WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MARVIN JOURNELL, et al.,

Grievants,

v. **Docket No. 2008-0609-CONS**

DEPARTMENT OF ENVIRONMENTAL PROTECTION/

DIVISION OF MINING AND RECLAMATION,

Respondent.

D E C I S I O N

Grievants (See footnote 1) are employed in the classification of Environmental Resources Specialist 2 with Respondent, the Department of Environmental Protection/Office of Mining and Reclamation ("DEP"). This is a consolidated grievance of five Grievants, filed on July 17, 2007. The individual grievance statements are identically worded. The statements read:

> WV DEP-DMR violated the *WV DOP, Pay Plan Implementation, Section III (Policy), subsection A.3 -* ***Internal Equity Policy***, when Mr. Charles Scruggs, Environmental Resources Specialist 2, was hired at the Logan DEP-DMR office with a significantly higher salary than me, and has no relevant qualifications to justify the obvious discrepancy in the salaries. Furthermore, Mr. Scruggs salary is not consistent with other current ERS-2 employees within the WV DEP-DMR, and his qualifications are not equally representative with other ERS-2 employees within DMR. Mr. Scruggs has the same job title, is in the same pay grade, and in the same DMR office as myself.

Relief sought;

> I request that my annual salary be raised to that of Mr. Scruggs at the time relief is granted, plus a 5% increase to that annual salary for my experience, education, and training, all of which exceeds that of Mr. Scruggs, plus back- pay to the date the grievance first occurred (his hire date of 5/16/ 2007), and plus any legal fees that may be incurred.

Individually the grievances were denied at level one of the grievance procedure on August 10, 2007. Grievants appealed to level two on August 23, 2007. On October 5, 2007, an Order by the Public Employees Grievance Board, signed by then Acting Chief Administrative Law Judge Janis I. Reynolds, consolidated the grievances and denied Grievants' motion for default filed on October 2, 2007. (See footnote 2) Level two mediation was unsuccessful. Grievants appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on April 29, 2008, in the Grievance Board's Charleston office. Grievants were present in person and represented by Grievant Christopher Dingess. (See footnote 3) Respondent was represented by its General Counsel, Raymond Franks, Esquire. Neither Grievants nor Respondent submitted written proposed findings of fact and conclusions of law. This matter became mature for decision on the date of the level three hearing, April 29, 2008.

Synopsis

An employee, recently hired as an Environmental Resources Specialist 2 by Respondent, was hired at a rate of pay higher than Grievants, long-standing employees with the same classification. Grievants contend this is improper. Grievants allege entitlement to an increase in pay, pursuant to the Internal Equity provision of the Division of Personnel's Pay Plan Implementation Policy. Respondent disagrees.

Applicable statutes, rules and regulations, coupled with relevant case law provide that classified employees are to be compensated within their pay grade. Grievants are being paid within the pay range of the pay grade assigned by the Division of Personnel to their respective classification. The salary of the newest hire in Grievants' classification is consistent with the Internal Equity provision of Personnel's Pay Plan Implementation Policy. Moreover, even if the salaries in Grievants' unit were inconsistent with the Internal Equity provision, this policy provides that it is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. However, such increases are discretionary on the part of the employer, and

all discretionary pay increases are currently prohibited by the Governor's office.

This grievance is denied.

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

Findings of Fact

1 1. Grievants are employed in the classification of Environmental Resources Specialist 2 ("ERS-2") by the Department of Environmental Protection/Office of Mining and Reclamation, Respondent. 2 2. An Environmental Resources Specialist 2 classification is compensated pursuant to pay grade 15, which has a salary range of $27,252 through $50,400 annually. *See* Division of Personnel ("DOP") Classification and Compensation Plan.

3 3. Respondent advertised and sought out individuals for two ERS-2 positions. Respondents experienced recruiting difficulties with these vacancy postings and one position was ultimately not filled.

4 4. On or about May 16, 2007, Respondent hired Charles Scruggs as an "original appointment" (See footnote 4) ERS-2 with an annual salary of $35,004. (Gr. Ex. 3).

5 5. All of Grievants' individual base salaries are within the established salary range of an ERS-2 classification. The lowest paid Grievant as of January 7, 2008, was compensated at $30,360 annually, while the highest paid Grievant's base salary was approximately $35,828 annually.

6 6. The largest differential between the salary of one or more of the Grievants and that of ERS-2 Scruggs is 19.2%. ($35,004 is greater than $30,360 by 19.2 %). There is not a 20% or more difference between any of the Grievants' base salaries and the salary of Mr. Scruggs.

7 7. The Governor's office established a moratorium on discretionary salary increases which has been in place since April of 2005. In a memorandum to all West Virginia Cabinet Secretaries dated April 29, 2005, the Governor's Chief of Staff, Larry Puccio, advised that "merit or salary advancements" should not be granted until furthernotice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases, and temporary upgrades.

Discussion

Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

Grievants argued DEP violated the Division of Personnel's Pay Plan Implementation Policy when it hired Mr. Scruggs as an ERS-2 at a salary higher than that of other ERS-2 employees currently employed by DEP. Grievants aver entitlement to an increase in their respective wages, and contend that their individual experience, education, and training, exceed that of Mr. Scruggs. DEP pointed out that state employees in the same classification need not receive the same level of pay. Respondent argued Mr. Scruggs' salary was appropriate, as it was the result of market forces, qualifications, and experience, and that DEP is not required to raise Grievants' salary at this time. Respondent furtherhighlights that employee Scruggs' salary is not in violation of DOP's Pay Plan Implementation Policy in that said wage was not in excess of 20% of any of Grievants' current wages.

The first of Grievants' arguments is in the nature of “equal pay for equal work,” in that while Mr. Scruggs holds the same classification, their respective salaries are different. While Grievants are understandably upset that Mr. Scruggs is making more money than them, all employees are being paid within the pay range established for state ERS-2 employees.

As explained by the testimony of Lowell “Tim” Basford, former Division of Personnel's Assistant Director, starting salaries may be affected by several factors not necessarily limited to experience and training. 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 v. West Virginia Division of Health and Division of Personnel, 192 W. Va. 239 at 246, 452 S.E.2d 42 (1994). Also, as noted in that case, W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Id.* at Syl. Pts. 2, 3 & 4. The requirement is only 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'tof 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 also AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

This is not a unique or unprecedented grievance, this issue has previously been addressed by the Grievance Board. It is a well-discussed concept that state employees in the same classification need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. (Citations omitted). However, the concept is not without limits.

Additionally, Grievants' contend that Respondent has violated Division of Personnel's Pay Plan Implementation Policy. DOP's Pay Plan Implementation Policy (revised July 1, 2005) contains a provision entitled “Internal Equity,” which Grievants assert entitles them to a pay increase based upon a comparison of salaries in their work unit. (See footnote 5) That provision reads as follows:

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whosesalary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.

Section III. D.3.

There does not existed a differentiation equal to or greater than 20% between one or more of the Grievants' salary and that of the Mr. Scruggs. By comparing the base salary of the lowest paid Grievant with that of the starting salary of Mr. Scruggs, which is the greatest margin of difference among all the parties, it is determined there is a 19.2% differential between the salaries. *See supra*

Finding of Fact number six; $35,004 is greater than $30,360 by 19.2 %.

It is understandable that Grievants are disturbed by the fact that their salaries did not progress with current market rates. However, Grievants are incorrect in their assertion that the newest employee in their classification makes more than 20% more than one or more of them. Respondent is not in violation of the Internal Equity provision of DOP's Pay Plan Implementation Policy.

Further, as discussed in *Allen v. Department of Transportation*, Docket No. 06-DOH- 224 (Jan. 31, 2007), the granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of Respondent. Moreover, discretionary increases are clearly prohibited by the Governor's moratorium, which remains in effect. As recently noted in *Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008):

> Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievant an entitlement to a salary increase should she prove her situation fits within the policy. It is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. . . . "Thegrievance board simply does not have the authority to second guess a state employer's employment policy." *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008).

In conclusion, while Grievants disagree with the Respondent's decision to pay such a high entry level salary to Mr. Scruggs, 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).

Grievants' situations are, unfortunately, not unique. Grievants are 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. *Eg. See West Virginia University v. Decker*, 191 W. Va. 567; 447 S.E.2d 259 (1994). While this circumstance is disheartening and irrefutably bad for morale, it does not afford Grievants a basis for relief under the facts of this case and the current laws of our state.

Under the circumstances presented here, Grievants have not established that Respondent

violated any law, rule or policy. Further, Grievants have failed to prove, by a preponderance of the evidence, that Respondent has any legal obligation to increase their pay. Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievants a mandatory entitlement to a salaryincrease. It is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. However, the Governor's moratorium on discretionary salary increases has been in place since April of 2005. Discretionary salary increases are clearly prohibited by the Governor's moratorium, thus discretionary raises have effectively been removed from state agencies purview. (See footnote 6) "The grievance board simply does not have the authority to second guess a state employer's employment policy." *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008); *Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008).

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1 1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2 2. 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 v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239 at 246, 452 S.E.2d 42 (1994).

3 3. 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. 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). *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006).

4 4. State employers may grant salary increases of up to 10% to employees who are paid at least 20% less than similarly situated employees, pursuant to DOP's Pay Plan Implementation Policy; however, the granting of such increases is purely within the discretion of the employing agency. *See Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008). 5 5. Grievants have failed to prove by a preponderance of the evidence that they are entitled to a pay increase pursuant to DOP policy. Further, Grievants have not demonstrated that Respondent violated any law, rule, or policy in hiring an employee with a starting salary in excess of the salary of current employees of the same classification.

6 6. Grievants failed to demonstrate that Respondent, the employer, has violated any rule, regulation, policy or statute in the circumstances presented.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 22, 2008

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Landon R. Brown

Administrative Law Judge

Footnote: 1

Marvin Journell, Christopher Dingess, Phyllis Jeffrey, Kenneth Maxwell, James Meade.

Footnote: 2

Grievants alleged the Public Employees Grievance Board was in default at Level 2 because the mediation was not scheduled within the time frames set forth in the statute. Pursuant to W. Va. Code § 6C-2-3(b), "[t]he grievant prevails by default if a response is not made by the ***employer*** *within the time limits established in this article. . . ." (Emphasis added). It was abundantly clear the Grievance Board was not Grievant's employer. As ruled upon upon by the Grievance Board and previously affirmed by Circuit Court of competent jurisdiction, the Grievance Board is not subject to the statute's default provisions, as that provision "do[es] not apply to Administrative Law Judges over which neither party has control." See Flint v. Bd. of Educ. of Harrison County, Civil Action No. 95- C-485-1 (Nov. 10, 1998).*

Footnote: 3

Grievant Phyllis Jeffrey was not present at the level three hearing but indicated to the Grievance Board that her fellow Grievants and the designated representative were authorized to proceed with the hearing in her absence.

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).

Footnote: 5

Section III.A.3 of the West Virginia Division of Personnel Pay Plan Implementation Policy cautions that "[t]he appointing authority shall be responsible for 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." Other than their individual good faith belief presented as testimony, Grievants did not elicit any testimony or present any reliable evidence to suggest that the DEP is 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."

Footnote: 6

As of the date of this decision, the Governor's directive was still in effect, and recommendations for discretionary salary increases were not being approved.