THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JAMES HILL,

Grievant,

v.

DOCKET NO. 06-DEP-348R

DEPARTMENT OF ENVIRONMENTAL PROTECTION/

REHABILITATION ENVIRONMENTAL ACTION PLAN

and DIVISION OF PERSONNEL,

Respondents.

AMENDED DECISION

This matter comes before the undersigned Administrative Law Judge upon remand from the Circuit Court of Kanawha County, by Order dated April 4, 2007, to The Honorable Wendy A. Campbell, Administrative Law Judge, "for the purpose of filing and making James M. Hill's Proposed Findings of Fact and Conclusions of Law submitted in response to the Level III hearing a part of the record herein and to consider the same in order to determine if such information will effect or impact her original decision and to report back to this Court in an Amended Decision as to her action taken in that regard."

The Decision in this grievance, issued by Administrative Law Judge Campbell on February 16, 2007, denied the grievance. Grievant appealed the Level IV decision to the Circuit Court of Kanawha

County, and the remand followed, on the Motion of Respondent, Department of Environmental Protection ("DEP"). Administrative Law Judge Campbell is no longer employed by the Grievance Board. This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons on July 3, 2008. This Amended Decision amends the Decision issued on February 16, 2007, as follows.

In compliance with the Order of the Circuit Court of Kanawha County, Grievant's Proposed Findings of Fact and Conclusions of Law, submitted after the Level III hearing, will be marked as Grievant's Level IV Exhibit 1, and that Exhibit is ORDERED admitted into evidence.

The undersigned, having carefully reviewed the Decision issued by Administrative Law Judge Campbell, and Grievant's Level IV Exhibit 1, adopts all the Findings of Fact set forth in the February 16, 2007 Decision, and incorporates them into this Decision. In addition, the following additional findings of fact are made based upon the information contained in Grievant's Level IV Exhibit 1. (See footnote 1)

Additional Findings of Fact

13. There are 835 salaried employees of DEP, and 583 of these employees, or 69.8%, are paid more than Grievant. Of these employees, 93 are in the same classification as Grievant, and 76 of these employees, or 81.7%, are paid more than Grievant.

14. Timothy Craddock worked in the same office as Grievant when they were both employed by the West Virginia Division of Natural Resources. Mr. Craddock was employed in a classification which was in a lower pay grade than Grievant's classificationat that time. Mr. Craddock is now employed by DEP, and his salary is higher than Grievant's, even though he started working for DEP after Grievant. The record does not reflect Mr. Craddock's classification, but he is in a higher pay grade than Grievant. Mr. Craddock's duties and responsibilities are not the same as Grievant's.

15. David Wheatcraft began working for DEP after Grievant, and is paid more than Grievant. Mr. Wheatcraft is in the same classification as Grievant. The record does not contain any information about Mr. Wheatcraft's duties and responsibilities, the circumstances under which he was hired, or whether he had received any merit increases.

Discussion

The undersigned adopts the discussion in the February 16, 2007 Decision in its entirety, and incorporates it into this Amended Decision, except for the following language, which is ORDERED stricken from the February 16, 2007 Decision, because it disregards the information contained in Grievant's Level IV Exhibit 1:

> 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-BOD-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.

In addition, the following additional discussion is deemed necessary to this Amended Decision.

II. Equal Pay for Equal Work

Grievant pointed to the fact that many other employees of DEP are paid more than he. In particular, he pointed to Mr. Craddock and Mr. Wheatcraft. Grievant's Level IV Exhibit 1 states that Mr. Craddock is “classified higher.” The undersigned has concluded from this vague statement that Mr. Craddock is in a different classification than Grievant, which is in a higher pay grade. Mr. Wheatcraft is in the same classification as Grievant. The record does not reflect whether these employees are paid in accordance with the pay scale for their proper employment classifications, but the record does reflect that Grievant is paid in accordance with the pay scale for his classification. This is all that is required.

As to Grievant's claim of discrimination, Grievant has compared himself to all other DEP employees, without regard to the duties and responsibilities of these other employees, their tenure, their work performance, or the circumstances under which they were hired. Grievant is not similarly situated to all other DEP employees. With regard to Mr. Craddock, Grievant acknowledged that Mr. Craddock is “classified higher,” and does not have the same duties and responsibilities as Grievant. Mr. Craddock is not similarly situated to Grievant. It is of no relevance that Mr. Craddock was paid less than Grievant when they both worked at the Division of Natural Resources.

Mr. Wheatcraft is in the same classification as Grievant, and is paid more than Grievant. Grievant asserted that Mr. Wheatcraft had “fewer” responsibilities and qualifications than Grievant, but he did not present any evidence regarding what Mr. Wheatcraft's duties or qualifications were. Grievant's opinion on Mr. Wheatcraft's position is of no use to the undersigned without the specific detail of Mr. Wheatcraft's job duties and responsibilities. The record does not even reflect how much Mr. Wheatcraft is paid. Grievant has not demonstrated that the salary difference is unrelated to the actual job responsibilities of the employees. Further, as stated in the February 16, 2007 Decision in this matter, “[i]t is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. [sic] of Health and Human Resources/Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003).”

The undersigned adopts, and incorporates herein, all the Conclusions of Law set forth in the February 16, 2007 Decision, except for Conclusion of Law 14, which is ORDERED stricken from the February 16, 2007 Decision, because it disregards the information contained in Grievant's Level IV Exhibit 1. That Conclusion of Law reads as follows: “'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-BOD-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995).” Conclusion of Law 15 is ORDERED renumbered as Conclusion of Law 14. The undersigned specifically makes the following additional Conclusions of Law which support the decision reached.

Additional Conclusions of Law

15. “W. Va. Code § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but that Code Section does not require these employees to be paid exactly the same. Syl. Pts. 3 and 4, *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S. E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-386 (Mar. 26, 1997).” *Nelson v. Dep't of Health and Human Resources*, Docket No. 05-HHR-315 (May 16, 2006). 16. The differences between Grievant's salary and the salaries of Grievant's co- workers who were in his same classification at the time this grievance was filed, were not inconsistent with the Internal Equity provision of Personnel's Pay Plan Implementation Policy (revised July 1, 2005).

Accordingly, this grievance is **DENIED.**

Any party may appeal this amended 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 amended decision. *See* W. Va. Code § 29-6A-7 (repealed*)*. (See footnote 2) 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 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.

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BRENDA L. GOULD

Administrative Law Judge

Date: August 7, 2008

Footnote: 1

Grievant's Level IV Exhibit 1 contains a Table which compares his duties to those of the Environmental Resources Program Manager 1. This table contains no new evidence regarding Grievant's duties and responsibilities. Accordingly, it is determined that this evidence of Grievant's duties and responsibilities, which was in the Level III record, was considered by Administrative Law Judge Campbell when she issued her Decision, and the undersigned need not address this information further in this Amended Decision.

Footnote: 2

In 2007, the Legislature abolished the West Virginia Education and State 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 amended decision are to the former statutes, which continue to control the proceedings in this case.