THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

WANDA CRIGGER,

Grievant,

v.

Docket No. 07-DOH-394

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Wanda Crigger, is employed as a Transportation Realty Agent ("TRA") 3 with the Division of Highways ("DOH") in the Right-of-Way Section of District Two. Grievant's Statement of Grievance reads as follows:

> I am filing a grievance based on the fact that a fellow agent has been reclassified from a R/W Agent 2 to R/W Agent 3 at a higher salary than mine. Since I have been an Agent for 9 years and an Agent 3 for approximately 5 years, this created an inequity, making my salary the lowest of the Agent 3's.
>
> Her Relief Sought: I am requesting that the inequity be corrected by upgrading my salary to a level above that of the newly reclassified agent.

She filed this grievance on May 22, 2007, seeking an adjustment of her salary to compensate for the perceived inequity set out above. The grievance was denied at all lower levels. She appealed to level four on September 21, 2007. The level four hearing was conducted on March 13, 2008, in the

Board's Charleston Office. Grievant appeared *pro se*. Respondent appeared by Barbara Baxter, Esquire. The case became mature after the hearing because the parties elected not to file proposals.

Synopsis

___Grievant argues that, notwithstanding the fact that she has been an agent for nine years with five years experience as a TRA 3, her salary is the lowest of the TRA 3employees. She cites as an example fellow agent, Terri Cash, whose position was reallocated from a TRA 2 to a TRA 3 resulting in a five percent pay increase. Ms. Cash's salary is now higher than Grievant's, and Grievant requests that her salary be increased to an amount above Ms. Cash's. Respondent argues that while it is unfortunate, nothing can be done in the current climate to increase Grievant's salary.

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

Findings of Facts

1. Grievant has been employed with DOH since February 1, 1996, and is classified as a TRA 3.

2. Grievant is the Property Manager for District Two. (See footnote 1) Grievant's position was reallocated to TRA 3 in August 2002. Grievant has benefitted from salary adjustments within her pay grade since that reallocation.

3. The TRA 3 position is classified by the West Virginia Division of Personnel Classification and Compensation Plan as a pay grade 15. The minimum and maximum monthly salary range for that pay grade is $2,271.00 to $4,200.00.

4. One of Grievant's co-workers, Terri Cash, had her position reallocated from a TRA 2 to a TRA 3, and she received a corresponding five percent increase in pay.

5. This reallocation resulted in Ms. Cash's monthly salary being $3,117.00, while Grievant's monthly salary lagged behind at $2,916.00. In addition to this pay difference, Grievant is one of the lowest paid TRA 3 employees in the state.

6. Jeff Black, Director of Human Resources for DOH, reviewed the monthlysalaries of all TRA 3 statewide employees at the request of Grievant. Mr. Black determined that the salary amounts comported with all of the applicable rules and regulations of the Agency, and the Division of Personnel. Level Three Transcript, pp. 5-16.

7. Both Grievant and Ms. Cash are paid within their pay grade.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). (See footnote 2)

Grievant has been an agent for DOH for nine years, and a TRA 3 for approximately five of those years. Grievant's salary is one of the lowest of the TRA 3 employees statewide. (See footnote 3) Grievant also cites her fellow agent, Terri Cash, whose position wasreallocated from a TRA 2 to a TRA 3, with the resulting five percent pay increase. This action occurred after Grievant's position was reallocated in 2002, nevertheless, Ms. Cash's salary is now higher then Grievant's.

Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the: preparation, maintenance and review of a position classification plan for all positions within the classified service . . . based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

Additionally, the State Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). (See footnote 4) The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

Additionally, "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health and Human Res.*, Docket

No. 96-HHR-518 (Jan. 12, 1998). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985). As stated by the West Virginia Supreme Court of Appeals, an employee who alleges impropriety regarding a reclassification action or challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. W. Va. Div. of Rehab. Serv.*, Docket No. 94-RS-061 (May 31, 1995); *Frame v. W. Va. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994).

Grievant asserts that the actions of DOH violated W. Va. Code § 29-6-10(1) & (2). As previously stated, this code section gives the State Personnel Board the authority to implement both a classification and pay plan for all employees in the classified service. Respondent counters through Jeff Black, Director of Human Resources for DOH, that a review of the monthly salaries of all TRA 3 positions statewide was conducted at the request of Grievant. That review indicated that Grievant is paid within her pay grade, andreceives greater compensation then some of her peers. Mr. Black determined that the salary amounts comported with all of the applicable rules and regulations of the Agency, and the Division of Personnel.

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 controlling in examining the issues raised by Grievant. *Largent* noted 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. *Largent* at Syl. Pts. 2, 3 & 4. The requirement is 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). 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. (Emphasis added).

It is clear there has been no violation of the equal pay for equal work principle of W. Va. Code § 29-6-10 with this set of facts. The limited amount of evidence offered to theundersigned establishes that Grievant is compensated within her pay grade. Grievant is being paid within the salary range assigned to her classification and, in fact, receives a salary at more than the base level, due to her experience. In addition, Grievant receives greater compensation then some of her fellow agents. While some disparity of compensation within the pay grade of the TRA 3 class does exist in this case, the evidence does not support a finding of a violation of any law, rule, policy or statute. Although Grievant's disappointment is understandable, as the law currently exists, she has not proven a violation of the equal pay for equal work principle, as she is properly paid within her pay grade. This grievance must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 authorizes the State Personnel Board to promulgate rules for the implementation and administration of the classified State employees' job classification and pay plans for which plans the Personnel Board is responsible. *Framev. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-140 (Nov. 29, 1994).

3. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2).

4. Interpretations of statutes by bodies charged with their administration are given great weight

unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 431 S.E.2d 681 (W. Va. 1993); *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W. Va. 1985); *Dillon v. Bd. of Ed. of County of Mingo*, 301 S.E.2d 588 (1983).

5. 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. *Largent v. West Virginia Div. of Health and Div. of Personnel*, Syl. Pts. 2, 3 and 4, 192 W. Va 239, 452 S.E.2d 42 (1994). The requirement is 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).

6. Grievant did not meet her burden of proof, and failed to demonstrate a violation of the equal pay for equal work principle.

7. Grievant has failed to prove a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which she works in relation to her compensation. Grievant is properly compensated within the pay scale for her position.

Accordingly, 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." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (2006) (repealed, *see* fn. 2 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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 24, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

District Two is Cabell, Lincoln, Logan, Mingo, and Wayne counties.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and Stat e Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

This information is contained and confirmed in Grievant's Exhibit 3, Level Three. This response by Robert Miller to Grievant was in the form of a FOIA disclosure listing themonthly salaries for Transportation Realty Agent 3 employees statewide.

Footnote: 4

Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."