THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CAROL L. ROUSH,

Grievant,

v. **Docket No: 2008-0782-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION / DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Carol L. Roush is employed by the West Virginia Department of Transportation / Division of Highways ("DOH"). She is presently assigned to the Traffic Engineering Section for Outdoor Advertising and Salvage Yard Inspection. Grievant is classified as an Inspector 3 at pay grade 12. On November 26, 2007, she filed a grievance at level one, alleging that she was a victim of sexual discrimination. She contends that she has more experience than many of the other Inspectors in her section, but receives the lowest pay. For relief she asks "to be made whole." A level one hearing was held on December 11, 2007, and a level one decision denying the grievance was entered on January 2, 2008. The parties attempted mediation at level two but that effort was unsuccessful. A level three hearing was held on June 18, 2008, at the Charleston, West Virginia office of the Public Employees Grievance Board. The Administrative Law Judge for the level three hearing was Thomas J. Gillooly. Grievant was represented at the hearing by Bill Holly, co-worker and DOH was represented by Robert Miller, Esquire. Theparties agreed to submit proposed findings of fact and conclusions of law by July 28, 2008, and this matter became mature for decision on that date. (See footnote 1)

Synopsis

Grievant is one of nine employees in her section who are classified as Inspector 3. She and one other employee are the only women in this group. Grievant is paid the least of all these Inspectors

even though she has more experience than four of them. Grievant contends that this disparity in pay is the result of sexual discrimination by the DOH. Respondent counters that all of the employees are paid within the pay range established for pay grade twelve which is the appropriate pay grade for the Inspector 3 classification. DOH avers that the agency has no obligation to pay employees within the same classification the same salary as long as they are all paid within the pay grade required for their classification. Respondent's position is supported by substantial precedent and the grievance must be denied. The following findings of fact are based upon a thorough review of the entire record in this grievance.

Findings of Fact

1 1. Grievant Roush is employed as an Inspector 3 by the DOH. She is assigned to the Traffic Engineering Section of Outdoor Advertising and Salvage Yard Inspectors.

2 2. Grievant and other Inspectors were transferred to their present assignment from the DOH Right of Ways Section on November 16, 2006. They all came into the new section at their existing pay level and classification. 3 3. On November 17, 2005, Grievant was promoted from the position of Office Assistant 2 to her present classification of Inspector 3. This promotion took effect while Grievant was working in the DOH Right of Ways Section and she received a pay increase with this promotion in compliance with the West Virginia Division of Personnel Policy for Pay Plan Implementation. (See footnote 2)

4 4. There are nine Inspector 3 positions in Grievant's section. The pay for employees holding these positions starts with Grievant, at $2072 per month, and goes to the highest, at $3227 per month. All nine of the employees classified as Inspector 3, including Grievant, are paid within pay grade 12 which is the designated pay grade for that classification. (See footnote 3) The monthly pay for pay grade 12 ranges from $1,852 to $3,426.

5 5. Seven of the eight other Inspectors are males and four of those Inspectors have less experience than Grievant.

6 6. Grievant is one of only two Inspectors who have state wide responsibilities in addition to her own region that she serves. The other Inspector with state wide responsibilities is Carson Blankenship.

7 7. Grievant has as much responsibility and works as hard as any other Inspector in her section. Her supervisor, William E. Light, feels that her pay should be comparable to that of another

Inspector, Mr. Blankenship, who has similar experience and duties to Grievant's. Mr. Blankenship's rate of pay is $2862 per month. 8 8. Mr. Light believes that he is barred from increasing Grievant's pay by a memorandum issued by Governor Manchin's Chief of Staff on April 29, 2005, instructing Cabinet Secretaries for state agencies not to grant merit or salary advancements until further notice. (See footnote 4)

Discussion

In support of her sex discrimination claim, Grievant's representative points to the Federal Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 and material published by the West Virginia Human Rights Commission. These are all important legislative provisions for the protection of the rights of citizens. However, the Public Employees Grievance Board's jurisdiction in discrimination cases is limited to the statutory framework creating the grievance procedure. For the Grievance Board to maintain jurisdiction, the grievance must state a claim under the grievance statutes, in this case W. Va. Code § 6C-2-2. The fact that a grievance may also state a claim under the West Virginia Human Rights Act does not deprive the Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). However, the Grievance Board may not determine an employer's liability for discrimination under the Human Rights Act or the other Civil Rights Acts cited by the Grievant. Syl. Pt. 1, *Vest, supra*; *Murphy v. Public Serv. Comm'n,* Docket No. 07-PSC-350 (May 16, 2008).

For purposes of the Public Employees Grievance Procedure, "'discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed toin writing by the employees." W. Va. Code § 6C-2-2 (d) (2008). To establish a claim of discrimination under this statute a Grievant must prove:

(a) that 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 she did not agree in writing to the difference in treatment.

Frymier V. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S. E. 2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278

(2005).

The case of *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994) provides guidance in pay discrimination cases brought by public employees. In that case, the West Virginia Supreme Court of Appeals noted that 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, supra.,* at Syl. Pts. 2, 3 & 4. 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 AFSCMEv. 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." *Largent supra.* at 246.

Under *Largent* the fact that other employees are employed in the same classification as Grievant, at a higher salary, does not violate protections related to equal pay for equal work. As long as the agency is paying all of the employees who are in the same classification within the range set out in the appropriate pay grade, it does not have to place all of those employees at the same specific pay step, to meet the agency's pay equity obligations. Syl. Pts. 3 and 4 *Largent supra.* *(See footnote 5)* In this case, all of the employees in the Inspector 3 classification are paid within the appropriate pay grade 12. Even though there is a significant difference in the actual rate of pay among the Inspectors, DOT has met the obligation regarding pay equity by placing all Inspectors in the same pay grade. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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 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 Grievant was able to show that other Inspectors were receiving different amounts of pay, she was unable to prove that practice constituted discrimination for salary equity purposes. It is not discrimination for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003). Consequently, Grievant has failed to prove discrimination, by a preponderance of the evidence, and the grievance must be denied. (See footnote 6)

Conclusions of Law

1 1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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 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 2. For the Grievance Board to have jurisdiction in a discrimination case, the grievance must state a claim under the grievance statutes. The fact that a grievance may also state a claim under the West Virginia Human Rights Act does not deprive the Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). However, the Grievance Board may not determine an employer's liability for discrimination under the Human Rights Act. Syl. Pt. 1, *Vest, supra*; *Murphy v. Public Serv. Comm'n,* Docket No. 07-PSC-350 (May 16, 2008).

3. Within the context of the West Virginia Public Employees Grievance Procedure, "'discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. Code § 6C-2-2(d).

4. In order to establish a discrimination claim asserted under the grievance statute, an employee must prove:

(a) that 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 she did not agree in writing to the difference in treatment.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306, 655 S. E. 2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005).

5. It is not discrimination for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

6. Grievant failed to prove that the difference in her salary and the salaries of the male employees in her section, who are also in the Inspector 3 classification, resulted from discrimination.

Accordingly the 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: October 31, 2008

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WILLIAM B. MCGINLEYADMINISTRATIVE LAW JUDGE

Footnote: 1

This grievance was reassigned to the undersigned Administrative Law Judge because Thomas J. Gillooly is no longer employed by the Public Employees Grievance Board.

Footnote: 2

Respondent's Exhibit # 3, revised July 1, 2005.

Footnote: 3

See Division of Personnel Classification and Compensation Plan (updated September 15, 2008)

Footnote: 4

Respondent's Exhibit # 2, Memorandum from Larry Puccio, Chief of Staff, to Cabinet Secretaries, regarding "Merit Increases" dated April 29, 2005.

Footnote: 5

In a dissenting opinion in Largent, Justice McHugh noted:

.the majority opinion discusses market forces to the exclusion of a factual comparison between the qualifications, training and experience of D.M. and the appellants. Therefore, the majority opinion unjustly concludes in syllabus point 4 that," W.Va.Code, 29-6-10 [1992], does not provide that employees who are performing the same tasks with the same responsibilities be placed at the same step within a job classification."

It is apparent that a factual comparison of the "qualifications and experience" of the employees was not necessary for the majority to find that the pay equity obligations of the agency were met. All that is required is that all employees in the same classification are paid within the same pay grade. Largent supra. (McHugh J. and Cleckley, J, dissenting).

Footnote: 6

This conclusion regarding pay discrimination is made solely within the jurisdiction of the Public Employees Grievance Board. Different tribunals, with different definitions and standards within their jurisdictions, may reach different conclusions. The decision in this case does not preclude Grievant from seeking remedies in other appropriate forums. Vest supra.