THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ERIC J. MORGAN,
Grievant,

v. **Docket No. 2008-1714-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Eric J. Morgan, filed a grievance against his employer, Division of Highways ("DOH"), on or around June 3, 2008.[1] The statement of grievance alleges Respondent has engaged in a continuing practice of paying Grievant less than others and has engaged in disparate treatment concerning pay and promotions.[2] For relief, Grievant seeks an "Earnings Correction."

A level three hearing was held in the Grievance Board's Beckley Office. Grievant was represented by Stephen P. New, Esq., and Respondent was represented by Barbara Baxter, Esq. This case became mature on April 22, 2009, at the conclusion of the evidence, as the parties declined to file findings of fact and conclusions of law.

Synopsis

Grievant asserts his salary was incorrect when he started at DOH in 1998. Therefore, his salary has continually remained incorrect through the eleven years of his employment. Also, Grievant avers DOH has engaged in disparate treatment whereby individuals with less

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[1]The Grievant did not place the filing date on the grievance form. Therefore, the undersigned is working from the date the form was received by the Grievance Board.

[2]This is a paraphrase of the statement of grievance which was four pages in length.

seniority in DOH are being paid a higher salary than Grievant.[3] Lastly, Grievant asserts he was not trained on the grievance procedure.

Respondent asserts this grievance is not timely filed. Respondent argues Grievant's starting pay in 1998 was correct. However, Respondent avers if Grievant believed his pay to be incorrect, he should have brought his grievance at that time. Respondent also asserts that Grievant's salary is within his pay grade and does not violate any policy or law. After a complete review of the record, this grievance is denied.

Findings of Fact

1. Grievant is currently employed as a Highway Engineer Associate by DOH in the Roadway Design Section in District 10.

2. Grievant was hired in 1998, as a Highway Engineer Trainee.

3. At the time Grievant was hired, DOH had Highway Engineer Trainee, Highway Engineer 1, 2, and 3. This allowed individuals hired in this classification series to advance after fulfilling specific requirements.[4]

4. In 1998, the position of a Highway Engineer Trainee was a pay grade 14, with a base salary of $2121.00/monthly.

5. During recruitment of engineers, potential employees were provided with information concerning DOH's recruitment process, along with the job duties of a Highway Engineer Trainee. On the back of the job description is a note that reads:

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[3]Initially, Grievant's attorney also asserted disparate treatment with respect to promotions at the beginning of the hearing. However, because this was not alleged in his statement of grievance, he was precluded from introducing testimony on this issue.

[4]This series of Highway Engineer positions has collapsed into one classification called a Highway Engineer Associate, which is the Grievant's current classification.

> Appointment above the entry level may be made at the rate of five percent for each three months Co-op experience with the West Virginia Division of Highways, Co-op experience with another transportation organization or related work experience with a company such as an engineering consulting firm.

6. Grievant was recruited by Gary Lanham, Engineering Program Coordinator, and was hired at the base salary of $2121.00/monthly.

7. Grievant contacted Mr. Lanham and asked that his prior experience at Columbia Gas be reviewed to determine if he was eligible for the co-op credit. Co-op credit would have increased Grievant's starting salary by 5%.

8. Only the Division of Personnel could make the determination as to whether Grievant's prior experience would qualify him for the co-op credit.

9. In 1998, when Grievant was completing his paperwork, he recognized there was a problem with his salary, as it was listed as $2020.00. Grievant brought this to the payroll clerk's attention.

10. After a few phone calls, Grievant's salary was adjusted to read $2121.00.[5]

11. After working for a month, Grievant received his first pay stub, and it reflected a salary of $2121.00/month.

12. Grievant did not file a grievance.

13. Grievant talked to his supervisor Darrell Allen during evaluations in early 1999.

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[5]It is interesting to note that $2121.00 is 5% higher than $2020.00. There was speculative testimony that the Division of Personnel allowed DOH to begin engineers at 5% above the minimum pay for pay grade 14 due to a need for qualified employees. However, that was mere speculation by several witnesses.

14. In 1999, Grievant was the lowest paid Highway Engineer Trainee working for Mr. Allen.

15. Upon passing the Engineer In Training ("EIT") exam, Grievant would have received a 5% increase in salary. However, Grievant had not passed his EIT exam in 1999, when he spoke with Mr. Allen.

16. Mr. Allen, Grievant's supervisor, still wanted to do what was possible to advance Grievant, as Grievant is a very good employee.

17. Mr. Allen tried to get Grievant a 10% raise by providing written justification for the increase to Bill Bennett, Mr. Allen's supervisor.

18. The request for a 10% salary increase for Grievant was not approved.[6]

19. Since being employed with DOH, Grievant has received increases in his salary 18 times.

20. Currently, Grievant is paid within his classification.

21. There are co-workers in the same classification as Grievant who have not been employed by DOH as long as Grievant but who are paid higher salaries. These individuals are paid within the pay grade for their classification.

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 W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of

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[6]No one could say exactly where the 10% increase request was stopped, but it appears as if it stopped with Mr. Bennett.

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).

As a preliminary matter, DOH asserts this grievance is untimely. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time
limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing
a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

Grievant contends DOH has engaged in a continuing practice of paying him an incorrect salary, and as such, his grievance, filed within ten days of the most recent pay check, is timely. This grievance, however, involves a single act that occurred in 1998, which was determining Grievant's salary. This Board has ruled that when a Grievant challenges a salary determination which was made in the past, which the Grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance pursuant to Code § 29-6A-4(a)." *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001). This is exactly what Grievant is doing; his claim arises from a single event that occurred in 1998. He claims that in 1998, he was denied a 5% pay raise he asserts was promised to him. Once Grievant learned about the pay discrepancy, he had an obligation to initiate the grievance procedure. Grievant is, therefore, untimely.

Grievant argues he was not trained on the grievance procedure when he was hired. Testimony throughout the hearing indicated that Grievant was presented with an employee handbook. In that handbook was information about the grievance procedure. Grievant testified that he believed grievance was a "dirty word." When pressed on cross-examination as to the reason for that belief, he testified that he believed having a good work ethic and being a good worker would be enough to advance him.

Although the grievance was not timely filed, some discussion of the merits may assist Grievant in understanding his perceived favoritism/discrimination regarding the pay raise policy. This grievance presents an unfortunate set of circumstances. Grievant, an employee with many years of experience, is now being paid less than newly hired employees. It is regrettable that this has happened, but unfortunately this is a fairly frequent occurrence within state government, especially in positions that have recruitment problems. *See Hartley v. Bd. of Trustees*, Docket No. 96-BOT-347 (Mar. 31, 1997).

Grievant argues that it demonstrates discrimination and favoritism when employees with less seniority and experience are awarded salaries in excess of his when his salary has not been similarly increased. "Discrimination" is defined by statute 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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. *See* W. VA. CODE § 6C-2-2(h). 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., 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 holding of the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994), is instructive in examining the issue raised by Grievant. The West Virginia Supreme Court of Appeals held that "employees 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. Additionally, 128 C.S.R. 62, § 19.4 states any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade . . . " As noted by the West Virginia Supreme Court of Appeals in *Largent*, 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." *Id.* at 246. A state employee's salary is the result of many factors, especially when the employee has worked for the state for many years. *See White, et al. v. W. Va. State Police and Div. of Personnel*, Docket No. 05-DPS-168 (July 28, 2005).

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.*

Grievant has been an excellent employee throughout his tenure at DOH. Testimony at level III was that Jennifer Belcher, hired in January 1997 as a Highway Engineer 1, was able, due to her years of prior experience, to advance to a Highway Engineer 2 quickly. This advancement provided her with a 5% pay increase. Ms. Belcher had completed the paperwork to be reallocated to a Highway Engineer 3, and then the policy changed. As a Highway Engineer 2, she was making more than Grievant who was a Highway Engineer 3. However, both individuals were being paid within their classifications. Therefore, DOH did not violate any policy or law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *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 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. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

3. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991). Respondent has met its burden of demonstrating an untimely filing in this case.

4. Once Respondent has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse the failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 28, 1997); *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).

5. Grievant was aware of the determination of his starting salary in 1998, and as such, this grievance is untimely filed.

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: May 13, 2009

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Wendy A. Campbell
Administrative Law Judge