts to DEP to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant is of Asian-Indian descent. Messrs. Reese, Pierce, and Wojtowicz are white. Grievant has met his burden of proof and established a prima facie case of discrimination or favoritism with regard to Messrs. Reese, Pierce, and Wojtowicz, with respect to his race. Therefore, the burden shifts to DEP to show legitimate, non- discriminatory reasons for the differences in treatment. The undersigned DEP has met that burden.

First, with respect to Mr. Reese, he was hired at a different time than Grievant, within the pay grade for Engineer III, and below the midpoint, which were the only criterion DEP was required to adhere to. While Grievant might assign different weight to Mr. Reese's experience, as he thoroughly demonstrated at hearing, there is no evidence that DEP's and DOP's quantification of Mr. Reese's experience was clearly wrong or arbitrary and capricious, or the result of discrimination or favoritism. There is simply no requirement that all employees hired by a state agency within the same classification be paid the exact same salary. With respect to Messrs. Pierce's and Wojtowicz's recent salary adjustments, the evidence demonstrates that Mr. Pierce applied for an Engineer IV vacancy and received the position, resulting in an appropriate salary adjustment. Mr. Wojtowicz was reallocated to an Engineer IV, again receiving the appropriate salary adjustment. Furthermore, both gentlemen received additional increases based on market factors and experience, in the discretion of the appointing authority, reaping the benefit of the newly amended Pay Plan Implementation Policy. The effect of these salary adjustments is that Messrs. Pierce and Wojtowicz now make more money than Grievant. Since Grievant did not apply for the position Mr. Pierce received, nor was he reallocated to his Engineer IV position, the differences in salary cannot be attributed to discrimination or favoritism.

Grievant has been an Engineer IV for some time, and continues to receive merit increases within that classification. Other than being promoted through posting or reallocation, there are no other ways available in state government for Grievant to receive salary adjustments. As discussed previously, Mr. Crum got Grievant a 10% merit raise in 2002, with the assurance he would try to get him another 10% merit raise in 2003, in order to alleviate the alleged pay inequity. Grievant has received all he is entitled to through the actions of Mr. Crum. He has not demonstrated any

discrimination or favoritism on the part of DEP.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000);Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. It is well-established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. .Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

3. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

4. Favoritism is defined by W. Va. Code § 29-6A-2(h), as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

5. In order to establish a claim of discrimination and favoritism, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or

the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. Grievant is of Asian-Indian descent. Messrs. Reese, Pierce, and Wojtowicz are white. Therefore, Grievant has established a prima facie case of discrimination and favoritism based upon his race.

7. DEP successfully articulated legitimate, non-discriminatory reasons for the difference between Grievant's salary as an Engineer IV and the salaries of Messrs. Reese, Pierce, and Wojtowicz.

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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 26, 2003

ADDENDUM A

Level Three Grievant's Exhibits

Ex. 1 -

Dalip Sarin's Resume.

Ex. 2 -

October 29, 1994 Level Three Order.

Ex. 3 -

October 18, 1995 letter from Dalip Sarin to John Ailes.

Ex. 4 -

March 20, 1996 note from Dalip Sarin to Rick Clark.

Ex. 5 -

October 28, 1998 note from Dalip Sarin to Michael Miano.

Ex. 6 -

July 22, 2002 Opening Statement of Dalip Sarin.

Ex. 7 -

W. Va. Division of Personnel Pay Plan Implementation Policy, revised January 1, 2002.

Ex. 8 -

W. Va. Division of Personnel Play Plan Implementation Policy, effective May, 1994.

Ex. 9 -

October 26, 1994 memorandum from John Ailes to Sandy Kee.

Ex. 10 -

Schedule of Monthly Salary Grades, August 1, 1990.

Ex. 11 -

Engineer IV Classification Specification, effective October 16, 1993.

Ex. 12 -

Engineer 4 Classification Specification, effective July 16, 1996.

Ex. 13 -

Annotation from W. Va. Code § 5-11-10.

Ex. 14 -

Grievance form filed June 24, 2002; July 17, 2002 level two response from Matthew B. Crum to Dalip Sarin.

Level Three DEP Exhibits

Ex. 1 -

Annotation from W. Va. Code § 29-6-10.

Ex. 2 -

Largent v. W. Va. Div. of Health, ___ W. Va. ___; ___ S.E.2d ___ (1994).

Ex. 3 -

Emigh, et al. v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-408 (May 31, 2000).

Ex. 4 - Payroll Transaction Card for Dalip Sarin.

Ex. 5 -

Agency roster of engineers with payroll transaction reports.

Level Four Grievant's Exhibits

Ex. 1 -

Dalip Sarin's Personnel File.

Ex. 2 -

March 16, 1992 letter from Sandra Kee to Dalip Sarin; application for employment.

Ex. 3 -

October 16, 1993 memorandum from Robert L. Stephens, Jr. to Dalip Sarin with attached reclassification documents.

Ex. 4 -

Dalip Sarin's level three reclassification grievance hearing Order; transcript.

Ex. 5 -

March 31, 1994 memorandum from Rick Clark to John Ailes with attachment.

Ex. 6 -

W. Va. Division of Personnel Pay Plan Implementation Policy, effective May 1, 1994.

Ex. 7 -

W. Va. Division of Personnel Pay Plan Implementation Policy, revised January 1, 2002.Ex. 8 -
Payroll Transaction Reports for Edward Wojtowicz, James Pierce, and William Reese.

Ex. 9 -

Payroll Transaction Reports for William Reese, Edward Wojtowicz, James Pierce, and Dalip Sarin.

Ex. 10 -

Dalip Sarin's Payroll Transaction Card.

Ex. 11 -

Civil Service System Training & Experience Rating for Dalip Sarin.

Ex. 12 -

Schedule of Salary Grades, July 1, 2002.

Ex. 13 -

Pilot Salary Schedule, January 1, 2002.

Ex. 14 -

Dalip Sarin's Resume.

Ex. 15 -

Dalip Sarin's Employee Performance Appraisal, rating period 2000.

Ex. 16 -

Table Indicating Percentage Increase in Salary.

Ex. 17 -

September 4, 2002 letter from Sandra Kee to Dalip Sarin enclosing level three reclassification hearing documents.

Ex. 18 -

March 11, 1994 memorandum from Mary Hunt to All DEP Chiefs; draft Pay Plan Implementation Policy.

Ex. 19 -

October 24, 2002 opening statement of Dalip Sarin.

Ex. 20 -

Affidavit of Sandra K. Kee, January 11, 2002.

Ex. 21 -

Miscellaneous Certificates.

Ex. 22 -

August 4, 1992 letter of recommendation from Charles H. Ware.

Ex. 23 -

February 4, 1998 letter from Sung M. Lee and Dae S. Young to Dalip Sarin.

Ex. 24 -

Personnel Documents for Edward Wojtowicz, James Pierce, Jon Coberly, and William Reese.

Ex. 25 -

James Pierce's and Edward Wojtowicz's Employee Performance Appraisals, rating period 2000.

Ex. 26 -

Dalip Sarin Personnel Transaction Cards.

Ex. 27 -

Dalip Sarin Civil Service Rating Scores.

Ex. 28 -

Dalip Sarin's Training & Experience Rating.

Ex. 29 -

November 13, 2002 letter from Dalip Sarin to Mary Jo Swartz; concluding statement of Dalip Sarin.

Ex. 30 -

November 21, 1991 letter of recommendation from Stephen C. Keen.

Ex. 31 -

W. Va. Human Rights Commission Determination in the matter of Dalip Sarin, June 30, 2000.

Ex. 32 -

June 30, 1998 letter from “Rick” to Michael Miano.

Ex. 33 -

Affidavit of Ajoy K. Mukherjee, April 8, 2002.

Ex. 34 -

August 18, 2002 letter from Sandra Kee to Dalip Sarin.

Ex. 35 -

Newspaper article.

Ex. 36 -

Schedule of Salary Grades, July 1, 2002.

Ex. 37 -

Schedule of Salary Grades, March 1, 2001.

Level Four DEP Exhibits

Ex. 1 -

Agency roster of engineers.

Ex. 2 -

Salary Schedule, April 30, 1994.

Ex. 3 -

January 28, 2002 memorandum from Larry Alt to Dalip Sarin.

Ex. 4 -

Schedule of Salary Grades, July 1, 1986.

Ex. 5 -

Pilot Salary Schedule, January 1, 2002.

Ex. 6 -

Agency roster with salary transactions.

Footnote: 1

At level four, Grievant alleged he was the victim of ongoing discrimination from the date he was hired. DEP objected, claiming Grievant was limited to evidence regarding the recent promotions of the two individuals referred to in his statement of grievance. The undersigned permitted Grievant to present evidence of alleged discrimination back to the date of his hire, noting that any relief incidental to events which occurred ten days prior to the filing of the grievance would be time barred.

Footnote: 2

The Department of Energy no longer exists and the services formerly provided by that agency are now provided by the Department of Environmental Protection.

Footnote: 3

Grievant alleges he should have been reallocated to the Engineer IV position, rather than reclassified, which would have allowed for a minimum 5% salary increase pursuant to DOP Administrative Rules. However, Grievant did not file a grievance over the action to reclassify rather than reallocate at the time, and any claim for relief in that regard is time barred. Moreover, the record supports DEP and DOP's contention that reclassification was the appropriate avenue for changing Grievant's status in October 1994.

Footnote: 4

This is not counting the September 1, 2002, 10% merit raise he received at Mr. Crum's direction as a result of this grievance.

Footnote: 5

Grievant's salary with new merit raise is approximately $61,500 per year.