THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KARL MYERS,
Grievant,

v. **DOCKET NO. 2008-1380-DOT**

DEPARTMENT OF TRANSPORATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Karl Myers, on January 17, 2007. His statement of grievance reads:

> Unfair labor practice. I was lied to by Mr. Kenny Cross and forced to sign and take a dollar and a half on the hour pay cut to transfer from Mineral Co. to Tucker Co. Now the States hires Mr. Dicky Hedrick from Parks Dept. and he does not have to take a pay cut.

The relief sought by Grievant is, "Fair labor practice. My former wages reinstated."

The grievance was denied at level one on January 25, 2007. Grievant appealed to level two, where a conference was held on February 6, 2007. A level two decision denying the grievance was issued on February 8, 2007, and Grievant appealed to level three on February 19, 2007. A hearing was scheduled for May 21, 2007, at level three under the old grievance procedure in effect at that time, but was continued at Grievant's request, so that the grievance could be transferred to the new grievance procedure, which would be effective July 1, 2007.[1] Grievant did not fill out the form provided to him to transfer the

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[1] 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

grievance to the new procedure, resulting in some delay. The grievance was initially transferred to level two of the new grievance procedure, but the parties then agreed to waive level two. A level three hearing was held before the undersigned Administrative Law Judge on August 13, 2008, in Elkins, West Virginia. Grievant represented himself, and Respondent was represented by Rober Miller, Esquire, Legal Division. This matter became mature for decision at the conclusion of the level three hearing on August 13, 2008, as the parties declined to submit any written proposals.

Synopsis

Grievant, an Equipment Operator 2, voluntarily transferred from Mineral County to Tucker County in 2002, and accepted a decrease in pay. At the time of the transfer, Grievant had been an employee of the State of West Virginia for eight months, and his pay was the same as other Equipment Operator 2's in Tucker County with the same amount of service. Four years later, in January 2007, Dickie Hedick transferred from a Supervisor position with the Division of Natural Resources, to an Equipment Operator 2 position in Tucker County, with the Division of Highways. Mr. Hedrick had 17 years of service with the State, and had previously been employed by the Division of Highways for a few years in the 1990's. Mr. Hedrick's pay upon his transfer was higher than Grievant's, but was less than some other Equipment Operator 2's in Tucker County with fewer years of service with the State. Grievant did not demonstrate that this difference in pay was discriminatory, or that it was otherwise improper.

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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant is employed by the Department of Transportation/Division of Highways ("DOH") as an Equipment Operator 2.

2. Grievant began working for DOH as an Equipment Operator 2, on March 25, 2002, in Mineral County at a rate of pay of $9.97 per hour. Sometime in 2002, Grievant asked to transfer to Tucker County, in order to help his father. He spoke with Kenneth Cross, an Administrative Assistant for DOH, who told him he would have to take a pay cut if he transferred to Tucker County.

3. Grievant bid on an Equipment Operator 2 position in Tucker County, at a lower rate of pay than he was making in Mineral County. On November 19, 2002, Grievant accepted a voluntary transfer to Equipment Operator 2 in Tucker County, and a reduction in salary from $9.97 per hour to $8.70 per hour, which was effective December 1, 2002. Grievant was required by DOH to sign a document accepting the reduction in pay.

4. At the time Grievant transferred to Tucker County, three other Equipment Operator 2's were working in that county with approximately the same amount of service with the State as Grievant. Grievant's rate of pay was the same as these three Equipment Operator 2's.

5. On January 1, 2007, Dickie Hedrick transferred from a Supervisor position with the Division of Natural Resources, to an Equipment Operator 2 position with DOH in Tucker County, at a rate of pay of $11.18 per hour. He was not required to accept a

reduction in pay.[2] Mr. Hedrick had previously been employed by DOH in the 1990's, and had 17.4 years of service with the State of West Virginia.

6. Another Equipment Operator 2 employed in Tucker County in 2007 with fewer years of State service than Mr. Hedrick, Dan Booth, was making more than $11.18 per hour.

7. On January 1, 2007, Grievant had almost five years of service with the State, and was making $9.36 per hour. On July 1, 2007, his hourly rate of pay was increased to $10.32.

8. Grievant and Mr. Hedrick are both in pay grade 11, and both are paid within the salary range for that pay grade.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the 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

[2] The record does not reflect whether Mr. Hedrick applied for a posted position. It should also be noted that the record is not entirely clear on whether Mr. Hedrick kept the same rate of pay upon his transfer, or his rate of pay was reduced from $11.27 per hour to $11.18 per hour, but it appears that he was allowed to keep his same rate of pay. At any rate, the difference of $0.09 per hour is insignificant for the purposes of this case.

more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant did not articulate any legal argument to support his grievance. His complaint essentially was that it was not fair that he was required to accept a pay cut when he transferred to Tucker County, and he is still not making as much as Mr. Hedrick received when he transferred from the Division of Natural Resources to DOH. His statement of grievance says he was forced to take a pay cut. Grievant asked to transfer to Tucker County so he could help his father. He was well aware that if he did so, he would have to take a pay cut, and he agreed to do so. He was not forced by anyone to accept this transfer. As to his claim that Kenneth Cross lied to him, Grievant stated Mr. Cross told him he would have to take a pay cut to transfer, that the pay scale in Tucker County was lower than it was in Mineral County, and he gave Grievant the impression that it would not take long for his salary to return to what it had been in Mineral County. Certainly Mr. Cross could not accurately predict what pay increases would be available to Grievant, and Grievant did acknowledge that circumstances at DOH had changed in the last several years, limiting the availability for pay increases. Grievant did not demonstrate that Mr. Cross told him anything but the truth at the time. Even so, it was Grievant who chose to transfer to Tucker County. Mr. Cross certainly did not attempt to coerce Grievant into transferring.

It is well established that employees in the same classification, who are performing the same duties, need not be paid the same salary, as long as they are paid within the pay range for the pay grade to which their classification is assigned. The analysis of the concept of equal pay for equal work for a state employee involves a limited inquiry. “The

West Virginia Equal Pay 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).

Grievant's argument is essentially that he has been discriminated against. For purposes of the grievance procedure, discrimination is defined as "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). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or 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 the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

"It is not discriminatory for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health and Human Resources/Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003). Further, Grievant is not similarly situated to Mr. Hedrick. Mr. Hedrick has many more years of service with the State of West Virginia than Grievant. In fact, at the time Grievant transferred to Tucker County from Mineral County, he had been employed by DOH less than a year. In addition, Mr. Hedrick transferred to DOH from the Division of Natural Resources four years after Grievant's transfer, and Mr. Hedrick moved from a Supervisor position to an Equipment Operator 2. While it is understandable that Grievant would be unhappy that his hourly rate has not advanced significantly since 2002, the circumstances of his transfer were not the same as Mr. Hedrick's.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the 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).

2. "The West Virginia Equal Pay 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. West Virginia Division of Health and Division of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994).

3. "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).

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

> (a) that he or 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 the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

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

6. Grievant is not similarly situated to Mr. Hedrick, nor did he otherwise demonstrate anything improper in Mr. Hedrick's transfer from the Division of Natural Resources to DOH at a higher salary than Grievant.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 12, 2009