GREGORY KEYS,

Grievant,

v. **Docket No. 04-DEP-115**

DEPARTMENT OF ENVIRONMENTAL
PROTECTION/DIVISION OF MINING
AND RECLAMATION,

Respondent.

DECISION

This grievance involves issues of internal pay equity within the respondent agency, the Division of Mining and Reclamation ("the Division") of the Department of Environmental Protection. The grievant, Gregory F. Keys ("Grievant"), instituted this grievance on February 17, 2004, because "[t]he initial salaries for the two recently hired Engineer-3's at the Logan DMR Regional Office are in violation of the West Virginia Division of Personnel Pay Plan Implementation Policy (Section III.A.3)[.]" As relief, Grievant seeks "a comparable minimum annual salary of $62,000.00" and back pay consisting of "the total difference between the grievance-granted salary and my existing salary from October 2002 up to the date of [sic] which the grievance is granted."

This grievance was denied at Levels I and II, on February 24, 2004 and March 2, 2004, respectively, because the grievance evaluators at those levels lacked the authority to grant the relief requested. A Level III hearing was held on March 12, 2004. The resulting proposed Level III decision denying the grievance was adopted by CabinetSecretary Stephanie Timmermeyer on March 18, 2004. The decision rested upon a failure of proof.

Grievant appealed to Level IV on March 23, 2004. A Level IV hearing was held on June 14, 2004, at the Charleston office of the West Virginia Education and State Employees Grievance Board. (See footnote 1) Grievant represented himself. The Division was represented by Ronald L. Reece, Assistant

Attorney General. Thereafter, this grievance matured for decision on June 28, 2004, upon receipt of "Respondent's Proposed Findings of Fact and Conclusions of Law." Grievant declined the opportunity to present a post- hearing submission.

Upon review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievant is employed by the Division as an Engineer 3.

2 2. An Engineer 3 position falls within pay grade 22, which has a salary range of $43,800.00 through $81,036.00.

3 3. Grievant has been licensed as a Registered Professional Engineer since February 1982.

4 4. After over eleven years with the Division, Grievant's current salary is $51,240.00. (See footnote 2)

5 5. On or about October 16, 2002, Nick Estes ("Estes") was hired as an Engineer 3 in the Division's Regional Office in Logan, at a beginning salary of $64,008.00.

6 6. Estes has been licensed as a Registered Professional Engineer since February 1993.

7 7. On or about July 16, 2003, Michael G. Smith ("Smith") was hired as an Engineer 3 in the Division's Regional Office in Logan, at a beginning salary of $64,008.00.

8 8. Smith has been licensed as a Registered Professional Engineer since February 2001.

9 9. It took approximately six months to fill the vacancies in the Division's Regional Office in Logan.

10 10. Grievant did not file this grievance until February 17, 2004.

11 11. The Division did not raise timeliness as a defense.

Discussion

Grievant and the new hires, Estes and Smith, are all in the Engineer 3 category, which is a pay grade 22. The range for pay grade 22 is $43,800.00 through $81,036.00. The salaries for all three fall within the applicable range for their pay grade. The Supreme Court of Appeals of West Virginia has previously clarified that there is no violation of thestatutory "equal pay for equal work" requirement (See footnote 3) where employees with the same job are paid different salaries as long as those salaries fall within the range established for the applicable pay grade. *Largent v. W. Va. Div. of*

Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

The *Largent* Court recognized that the Legislature, of necessity, built a certain amount of flexibility into the civil service scheme. Specifically, the Court noted that the civil service

> system allows some flexibility in the hiring process and aids the state in attracting quality people to public service. Moreover, this flexibility allows for fluctuations in market conditions allowing the State to take into consideration other factors when hiring new employees such as the applicant's education and work experience. 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 market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer.

Largent, 192 W. Va. at 246, 452 S.E.2d at 49 (citing *West Virginia University v. Decker*, 191 W. Va. 567; 447 S.E.2d 259 (1994)).

Although the pay disparity of which Grievant complains may not offend the provisions of West Virginia Code section 29-6-10(2), Grievant rests his argument upon Section III.A.3 of the West Virginia Division of Personnel Pay Plan Implementation Policy ("Implementation Policy"). This provision cautions that "[t]he appointing authority shall be responsible for assuring that original appointments above the entry rate are applied in aconsistent manner with due consideration to the salaries and relative qualifications of incumbent employees in the same classification." There is no evidence to suggest that Estes and Smith were not "original appointments." (See footnote 4) The provisions of Section III.A.3 thus apply.

There is nothing in the Implementation Policy to indicate what consequences attend an appointing authority's failure to exercise such responsibility. This issue need not be resolved in this grievance because there is a failure of proof as to whether the Division breached its responsibility, as described in Section III.A.3 of the Implementation Policy.

Grievant, who bears the burden of proof in this nondisciplinary grievance, failed to introduce any evidence about the hiring process for either Estes or Smith. Grievant did not elicit any testimony or present any evidence to suggest that the Division was not "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." The fact that both Estes and Smith came in at the same entry salary suggests that the Division is, in fact, being consistent.

There is no evidence that the Division did not give “due consideration” to the salaries being paid to long-time employees such as Grievant. Evidence that an engineer hired for the Philippi office in 1998, at two percent above the salaries of incumbents, does not really assist Grievant without additional evidence to put this fact into context with respect to Estes and Smith. By way of example, there is no evidence regarding thenumber of applicants, no evidence of comparable private sector salaries for engineers of comparable experience in the locale, no evidence that offers at lower salaries had been rejected, and so forth. This type of evidence would have been helpful in assessing whether the Division had breached its responsibility, as set forth in Section III.A.3 of the Implementation Policy.

In this case, there is no dispute that there was a large salary gap between Grievant and the new hires, Estes and Smith. Grievant argues that, in light of the fact that they were all performing similar duties, such gap was unwarranted. The Division responds that the entry salaries for Estes and Smith were dictated by problems in recruiting engineers for its Logan office. Grievant acknowledged that the Division had recruitment problems in Logan. In fact, he volunteered that the Division has trouble recruiting and retaining engineers, in general.

While Grievant may disagree with the Division's decision to pay such relatively high entry level salaries to Estes and Smith, this is a management decision. "'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).” *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999) (additional citations omitted). Grievant has failed to demonstrate a violation of any law, rule, regulation, or policy upon which to predicate this grievance.

The Grievant's situation is, unfortunately, not unique. Cases such as *West Virginia University v. Decker*, 191 W. Va. 567; 447 S.E.2d 259 (1994), have introduced us to termssuch as salary compression and salary inversion. Grievant is suffering from salary inversion, which occurs when market factors conspire to give new hires higher salaries than those being paid to experienced, long-term employees. While this circumstance is disheartening and irrefutably bad for morale, it does not afford Grievant a basis for relief under the facts of his case and the current state of our law.

Based upon the foregoing findings of fact, a review of the applicable law, and the arguments of

the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievant must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. The pay equity provision of West Virginia Code section 29-6-10 is not violated where, as here, employees within the same classification are paid at different levels within the appropriate pay grade. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

4 4. Grievant has failed to prove that the Division failed to fulfill its responsibility under the internal pay equity provisions of Section III.A.3 of the Implementation Policy.

5 5. Grievant has failed to prove a violation of any law, rule, regulation or policy upon which to challenge the Division's management decision with respect to filling the vacancies in the Logan office.

6 6. Grievant is not entitled to prevail in this grievance.

Accordingly, this grievance is **DENIED**.

Any party 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 West Virginia Code section 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: August 6, 2004

_____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Upon review of the file, it was observed that Respondent's Exhibit 1 at Level IV contained Grievant's social security number. The original exhibit has been removed from the file and replaced with a redacted version to protect Grievant's social security number from disclosure in the event this decision is appealed.

Footnote: 2

Grievant's salary was raised from $46,572.00 when he received a merit raise on March 1, 2004, during the pendency of this grievance.

Footnote: 3

West Virginia Code section 29-6-10(2) provides, in pertinent part, that "[t]he 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."

Footnote: 4

There are other salary rules that apply to former permanent classified employees who are reinstated, meaning rehired. Jenkins v. Dep't of Envtl. Prot., Docket No. 03-DEP-154 (Sept. 12, 2003).