THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JAMES HILL,

Grievant,

v. DOCKET NO. 06-DEP-348

DEPARTMENT OF ENVIRONMENTAL PROTECTION/
REHABILITATION ENVIRONMENTAL ACTION PLAN
and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, James Hill, filed this grievance on March 1, 2006, alleging he was improperly classified. In the alternative, he alleged that his salary in his current classification should be increased based on his experience and years of service. He believes he has been the subject of discrimination. His stated relief sought is, “I want “equal work for equal pay” [sic] which should be the mid level [sic] pay scale for an Environmental Resources Program Manager 1.”

Upon agreement of the parties, this case was submitted on the record developed below. At the lower level hearing, Grievant appeared *pro se*, and Department of Environmental Protection (“DEP”) was represented by Heather Connolly, General Counsel. The Division of Personnel (“DOP”) was represented by Lowell Basford, Assistant Director, Classification and Compensation Division. The matter became mature for decision on January 10, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Synopsis

Grievant argues he should be classified as an Environmental Resources Program Manager 1

("ERPM 1) instead of an Environmental Resources Specialist 2 ("ERS 2"). He also asserts, if it is determined that his appropriate classification is as an ERS 2, he should receive equal pay for equal work. He argues he is a victim of discrimination.

Respondents aver Grievant is appropriately classified. Respondents also assert Grievant is paid within his pay grade, and therefore no discrimination has occurred. Grievant has failed to meet his burden of proof on all issues raised, and therefore, this grievance must be denied.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is an ERS 2 and has worked as such since 1997.
2. Grievant is currently employed by DEP, but was previously an ERS 2 for the WV Division of Natural Resources.
3. Grievant was transferred to DEP as the result of a legislative change that transferred the Rehabilitation Environmental Action Program ("REAP") to DEP in 2005.
4. When REAP employees were transferred, DEP requested they complete a position description form ("PDF") to ensure they were properly classified.
5. Grievant completed his PDF, and it was sent to DOP for review.
6. On December 29, 2005, DOP issued a memorandum notifying Grievant and DEP that after a review, it was DOP's determination Grievant was properly classified as an ERS 2.
7. On January 26, 2006, DEP's Office of Human Resources provided additional information regarding the REAP staff's duties and requested DOP reconsider the earlier determination.
8. On March 1, 2006, Grievant was informed DOP declined the request for reconsideration.
9. An ERS 2 is a Pay Grade 15. The salary range is $27,252 to $50,400 annually. Grievant is paid within this range. 10. The class specifications for an ERS 2 are as follows:

Nature of Work

At the full-performance level, performs complex professional work in a specialty area in the acquisition, preservation, management and protection of the state's environmental/natural resources. Work involves the application of scientific principles, laws and regulation and program planning techniques in the specialty area. Areas include grants and contract administration, environmental/natural resources, program development and evaluation, education or environmental

monitoring and compliance. Typically, positions are involved in a state-wide specialty program. Travel over difficult terrain and in inclement weather may be required. Performs related work as required.

Distinguishing Characteristics

This classification differs from the Environmental Resources Specialist 1 by the full-performance level work and complex work in the assigned area. Incumbents are involved in a state-wide specialty program area. The Environmental Resources Specialist 3 differs from Environmental Resources Specialist 2 by the [sic] performing as lead worker in complex program assignment with responsibility for multi-agency and multi-level coordination of program activities.

Examples of Work

Collects and reviews technical/scientific data related to environmental/natural resources quality; assists in preparing detailed statistical/narrative reports. Conducts field inspections to identify pollution sources, monitor contract activities and to assess environmental/natural resources quality impact. Collects, analyzes and evaluates data in the area of assignment. Presents findings of studies and explains proposed plans to state and local officials and the general public. Collates data, composes and compiles statistical and narrative reports relating to operational and comprehensive plans. Consults on the technical development of grants, grant proposals and programs relating to the area of assignments. Implements and monitors programs supported by planning agency grants. Conducts testing of plans developed by lower level planners. Composes correspondence and memos. Visits project sites to monitor projects, collect samples or to take photographs. Develops and presents a variety of solutions to problems uncovered by data collection. May supervise subordinate specialist and/or clerical staff. Verifies ownership and property rights from county court records; conducts negotiations with landowners.

11. The class specifications for ERPM 1 are as follows:

Nature of Work

Under administrative direction preforms professional work at the managerial level. Serves as the manager of a formally designated specialized environmental resources program or subsidiary

environmental resources program under direction of an administrator, manager or agency head and as may be outlined in the state code. Exercises delegated authority to staff organizational unit to pursue goals through orderly and efficient planning, directing and controlling of activities where objectives, operations, and statutory requirements are of a specific program of singular scope and require specialized knowledge of the methodology of the technical field. Work requires analysis and interpretation of scientific or technical theory and principles; professional practices; agency philosophy, operational policies and regulations; and knowledge of a specific field where situations may be atypical or precedent setting. Duties include direction and supervision of a small professional or technical staff. Has latitude to exercise independent judgment in execution of duties within jurisdiction. Work is reviewed primarily for results obtained; timeliness; compliance with laws, rules, regulations, procedures and policies. Performs related work as required.

Distinguishing Characteristics

Directs the operations of a small organizational unit identified as a statewide program. Work requires knowledge of specific scientific or technical theory and principles of an environmental specialty area. Operational policy and procedures are relatively stable and singular in theme. Exercises latitude in determining work procedures and priorities and advises and makes recommendations regarding program policies, rules, regulations and procedures. Includes supervision of a limited variety of technical or professional support staff. Is accountable to an administrator, manager or the agency head.

Examples of Work

Administers an integral part of an environmental program of the state consistent with state policy and accepted principles. Staffs organizational unit to effect orderly, efficient and economical operations. Recommends and assists in preparation of legislation and administrative procedures as necessary to maintain conservation activities consistent with current needs and circumstances. Delivers speeches; writes articles and disseminates other informational materials to explain conservation principles and acquaint public and private organizations with mission, policies, regulations; details impact on activities; and encourages cooperation and support. Assists withpreparation of budget and/or grant documents covering staff and equipment needs, and approves expenditures. Attends meetings,

seminars and symposiums to maintain knowledge of technical, scientific and professional advancements in the area of assignment. Plans, organizes implements, monitors and controls activities of professional, technical or scientific staff. Coordinates plans and programs of [sic] the section with functions and services of other divisions, offices and activities of local, state, interstate, and federal government entities, and interested parties, and seeks agreement to resolve problems and/or establish common goals. Testifies at legislative, judicial, or public hearings on behalf of the agency or as a subject-matter expert. Administers and enforces laws, rules and regulations regarding conservation, development, protection, enjoyment and use of natural resources of the state for maintenance of intrinsic, ecological or beneficial value. Negotiates utilization of resources consistent with public interest. Modifies or recommends action to revoke or suspend operational licenses or permits and may seek injunction, or civil action against violators. May initiate writs and warrants, make arrests, and/or review, recommend or develop consent agreements. Researches new procedures and directs scientific investigations to develop plans and recommendations for development, improvement, protection, preservation, regulation and use of natural resources based on predicted outcome. Prepares studies including descriptions of status, current practices, mitigation procedures, and progress reports regarding resource conservation, utilization and recovery. Recommends standards for resource depletion. Develops and implements informational plans to advertise, promote and publicize state natural resources and conservation, preservation, use, and husbandry activities consistent with state plan.

10. An ERPM 1 is a Pay Grade 19, with a salary range from $35,736 to $66,120.

11. Grievant administers the Office Paper Program. He developed the School Paper Collection Contest. Grievant also develops environmental education information, which includes brochures and how-to manuals for businesses, organizations and institutions. He organized the Data Collection Team and the West Virginia Collegiate Environmental Network. Grievant is a member of the Environmental Protection Agency Region 3 Food and Waste Paper Diversion Team, the Planning Committee for America Recycles, and is the chairman for the Mid-Atlantic Consortium of Recycling and EconomicDevelopment Officials. He has also written articles on relevant matters and has spoken at various organizations. Grievant also works to develop the conference for the Mid- Atlantic Consortium of Recycling and Economic Development Officials.

12. Grievant's job duties have not changed since 1997, when he was hired as an ERS 2.

Discussion

In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Because Grievant raises several issues, they will be discussed separately below.

I. Misclassification

In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited DOP classification specification than that under which he is currently assigned. *See generally, Hayes v. W. Va. Dep't. of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989). DOP specifications are to be read in “pyramid fashion,” i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, *Captain v. W. Va. Div. of Health, Docket No. 90-H- 471 (Apr. 4, 1991)*; for these purposes, the “Nature of Work” section of a classification specification is its most critical section. *Atchison v. W. Va. Dep't. of Health*, Docket No. 90- H-444 (Apr. 22, 1991); *see generally, Dollison v. W. Va. Dep't. of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant'scurrent classification constitutes the “best fit” for her required duties. *Simmons v. W. Va. Dep't. of Health and Human Res*., Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Div. of Personnel Admin. Rule, 143 W. Va. CSR 1; *Coates v. W. Va. Dep't. of Health and Human Res*., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. W. Va. Div. of Personnel Admin. Rule, 143 W. Va. CSR 1. Finally, DOP's interpretation and explanation of the classification specifications at issue, if said language is determined not to be ambiguous, should be given great weight unless clearly erroneous. *See, W. Va. Dep't. of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993). In a misclassification grievance, the Grievant must prove by a preponderance of the evidence

that the work he is doing is a better fit in a different classification than the one his is currently in. *See Hayes, supra*; *Oiler v. W. Va. Dep't of Heatlh and Human Resources/Bureau for Child Support Enforcement*, Docket No. 00-HHR- 361 (Apr. 5, 2001).

Grievant indicated on his PDF that a majority of his time was spent providing funds to encourage and support the WV Recycling Assistance Grant Program. The ERS 2 clearly states in the “Nature of Work” section that, “Areas include grants and contractadministration.” Clearly Grievant spends a bulk of time completing these duties, consistent with those required of an ERS 2.

Grievant also indicated he was responsible for data collection “to evaluate the program for effectiveness on achieving goals and to determine where additional efforts need to be focused.” Once again when looking under the “Nature of Work” section for an ERS 2, it clearly states this classification is responsible for “program development and evaluation.” Clearly, Grievant's duties once again fall under that of an ERS 2.

Grievant also testified his job duties had not changed since he was hired as an ERS 2 in 1997. “The key in seeking reallocation is to demonstrate a significant change in the kind or level of duties and responsibilities.” *Ramsell v. Dept. of Health & Human Res.*, 04- HHR-262 (Sept. 29, 2004). Grievant has not demonstrated a significant change in the duties he performs, nor has he demonstrated that his duties are a better fit under the ERPM 1.

II. Equal Pay for Equal Work

Grievant also alleges he should receive “equal pay for equal work.” 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. 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); *Tennantv. 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). 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. *Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003).

The undersigned can appreciate Grievant's frustration with his current situation. However, as Mr. Basford testified, there are many state employees with years of dedicated service and excellent credentials whose salaries are at the low end of the pay scale, and there are many legitimate reasons for this occurrence. Grievant has failed to meet his burden of proof on this issue.

Grievant also alleges discrimination. "'Discrimination' means 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." *W. Va. Code* § 29-6A-2(d).

In order to establish a claim of discrimination, 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 or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004). 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 Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

Grievant failed to provide any evidence at the lower level hearing to show that he was being treated differently than any other similarly-situated employee. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No.97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

Grievant did submit additional information in his Proposed Findings of Fact and Conclusions of Law. However, that information will not be considered, as the record was closed and no new

evidence is permitted. Grievant failed to prove he has been a victim of discrimination.

The following conclusions of law support this discussion:

Conclusions of Law

1. In non-disciplinary matters Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). 2. In order for Grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited DOP classification specification than that under which he is currently assigned. *See generally, Hayes v. W. Va. Dep't. of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989).

3. DOP specifications are to be read in “pyramid fashion,” i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, *Captain v. W. Va. Div. of Health, Docket No. 90-H- 471 (Apr. 4, 1991)*; for these purposes, the “Nature of Work” section of a classification specification is its most critical section. *Atchison v. W. Va. Dep't. of Health*, Docket No. 90- H-444 (Apr. 22, 1991); *see generally, Dollison v. W. Va. Dept. of Empl. Security*, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievant's current classification constitutes the “best fit” for her required duties. *Simmons v. W. Va. Dep't. of Health and Human Res*., Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broaddus v. W. Va. Div. of Human Serv*., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

4. Class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Div. of Personnel Admin. Rule, 143 W. Va. CSR 1; *Coates v. W. Va. Dept. of Health and Human Res*., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. W. Va. Div. of Personnel Admin. Rule, 143 W. Va. CSR 1.

5. DOP's interpretation and explanation of the classification specifications at issue, if said language is determined not to be ambiguous, should be given great weight unless clearly erroneous. *See, W. Va. Dep't. of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

6. In a misclassification grievance, the Grievant must prove by a preponderance of the evidence that the work he is doing is a better fit in a different classification than the one his is currently in. *See Hayes v. W. Va. Dep't. of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989);

Oiler v. W. Va. Dep't of Heatlh and Human Resources/Bureau for Child Support Enforcement, Docket No. 00-HHR-361 (Apr. 5, 2001).

7. "The key in seeking reallocation is to demonstrate a significant change in the kind or level of duties and responsibilities." *Ramsell v. Dep't. of Health & Human Res.*, 04- HHR-262 (Sept. 29, 2004).

8. Grievant did not show the work he is doing is a better fit for a different classification.

9. 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. 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).

10. 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. *Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003).

11. "'Discrimination' means 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." *W. Va. Code* § 29-6A-2(d).

12. In order to establish a claim of discrimination, 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 or she has been treated differently from one or more similarly-situated employee(s);
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14. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No.97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

15. Grievant failed to prove discrimination.

For the foregoing reasons, 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, 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: February 16, 2007

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Proposed findings and conclusions were only received from Grievant. Both DEP and DOP chose to stand on the filings at the lower level.