THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHARLES LOUGH,

Grievant,

v. **Docket No. 07-DOH-393**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

DECISION

Charles Lough ("Grievant") initiated this proceeding on August 23, 2005, alleging disparate pay practices on the part of his employer, the Division of Highways ("DOH"). Grievant contends that he has been performing professional engineering duties, while being paid at a lower pay grade, but does not allege that he is misclassified as a Transportation Engineering Technologist. The grievance was denied at levels one and two, and at level three following a hearing conducted before Brenda Craig Ellis, Hearing Examiner, on November 2, 2005. The record was left open following that hearing for the testimony of an additional witness, which the parties ultimately determined to be unnecessary. The level three decision was issued on September 14, 2007, and Grievant appealed to level four on September 17, 2007.

Due to legislative changes affecting the grievance procedure and the Grievance Board, a level four hearing was not scheduled until February 13, 2008. The day prior to that hearing, the parties notified the undersigned that they wished to submit this matter for a decision based upon the record developed below, supplemented by additional argumentsby May 12, 2008. However, no party

submitted any briefs. Grievant was represented by counsel, Michael Glasser; DOH was represented by counsel, Robert Miller; and the Division of Personnel ("DOP") was represented by counsel, Karen Thornton. (See footnote 1)

Synopsis

Grievant alleges he is entitled to the same salary as a Highway Engineer 3, with whom he shares some responsibilities related to bridge inspection work. However, Grievant does not allege he is misclassified as a Transportation Engineering Technologist, and the duties he performs are encompassed by his job description. The equal pay for equal work doctrine only entitles a properly classified employee to compensation within the pay grade assigned to his position. Grievant is compensated within his pay grade, and he is not entitled to the same salary as an employee in a different classification. The grievance is denied.

Findings of Fact

1. Grievant has been employed by DOH for approximately 34 years. He is currently classified as a Transportation Engineering Technologist in District Seven. He has been a Technologist since 2000, which is in Pay Grade 19, and his approximate salary is $4,184 per month.

2. Throughout most of his employment with DOH, Grievant has been assigned to bridge inspection. He was one of the first DOH employees to be certified as a bridge inspector, after federal mandates for bridge inspection were implemented. 3. In his current position, Grievant spends a significant amount of his time performing structural analysis on bridges, a duty he shares with Chad Boram, who is classified as a Highway Engineer 3 ("HE 3"). With regard to bridge inspection reports, Grievant and Mr. Boram review each other's work for accuracy.

4. Mr. Boram has an engineering degree and is certified as an engineer, and he is compensated within Pay Grade 22, at a monthly salary of $4,473. At the time of the level three hearing, he had been employed by DOH for eight years.

5. Grievant does not have a college degree or engineering certification. His primary responsibility is the supervision and coordination of all work performed by the bridge inspection crews.

6. Although Grievant and Mr. Boram share the stress analysis duties, Mr. Boram is responsible

for the overall evaluation of bridges, without being directly responsible for the inspection crews. His working title is “Evaluation Engineer,” while Grievant is the “Staff Engineer/Inspection Coordinator.”

7. Transportation Engineering Technologist is the highest level in the engineering technician series of classifications (level five). The “nature of work” section of DOP's specification for this classification describes the position as “[serving] in a managerial or program expert capacity in either the engineering or construction field/area of highway and bridge construction and maintenance.” The specification further describes such individuals as “managers of operational units with significant technical characteristics” or as being “responsible for a special division wide technical program that requires the highest degree of expertise in that specific technical field.” They are required to haveknowledge of the “principles and practices of civil engineering.” Individuals serving in such positions are the highest skilled technicians who are not actual engineers.

8. Grievant is paid within the pay grade assigned to his classification, which has a pay range of $2,978 - $5,510 per month.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6. (See footnote 2) *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).

While making it clear that he is *not* arguing that he is misclassified, Grievant contends that he is performing the same work as Mr. Boram, entitling him to the same salary; Grievant argues entitlement to equal pay for equal work. “The West Virginia EqualPay Act, W. Va. Code 21-5B-1 [1965], does not apply to the State or any municipal corporation so long as a valid civil service system based on merit is in effect.” Syl. Pt. 2, *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994). "'[E]mployees 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).

"The State 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). 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 [the] 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 HumanRes./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, [166 W. Va. 117,] 273 S.E.2d 72 (W. Va. 1980)." *Harvey-Gallup v. Dep't of Health and Human Res.*, Docket No. 04-HHR-149J (Feb. 21, 2008).

There is no dispute here that Grievant is compensated within the appropriate pay grade assigned to his classification. Moreover, his supervisors testified that, while Grievant has learned many of the highly technical aspects of bridge inspection work and is functioning at a very advanced level in his position, he is not performing professional level engineering work and is not an engineer. The job description for his classification requires knowledge of engineering principles, which Grievant obviously has and utilizes in his daily job duties. He does not believe that he is misclassified, and he is being compensated according to applicable DOP rules. Therefore, he is not entitled to the relief requested.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a

preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See* W. Va. Code § 29-6A-6.

2. 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. W. Va. Div. of Health and Div. of Personnel*, 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 ofHealth & 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).

3. Grievant is compensated within the pay grade assigned to his classification and does not contend that he is misclassified; therefore, he is not entitled to receive the same salary as an employee in a different classification.

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, *See Footnote 2, supra)*. Neither the West 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.

Date: July 14, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

DOP was not involved in the lower level proceeding, but was joined as a party at level four.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, 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 decision are to the former statutes, which continue to control the proceedings in this case.