WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRETT CHILDRESS,
Grievant,

v. **Docket No. 2008-0195-MAPS**

WEST VIRGINIA STATE POLICE
and DIVISION OF PERSONNEL,
Respondents.

D E C I S I O N

Grievant, Brett Childress, filed a grievance against his employer the West Virginia State Police ("WVSP"), Respondent. Grievant initially requested that his grievance be filed at the highest level but it was correctly remanded to Level One. The original grievance was filed on July 31, 2007, however, by agreement of the parties, the grievance was amended and refined to focus on a single issue.[1] Grievant is no longer seeking to be reclassified. The Level One Decision states:

> *The grievant perceives that his level of compensation should have been the same as a fellow employees, Ms. Nancy Cerchiaro's, during a period of time they were both assigned to the WVIX section, roughly estimated from June 2001 through July 2008. Further, since the grievant believes that he was unfairly compensated, he is seeking additional compensation for the time period in question, in the amount of the difference between the salary of Ms. Cerchiaro and his own, multiplied by the number of pay periods in question. Alternatively, if the relief for the entire time period is denied, the grievant seeks the same compensation from a period of time roughly estimated between 2004, when he was assigned training and auditing duties, until his transfer to the Motor Vehicle Inspection section in July 2008.*

A hearing was held at Level One on April 8, 2009, and a decision denying the grievance was issued on April 10, 2009. Grievant appealed to Level Two on April 21,

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[1] In relevant part , the original grievance provided that Grievant was seeking to be elevated in rank from Analyst I to Analyst II (reclassified) and an increase in pay from $25,014.96 to $40,414.80 along with back pay dating back to June, 2001, the date when Ms. Cerchiaro was put into her position with WVIX.

2009. The Division of Personnel ("DOP") was determined to be an indispensable party and joined as a Respondent party by Order dated May 11, 2009. A mediation session was held on June 2, 2009. Grievant appealed to Level Three. A Level Three hearing was held before the undersigned Administrative Law Judge on September 11, 2009, in the Grievance Board's Charleston office. Grievant appeared in person and by counsel, Robert B. Kuenzel, Esquire of Avis, Witten & Wandling, L.C., Law Offices. The West Virginia State Police was represented by counsel, Virginia Grottendieck Lanham, Assistant Attorney General, and the Division of Personnel, by counsel, Karen O'Sullivan Thornton, Assistant Attorney General.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 9, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. The parties submitted fact/law proposals.

Synopsis

Grievant alleges he is entitled to additional compensation. Grievant avers that his compensation should have been the same as a fellow employee during the period of time both were assigned to the West Virginia Intelligence Exchange (WVIX) section of the West Virginia State Police. Alternatively, Grievant is seeking additional compensation for the difference in pay during a period of time that he was assigned additional supervisory duties as a Terminal Agency Coordinator and/or auditing, training, and supervisory duties.

Respondents maintain that at all times Grievant was paid within the pay range of his Pay Grade and Classification. Respondent DOP provided its actions in this grievance were in accordance with applicable Legislative Rule and West Virginia Code. Respondent

WVSP provided it acted lawfully and pursuant to applicable procedure, and the Governor's directive.

Respondents were not acting in an arbitrary or capricious manner by not providing Grievant with an increase in pay (or backpay). Grievant did not establish that Respondents acted contrary to applicable law, rule or regulation with regard to his salary. This grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has, at all times pertinent to this grievance, been a civilian employee of the West Virginia State Police (WVSP).

2. Grievant began employment with the WVSP in August 1995, working in its intelligence collection section (generally referenced by the acronym - "WVIX"). In this position, Grievant primarily performed background investigations and intelligence analyst functions. As of November 2003, Grievant also was serving as Terminal Agency Coordinator (TAC) in the WVIX section.[2] Grievant was not classified as a supervisor.[3]

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[2] A terminal agency officer is one who operates telecommunication computers within police organizations; the TAC officer is usually the supervisory officer of the telecommunicators. (Gr. Ex. 7).

[3] As a TAC, Grievant was responsible for receiving and disseminating information to all intelligence personnel, updating the computer manuals, maintaining a file certified telecommunication staff, scheduling training and certification for intelligence personnel, completing and maintaining user agreements between agencies, and training new personnel in the telecommunication systems.

3. Grievant was employed by the WVSP in the West Virginia Intelligence Exchange Section from August 1995 through July 2008 as a Data Analyst I. Grievant applied for a position within the WVSP as an MVI Investigator and was hired in that position in July of 2008.[4] At all times relevant to this grievance, Grievant was classified as a Data Analyst 1 by the West Virginia Division of Personnel.

4. In 2001, Nancy Cerchiaro transferred into the WVIX section from a federally funded program. Ms. Cerchiaro, among other duties, administered two programs referred to collectively as the '1122' and '1033' program.[5]

5. In 2001, Ms. Cerchiaro was employed by the WVSP as an Administrative Services Manager I. Ms. Cerchiaro's position was reallocated in 2004 to an Administrative Services Assistant II classification.

6. The Administrative Services Assistant classification is in a lower pay grade than the Administrative Services Manager I classification. The Administrative Services Assistant II classification is Pay Grade 11, with a salary range of $20,760 through $38,400 dollars annually. The Administrative Services Manager I classification is Pay Grade 16, with the salary range of $29,160 through $53,952 annually. (Ranges applicable in 2004).

7. Upon the change of classification, Respondent continued to pay Ms. Cerchiaro the same dollar amount of compensation. As of December 2003-January 2004,

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[4] It is readily acknowledged by all Parties of the instant grievance that Grievant's acceptance of a new position with the WVSP rendered the request for reclassification of his former duties (position) moot.

[5]The 1122 Federal Procurement Program provides law enforcement in the State of West Virginia access to federal contracts, with regard to law enforcement equipment. The 1033 Excess Military Property Program allows law enforcement in the State to secure military property that the military deems no longer necessary to their efforts.

Ms. Cerchiaro's salary was $3,167.90 monthly. (See Resp. Ex. 3, box 3). Ms. Cerchiaro's annual salary of $38,014.80 in 2004 was within the salary range of the Administrative Services Assistant II (ASA II) classification ($20,760 - $38,400). [6]

8. In November 2003, both Grievant and Ms. Cerchiaro completed Position Description Forms (hereinafter "PDF") which were submitted to the Division of Personnel for a classification determination. (Gr. Ex. 7) (Resp. Ex. 3).

9. The Division of Personnel reviews Position Description Forms for positions statewide to determine the appropriate classification of such positions. The PDF is the document that DOP is required by law to use to classify positions in State Government.

10. The Division of Personnel reviewed the PDF submitted by Grievant and in January of 2004, made a determination that Grievant's position was properly allocated to the Data Analyst I classification. (Resp. Ex. 5). The Data Analyst I classification is Pay Grade 10, with then a salary range of 19,392- 35,892. (Current range 23,724 - 43,896).

11. The Division of Personnel reviewed the PDF submitted by Ms. Cerchiaro and pursuant to a January 20, 2004 memorandum (Resp. Ex. 3) determined that her position should be reallocated downward from an Administrative Services Manager to an Administrative Services Assistant II.

12. The Governor of the State of West Virginia by Memorandum dated April 29, 2005, suspended the ability of agency heads to provide discretionary pay raises for their employees. (Resp. Ex. 1). Such Memorandum has been reinforced with a subsequent Memorandum from Secretary Spears dated December 8, 2005. (Resp. Ex. 1).

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[6] In 2007, Ms. Cerchiaro, as an Administrative Services Assistant II, received $41,214.80 in compensation. (Gr. Ex. 2).

13. The pertinent sections of the classification specifications discussed are reproduced below:

ADMINISTRATIVE SERVICES ASSISTANT 2

Nature of Work

Under limited supervision, performs administrative and supervisory work in providing support services such as fiscal, personnel, payroll or procurement in a state agency or facility or serves as the assistant supervisor in a major administrative support unit of a large state agency. Develops policies and procedures for resolving operational problems and for improving administrative services. Supervises the work of office support staff in rendering required services. Work is typically varied and includes extensive inter- and intra governmental and public contact. Has some authority to vary work methods and policy applications and to commit the agency to alternative course of action. Performs related work as required.

Distinguishing Characteristics

Positions in this class are distinguished from the Administrative Services Assistant 1 by the supervisory nature of the work performed, by the size of the unit served and by the independence of action granted. Positions in this class are responsible for a significant administrative component in a medium size agency or state facility or serves as an Assistant Director of a major administrative support component of a large state agency. Authority to vary work methods and to commit the agency to alternative course of action is granted.

Examples of Work

Confers with inter- and intra-agency personnel to transact business, gather information, or discuss information; may be in a position with public or federal government contact.

Conducts performance surveys and reviews agency methods of operation; devises flowcharts and graphs; may conduct cost analysis studies.

Gathers and compiles information for state records; writes reports, balances tally sheets, and monitors inventories, purchases, and sales.

Updates records and contacts employees to gather information; represents the agency in the area of assignment in both internal and external meetings.

Maintains files of information in hard copy files or electronic format; runs reports for regular or intermittent review.

Determines the need for changes in procedures, guidelines and formats; devises a solution; monitors the success of solutions by devising quantitative/qualitative measures to document the improvement of services.

Writes manuals in the area of assignment; clarifies the wording and describes new procedures accurately.

Supervises the work of Office Assistants, Accounting Assistants or other support staff.

Knowledge, Skills and Abilities

Knowledge of regulations, processes and procedures in the area of assignment.

Knowledge of general office practices and procedures.

Knowledge of state and federal laws and regulations related to the area of assignment.

Ability to collect and compile accurate information.

Ability to conceptualize the nature of service difficulties and devise appropriate work methods, tools, and configurations to correct the problem.
Ability to prepare flowcharts, graphs and status reports.
Ability to communicate with a wide variety of people, both orally and in writing.
Ability to perform basic arithmetic.
Ability to supervise the work of others.

Minimum Qualifications
Training:
Graduation from an accredited college or university. Preference may be given to candidates with a major in the area of public or business administration, accounting, industrial relations, communications or related field.
Substitution:
Additional qualifying experience as described below may be substituted on a year-for year basis for the required training.
Experience:
Two years of full-time or equivalent part-time paid employment in a technical or professional position providing administrative services such as accounting, budgeting, project monitoring and reporting, personnel, or procurement and property.
Substitution:
Successful completion of graduate study in an accredited college or university in one of the above fields may be substituted for the required experience on a year for-year basis.

ADMINISTRATIVE SERVICES MANAGER 1

Nature of Work
Under administrative direction, manages an organizational unit providing administrative and support services (i.e., budgeting, purchasing, personnel, business operations, etc.) in a division where operations, policy, work processes, and regulatory requirements of the unit are predictable and stable. Involves the supervision of professional, technical, and clerical employees. The scope of responsibility includes planning the operations and procedures; directing the work of employees; developing employees; evaluating unit operation; developing budget needs; researching new procedures and improvements; interpreting statutes, regulations and policies. Performs related work as required.

Distinguishing Characteristics
The Administrative Services Manager I is distinguished from the Administrative Services Manager II by the responsibility to manage a department-wide administrative support function or a secondary mission, or unit of a primary statewide mission of the department.

Examples of Work
Plans, develops, and executes through professional, technical, and clerical staff, a secondary mission of a statewide program or a primary department-wide program.
Directs the daily operations of the staff and may direct regional or other field staff.
Develops and implements operating procedures within regulatory and statutory guidelines; develops

and approves forms and procedures.
Renders decisions in unusual or priority situations; consults with supervisors and other state managers in reviewing same.
Evaluates the operations and procedures of the unit for efficiency and effectiveness.
Recommends the selection and assignment of staff to supervisors; conducts interviews and background evaluations for prospective employees.
Determines need for training and staff development and provides training or searches out training opportunities.
Assists in the development of the division and/or agency budget for personnel services, supplies, and equipment.
Researches professional journals, regulations, and other sources for improvements to agency and unit programs and procedures.
Compiles a variety of data related to the operation of the unit and/or the agency.
Interprets statutes, regulations and policies to staff, other managers, and the public.
May serve as a witness in grievance hearings or other administrative hearings.
Prepares reports reflecting the operational status of the unit and or agency programs.

Knowledge, Skills and Abilities
May participate in local conferences and meetings.
Knowledge of the organization and programs of the agency or department.
Knowledge of the principles and techniques of management, including organization, planning, staffing, training, budgeting, and reporting.
Knowledge of state government organization, programs and functions.
Knowledge of state legislative processes.
Knowledge of federal, state, and local government relationships as they relate to the program, mission and operations of the unit and/or department.
Ability to plan, direct, and coordinate the program and administrative activities of the unit.
Ability to supervise others.
Ability to evaluate operational situations, analyze data and facts in preparation for administrative and policy decisions.
Ability to establish and maintain effective working relationships with other government officials, employees, and the public.
Ability to present ideas effectively, both orally and in writing.

Minimum Qualifications
Training:
Graduation from a regionally accredited college or university with a degree in the area of assignment.
Substitution:
Experience as described below may substitute for the training requirement on a year-for-year basis.
Experience:
Four years of full-time or equivalent part-time paid administrative or supervisory experience in the area of assignment.

Special Requirement:
A valid West Virginia drivers license may be required.

DATA ANALYST 1

Nature of Work
Under general supervision, performs complex, full performance level work in the collection, compilation and analysis of data obtained from research studies, source documents and surveys. Prepares a work strategy to obtain desired information and chooses sources. May employ mathematical formulae and refined analyses to emphasize important aspects or implications of each study. Initially, work is monitored by a supervisor and becomes more independent as proficiency increases. If employed by Employment Security's Labor and Economic Research Unit the employee may be required to travel in-state to test specific labor market areas. Performs related work as required.

Distinguishing Characteristics
This is basic research and data compilation work. After an employee becomes familiar with the various sources of information and with the data system and the types of programs it can run, the employee collects and analyzes a variety of data. The employee answers requests for data from internal and external sources, and compiles information for in-house publications which will be reviewed prior to publication. It is distinguished from the next level by the lack of time-sensitive assignments and special projects such as data for immediate publication in trade or industry journals or governors release to the mass media, and the lack of responsibility for the accuracy of others' work. If employed by Employment Security the employee is required to develop a high degree of skill in estimating employment trends in the state. Positions in this class also assist other units/local offices in the analysis and resolution of data problems relating to automated reporting systems.

Examples of Work
Maintains files and records of data collected, compiled and analyzed.
Collects, compiles and analyzes data resulting from division programs, studies, and surveys.
Evaluates the information obtained and presents it through a variety of analytical techniques.
Writes memoranda, correspondence and reports.
Confers with supervisor concerning unique work procedures or problem areas.
Devises data collection procedures, data analysis plans and methods for dissemination of information.
Provides technical expertise to program personnel involved in evaluation efforts.
Learns to design and implement research studies and surveys; may proofread or typeset data for publication.
Analyzes automated reporting systems; write recommendations for system modifications; assist programmers in system modifications.
Assists unit/local office personnel in writing data processing requests.
May draft revisions to instruction manuals for such systems.

Knowledge, Skills and Abilities
Knowledge of statistics and basic statistical techniques.

Knowledge of the application of mathematical formulae and of research techniques.
Knowledge of data collection, compilation, and analysis procedures and techniques.
Knowledge of the principles and techniques of economic research and employment conditions throughout the state.
Ability to analyze data, determine its value, make observations and applications, and draw conclusions and prepare summaries from the data.
Ability to apply or develop formulae for various statistical data to illustrate existing mathematical relationships.
Ability to design and implement research studies and surveys.
Ability to establish and maintain effective work relationships.

Minimum Qualifications
Training:
Graduation from an accredited four-year college or university including a course in methods of research and/or statistics or mathematics.
Substitution:
Qualifying full-time or equivalent part-time paid experience in research and data compilation may be substituted for the required training on a year-for-year basis.

Discussion

As 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 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.* Additionally, W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the

classified service. State agencies, such as West Virginia State Police which utilize such positions, must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994).

Grievant asserts he is entitled to additional compensation (back pay). His argument, presented by legal counsel, is at the very least two fold: (1) equal pay for equal work and/or; (2) Grievant was under-compensated as a result of the authorized agencies' failure to properly assess and classify the duties he performed during identified period(s) of employment.[7]

While making it clear that he is no longer pursuing reclassification, Grievant contends that he was performing the same work or similar duties as Ms. Cerchiaro, entitling him to the same salary;[8] Grievant argues entitlement to equal pay for equal work. "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

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[7] Grievant is seeking additional compensation for the difference in pay from June, 2001, when Ms. Cerchiaro transferred into the WVIX section, until July, 2008, when [Grievant] took another job within the State Police. Alternatively, Grievant is seeking additional compensation for the difference in pay during a period of time that he was assigned additional supervisory duties as a TAC officer and/or auditing, training, and supervisory duties. *See* Grievant's Proposed Findings of Fact and Conclusions of Law document.

[8] Additionally, Grievant professes "he was clearly performing duties beyond what Ms. Cerchiaro was performing, both as a TAC officer, a supervisory position, and the auditing functions of the WVIX section." Accordingly, he is entitled to equal pay but nonetheless more compensation than he received.

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*, [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).

Employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va 239, 452 S.E.2d 42 (1994); *Nafe v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-386 (Mar. 26, 1997). [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).

With the assistance of a licensed attorney-at-law, Grievant testified on his own behalf, presented the testimony of Nancy Cerchiaro, Kim Shamblen and the cross examination testimony of DOP witness Barbara Jarrell. No information presented by any of the witnesses establishes that the duties of Grievant and the so-called comparative employee's employment were similarly situated.

As Terminal Agency Coordinator, Grievant was responsible for receiving and disseminating information to all intelligence personnel, updating the computer manuals, maintaining a file certified telecommunication staff, scheduling training and certification for intelligence personnel, completing and maintaining user agreements between agencies, and training new personnel in the telecommunication systems. Additionally, in mid to late 2004, Mr. Childress assumed additional duties as a trainer for the WVIX Auditing Program. Nevertheless, Grievant's duties as communicated to DOP, the agency duly authorized and empowered to make classification assessments, were determined by DOP to best fit the classification of Data Analyst 1. Ms. Cerchiaro, among other duties, administered two federally sponsored programs referred to as the 1122 Federal Procurement Program and the 1033 Excess Military Property Program.

Barbara Jarrell, Senior Personnel Specialist, with the Classification and Compensation section of the DOP since 1989, and with a sum total of more than 30 years in State government personnel work, testified at the Level 3 hearing. Ms. Jarrell has reviewed thousands of PDF's during her tenure with DOP. Ms. Jarrell specifically stated DOP believes Grievant's position was properly allocated to the Data Analyst 1 classification and that Ms. Cerchiaro's position is properly allocated to the ASA II classification. (See Resp. Ex. 3, Ex. 5 and FOF 10, 11). 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*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). 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).

This standard of entitlement to substantial weight applies when an employee grieves DOP's interpretation of its own regulations, classification specifications, and pay grades. *Farber v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 95-HHR-052 (July 10, 1995). The Grievance Board's role is not to act as an expert in matters of classification of positions, job analysis, and compensation schemes, or to substitute its judgment in place of DOP. *Moore, supra*. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. If a grievant can demonstrate his or her classification

or pay grade was made in an arbitrary and capricious manner or was an abuse of discretion, then he or she has met the required burden of proof. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, No. 29066 (W. Va. 2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Grievant was paid within the pay range for the pay grade to which his position was assigned. Ms. Cerchiaro was paid within the pay range for the pay grade to which her position's classification was assigned. Grievant and Ms. Cerchiaro's positions are assigned to two entirely different classifications. Grievant, who at all times relevant to this grievance was classified as an Analyst 1, failed to establish that he was similarly situated to Ms. Cerchiaro, who at all times relevant to this grievance was in a position classified as an Administrative Services Manager or ASA II.

Grievant expressed dissatisfaction and disagreement with both Respondents in regard to recognition and assessment of his duties. However, Grievant did not establish that DOP's determination of the relevant best fit classification was erroneous. Further, Grievant did not establish that either Respondent exercised their discretion in an arbitrary or capricious manner. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v.*

W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. Neither Respondents' actions were arbitrary and capricious nor behavior which constituted an abuse of discretion in compensating Grievant.

Grievant's dissatisfaction with WVSP's failure to compensate him to the same degree as Ms. Cerchiaro is not a convoluted concept. Respondent asserts that the action(s) taken with regard to establishing and maintaining Grievant's compensation was proper and in accordance with applicable law and policy. Respondent specifically denies discriminatory action and highlights that the Governor of the State of West Virginia, by Memorandum dated April 29, 2005, suspended the ability of agency heads to provide discretionary pay raises for their employees. Such Memorandum has been reinforced with a subsequent Memorandum from Secretary Spears dated December 8, 2005. (Resp. Ex. 1 and 2).

In order to establish either a discrimination or favoritism 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The crux of such claims is that the complainant was treated differently than similarly situated employees.

_____Grievant did not establish he was similarly situated to Ms. Cerchiaro. Between Grievant and Ms. Cerchiaro, their job classifications were different, their tenure with the state, their background, training and duties all varied substantially.

The undersigned was not convinced that either Respondent violated an applicable rule, regulation or statute with regard to the salary provided to Grievant during the various time periods in discussion.

Finally, secondary to his equal pay argument, intently or not, Grievant indirectly challenges the classification or pay grade to which his position was assigned. Grievant highlighted that he and a co-worker, Kimberly Shamblen, trained Ms. Cerchiaro when she transferred into the WVIX section. Grievant testified that by 2003, he was the TAC officer and had responsibilities that are generally associated with that of a supervisor. Then, in 2004, he was given further responsibilities as a trainer for the WVIX Auditing Program. Grievant strongly infers that his duties were not properly credited in assessing the classification which best fit the duties he performed. These duties being supervisory or other assigned tasks. If Grievant truly felt his duties were improperly classified, the proper course of action would have been to appeal DOP's determination or request reallocation, if and when his duties changed substantially. This would have been in 2004. Grievant's presentation of this information, now, does not properly establish his position was incorrectly (compensated) classified. As noted earlier this is a difficult undertaking. (*Citations omitted*). Further, in 2004, Grievant was provided with an opportunity to challenge the classification decision and did not.[9] Grievant did not appeal to DOP or file

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[9] DOP's Position Review Determination Memorandum dated January 16, 2004, provided, among other information, that an appeal could be directed to the then Acting Director of Personnel, Willard M. Farley, within ten calendar days of receiving notification of the determination. (Resp. Ex. 5).

a grievance. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of DOP. *See* generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

In summation, there is no doubt that Grievant was paid significantly less than Ms. Cerchiaro for a number of years. However, it is not established that this was an unlawful act. Grievant has not proven, by a preponderance of the evidence, that he is entitled to back pay for the difference in salary. Insofar as Grievant argues entitlement to a salary increase based upon inequities, Grievant is not entitled to a salary increase because he was being paid within the appropriate pay range for his position's classification. All that is required under West Virginia law is that employees within a particular classification be paid within the specified salary range. *Largent v. W.Va. Div. of Health & Div. of Pers.*, 192 W.Va. 239, 452 S.E.2d 42 (1994). Grievant was paid within the appropriate pay range for his classification. Lastly, Grievant has not properly established entitlement to a higher pay grade in a timely or persuasive manner.

Conclusions of Law

1. As 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 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No.

96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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 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).

3. An employee who challenges the pay grade or classification 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 (1995); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. Div. of Rehab. Serv.*, Docket No. 94-RS-061 (May

31, 1995); *Frame v. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994). *See O'Connell v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR- 251 (Oct. 13, 1995).

4. Grievant did not establish (prove) that he was misclassified.

5. Grievant was compensated within the pay grade assigned to his classification this is proper.

6. It is not established that Grievant was misclassified; therefore, Grievant is not entitled to receive the same salary as an employee in a different classification.

7. In order to establish either a discrimination or favoritism 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant has failed to establish that Respondent's actions were discriminatory.

9. Grievant failed to prove by a preponderance of the evidence that Respondents, collectively or individually, violated any applicable rule, policy or statute in not granting him a higher rate of compensation.

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 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: November 25, 2009

Landon R. Brown
Administrative Law Judge