MATTHEW WHITE, ROBYN ROGERS,

AND PHILLIP COCHRAN,

Grievants,

v. Docket No. 05-DPS-168

WEST VIRGINIA STATE POLICE

and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievants, Matthew White, Robyn Rogers, and Phillip Cochran, are employed as Forensic Analysts 4 by the West Virginia State Police ("Respondent"). On April 14, 2005, Grievants filed this grievance asserting their pay should be higher than an employee who was classified as a Forensic Analyst 3. The Relief Sought was compensation greater than the Forensic Analyst 3. (See footnote 1)

This grievance was denied at all lower levels. On May 18, 2005, this grievance was appealed to Level IV. The parties agreed to submit this case on the record, and this case became mature for decision on June 27, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. Grievants elected not to submit these proposals.

Issues and Arguments

Grievants argue that no lower classified employee should receive a greater salary than a higher classified employee because of the increase in job responsibilities. Grievants also believe there is little chance for advancement from their current positions. Respondent notes the pay grades of the two positions overlapped, the salaries of state employees can differ for a variety of reasons, and both Grievants and the Forensic Analyst 3 are being paid within their pay grades.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are all currently classified as Forensic Analysts 4, and were reallocated to that position effective January 16, 2005. At the time of their reallocations they received a pay increase. Their current salary is $34,650. (See footnote 2)

2. A Forensic Analyst 4 position is placed in Pay Grade 17 with a salary range of $31,200 to $57,720.

3. Grievant White has been employed by DPS since November 16, 2000; Grievant Rogers has been employed by DPS since October 16, 2000; and Grievant Cochran has been employed by DPS since January 7, 2004.

4. Jeff Osborne is classified as a Forensic Analyst 3, and his current salary is $39,436. He has been employed by DPS since August 5, 1992. The record reflects he was reclassified on May 16, 2001, but there is no information indicating what Mr. Osborne's former position was. (See footnote 3)

5. A Forensic Analyst 3 position is placed in Pay Grade 16 with a salary range of $29,160 to $53,952.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

The holding of the West Virginia Supreme Court of Appeals in Largent v. West Virginia Division of Health and Division of Personnel, 192 W. Va 239, 452 S.E.2d 42 (1994) is instructive in examining the issue raised by Grievants. Largent dealt with employees in a somewhat similar situation to Grievants, as one employee within the same pay grade was receiving a much larger salary than other employees within the same pay grade. In Largent, the West Virginia Supreme Court of Appeals held "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 at Syl. Pts. 2 & 3. Further, W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but thatCode Section does not require these employees to be paid exactly the same. Largent at Syl. Pts. 3 and 4. The requirement is that all classified employees must be compensated within their pay grade. See Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96- HHR-386 (Mar. 26, 1997); Brutto v. W. Va. Dep't of Health & Human Res., Docket No. 96- HHR-076 (July 24, 1996); Salmons v. W. Va. Dep't of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dep't of Health & Human Res., Docket No. 91-H-177 (May 29, 1992). See AFSCME v. Civil Serv. Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989).

Additionally in Largent, the West Virginia Supreme Court of Appeals noted 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. Consequently, a state employee's salary is the result of many factors, especially when the employee has worked for the state for many years, as Mr. Osborne has. During that time there have been across the board raises. Additionally, Mr. Osborne may have been hired at a greater starting salary due to market forces, education and/or experience. His reallocation in 2002 could have been from a lower pay grade which would have resulted in a larger salary increase upon reallocation. These are the factors that affect salary over time as discussed in Largent.

The specific issue raised by Grievants was previously addressed by the Grievance Board in Nafe, supra. In that case, a supervisor was paid less than the employees he supervised. The Administrative Law Judge held this salary disparity did not "violate anystatute, policy, rule, or written agreement" under which Nafe worked. There, as here, Grievants did not identify a violation of statute, policy, rule, or regulation.

While it is understandable that Grievants believe an individual who is in a higher pay grade with greater responsibility should receive a larger salary, the Nafe case demonstrates that is not always the case in the classified service, given the factors identified above. Further, because pay grades overlap, it is a fairly regularly occurring event that employees with a higher pay grade receive less

compensation than those in a lower pay grade. What is clear is that Grievants are being paid in accordance with the pay scale for their employment classification, and Grievants have not shown Respondent is required to increase their salaries to the same level as Mr. Osborne.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). 2. W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S. E.2d 42 (1994).

3. 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. Largent, supra; Nafe v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-386 (Mar. 26, 1997).

4. 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." Largent, supra at 246.

5. Grievants have failed to prove by a preponderance of the evidence a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which they work. Nafe, supra.

6. Grievants are compensated by Respondent within the pay scale for their positions.

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 thisdecision. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 28, 2005

Footnote: 1

Grievants represented themselves, and Respondent was represented by John Hoyer, Assistant Attorney General at Level III and Virginia Grottendieck, Assistant Attorney General at Level IV. Although the Division of Personnel was listed below as a party in this grievance, the agency did not participate at that level or at Level IV.

Footnote: 2

While Respondent recorded this action as reclassification, the record reflects this action was actually a reallocation. Reallocation to a higher pay grade requires an increase in salary.

Footnote: 3

It may very well be this action was a reallocation as well.