SHERRY SABO-PETTRY,

Grievant,

v. **Docket No. 06-DOH-043**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Sherry Sabo-Pettry is employed as an Office Assistant 2 ("OA 2") with the Division of Highways ("DOH"), working at the Mercer County Headquarters. Grievant asserts that her salary is well below the starting salary for an OA 2 in DOH. She believes that, given her experience, she should be paid more. She filed this grievance on July 18, 2005, seeking a 15% increase in her salary. The grievance was denied at all lower levels. She appealed to Level IV, and the parties agreed to submit on the Level III record. (See footnote 1) Findings of fact and conclusions of law were submitted by Grievant, *pro se*, and by Barbara Baxter, counsel for Respondent. This case became mature on March 17, 2006, when the undersigned received the lower level record.

Issues and Arguments

Grievant argues that her salary is well below the starting wage for an OA 2 with DOH but does not allege the agency has committed any violation. She argues there areOA 1's with no experience in DOH who make more money than she does. Respondent argues Grievant was laterally transferred and is being paid within her pay classification, and, while it is unfortunate, nothing can be done at this time to increase her salary. Respondent asserts that when merit raises were available, Grievant did not meet the requirements, in that she did not have a 2003 evaluation on file and had not worked at the division prior to July 1, 2003.

Grievant asserts that she did have a 2003 performance evaluation on file from DOC but makes no mention of the requirement that she be a DOH employee prior to July 1, 2003. Respondent argues

the evaluation requirement was interpreted to mean a 2003 DOH evaluation. (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following findings of fact.

Findings of Fact

1. Grievant has been employed with DOH since August 2, 2004, and is classified as an OA 2.

2. She transferred laterally from DOC to DOH, and was brought to DOH making $1,284.00, the same salary as she had before the transfer.

3. An OA 2 is classified by the Division of Personnel as a pay grade 5. The minimum and maximum monthly salary range for that pay grade is between $1,150.00 to $2,128.00. 4. Grievant's salary is within the pay scale for an OA 2 position.

5. On July 9, 2004, Jeff Black, Director of Human Resources for Respondent, wrote Grievant offering her employment with DOH at the pay rate of $1,284 a month, and explaining that was the same class and rate of pay as her position with DOC. (See footnote 3)

6. Grievant signed the letter acknowledging acceptance of the position.

7. DOH instituted a Merit Increase Policy in effect from July 1, 2004 through June 30, 2005.

8. To be eligible for a merit increase, the employee had to be employed by DOH and certified permanent before July 1, 2003, and the merit increase was to be based on the 2003 performance evaluations.

9. Grievant was not an employee of DOH prior to July 1, 2003, did not have a DOH evaluation on file for that calendar year, and therefore was not eligible for the merit increase.

10. On June 7, 2005, Grievant's supervisor, John McBrayer, sent a letter to Mr. Black requesting Grievant receive a salary increase.

11. At that time, DOH did not have a merit raise policy in place. Also, Grievant did not meet the requirements set forth in the Pilot Compensation Policy, a pay implementation plan that deals with internal pay equity. The specific provision reviewed for Grievant required a 20% pay differential from others in the same agency, assigned organizational unit, same job class, comparable training, experience, responsibilities and years of State Classified Service.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a

preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

Grievant transferred as an OA 2 from DOC to DOH. Upon transfer, Grievant was informed her pay would remain the same as it had been with DOC. The salary offered by DOH fit within the minimum and maximum amount established by DOP.

On June 7, 2005, Grievant's supervisor wrote to Jeff Black, Director of Human Resources, requesting Grievant receive a salary increase. Mr. Black wrote back on June 30, 2005, explaining currently no merit program was in place. He also explained he had reviewed Grievant's salary to determine if a raise was warranted under the Pilot Strategic Compensation Policy, but since there was not a 20% difference between her salary and others within the agency who had the same job classification, comparable training, experience, responsibility and years of state service, she was ineligible for a raise.

The concept of "equal pay for equal work" is embraced by *W. Va. Code* 29-6-10. *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have 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. *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). It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003).

While it is unfortunate for Grievant that she did not meet the qualifications for a merit increase and DOH has no policy concerning merit raises at this time, Grievant is being paid appropriately. This grievance must be denied. The following conclusions of law support this Decision.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. The concept of "equal pay for equal work" is embraced by *W. Va. Code* § 29- 6-10. *See AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similarwork need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *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). It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003).

3. Grievant has failed to establish by a preponderance of the evidence that her salary is in violation of any law, rule, regulation or policy.

Accordingly this grievance must be **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, 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: April 25, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

At Level III, Grievant was represented by William Butt, and Respondent was represented by Robert Miller, Esq.

Footnote: 2

Based on evidence presented, Grievant was told she did not receive a merit increase because she had not completed her probationary period. This information was inaccurate. Because Grievant was a lateral transfer, DOH did not require her to serve a probationary period. This inaccurate information does not affect the outcome of this case, however, because Grievant did not meet the eligibility requirements for a merit raise.

Footnote: 3

This letter also informed Grievant that she would not be placed on a probationary period.