WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHAD SAAS,

Grievant,

v. **Docket No. 07-DOH-005**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Chad Saas ("Grievant") initiated this grievance at level one on March 28, 2006, alleging that his salary is inequitable, as compared to other employees and based upon training and experience. He seeks a 20% salary increase, retroactive to February 9, 2006, when he was promoted from Bridge Safety Inspector 1 to Bridge Safety Inspector 2 and received a 15% pay increase. The grievance was denied at all lower levels and appealed to level four on January 5, 2007. A hearing was conducted in the Grievance Board's office in Westover, West Virginia, on April 20, 2007. Grievant was represented by Chuck Paugh, and Respondent was represented by counsel, Barbara Baxter. The parties elected not to file post-hearing proposals, so this matter became mature for consideration at the conclusion of the level four hearing.

Synopsis

Grievant seeks a 20% salary increase to rectify the fact that he was only given the minimum salary for his classification when originally hired in 2004. The individual who hired Grievant did not know he could request a higher starting salary, and new employeeshired in other entry level positions have received higher salaries than Grievant. DOH officials attempted to rectify the situation when Grievant was promoted from Bridge Safety Inspector 1 to Bridge Safety Inspector 2 in February of 2006. Unfortunately, the Governor's prohibition on nondiscretionary salary increases had been put into place, so Respondent could not grant Grievant more than the maximum 15% pay increase upon promotion allowed by the DOP Rule. Because of the Governor's edict and the fact that Grievant was not similarly situated to other employees who received higher salaries, along with the equal pay for equal work doctrine, Grievant is not entitled to the relief requested.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") as a permanent employee since February 8, 2004, in District Four.

2. Grievant's classification title when he was hired was Bridge Safety Inspector 1, which is in Pay Grade 8, with a monthly salary range of $1411 to $2610.

3. Grievant's starting salary was $1482.

4. Grievant has a Bachelor of Science degree in Engineering Technology. Prior to his hiring by DOH in 2004, he had worked in bridge inspection in District Four as a summer employee and as a temporary worker.

5. Stephen Harris, District Four Bridge Engineer, along with Anthony Paletta, Administrative Services Manager, interviewed Grievant and recommended his hiring for permanent employment.

6. At the time Grievant was hired, Mr. Harris was unaware that a higher starting salary could be recommended for potential employees with additional education and experience, so he did not recommend a higher salary for Grievant. 7. During the summer of 2004, District Four conducted interviews for several positions in their construction division, and hired some employees as Transportation Engineering Technologist Trainees, which is also an entry level position in Pay Grade 8. However, some of these employees were hired at approximately $1800 per month, because of education and experience.

8. After discovering that entry level employees could be hired at higher than minimum salaries,

Mr. Harris corresponded with Jeff Black, DOH Human Resources Director, and inquired whether Grievant's salary could be adjusted.

9. Several months later, in April of 2005, Mr. Black advised Mr. Harris that the only method for adjusting Grievant's salary would be to give him additional money when he became eligible for promotion to Bridge Safety Inspector 2 in February of 2006.

10. On April 29, 2005, a memorandum was issued to all West Virginia Cabinet Secretaries, stating that, pursuant to a directive from Governor Joe Manchin, “merit or salary advancements” should not be granted “until further notice.” However, the memo advised that “nondiscretionary increases,” such as those required upon promotion, would continue as set forth in the Division of Personnel's (“DOP”) Administrative Rule.

11. Grievant was promoted to Bridge Safety Inspector 2 in February of 2006 and was granted a 15% salary increase, as provided for by the DOP Rule.

12. Both Bridge Safety Inspector 1 and 2 require only a high school education for qualification for the position.

13. Since his promotion to Bridge Safety Inspector 2, Grievant's salary is lower than that of only one other employee in that classification. However, all but one of the other Bridge Safety Inspector 2s have more seniority than Grievant.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he 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 his burden. *Id.*

Grievant maintains that he is entitled to at least a 20% *additional* salary increase, over and above the 15% he received upon promotion to Bridge Safety Inspector 2, in order to correct the initial salary inequity that occurred when he was hired. However, Respondent contends that, due to the constraints of the Governor's prohibition on nondiscretionary salary increases, it could not give Grievant any additional pay.

When promoted, the DOP Administrative Rule provides that employees are to receive a 5% increase per pay grade, up to a maximum of 15%. *DOP Administrative Rule,* § 5.5(b); *See Wickline v. Dep't of Health and Human Res.*, Docket No. 03-HHR-041 (July 8, 2003). Grievant did, in fact, receive this increase, and any additional increase was considered discretionary with the agency. *Id.* Unfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited. Therefore, although DOH officials clearly wish to rectify this inequity, Respondent's hands are tied by the prohibition on salary increases. *See Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). As has been claimed in similar situations, Grievant believes he has been subjected to discrimination, because other employees received higher entry salaries than he did. “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). A grievant must establish a case of discrimination by showing:

(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, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

As has been the case in other Grievance Board decisions, Grievant cannot establish he is similarly situated to other employees under these facts. First, he is not in the same classification as the other employees to whom he compares himself, the Transportation Engineering Technician employees. Although the job requirements may be similar, this is, in fact, a different classification from Grievant's, which cannot support a claim of discrimination. *See Wickline*, *supra*. Moreover, those employees received their increased salaries upon their initial hiring, and, unfortunately, Grievant's increase was proposed after the Governor's prohibition was issued. *See Allen, supra*.

In addition, there is no dispute that, although he could be paid more, Grievant is being paid within the appropriate pay grade for his classification. The concept of "equalpay 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. Dept. of Health & Human Res*. Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dept. of Health & Human Res.*, 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 Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

Accordingly, Grievant is not entitled to the relief requested. The following conclusions of law support this Decision.

Conclusions of Law

1. Grievant must prove all of his claims by a preponderance of the evidence, which means he 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). 2. "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).

3. Grievant has failed to prove that his salary violates the laws prohibiting discrimination, as he is not similarly situated to the employees to whom he compares himself.

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. *See* W. Va. Code § 29-6A-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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: July 25, 2007

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DENISE M. SPATAFORE

Administrative Law Judge