THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARK A. BURNS,
Grievant,

v. **DOCKET NO. 2009-1079-DOT**
DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Mark A. Burns, on January 19, 2007. His statement of grievance reads:

> State wages and years of experience were transferred over for a new employee at the Thomas sub-station. This is a discrimination violation against my work experience and wages.

The relief sought by Grievant is:

> Wages for all employees below the new employee's rate should be made equal depending on years of experience for the Department of Highways. If experience from any state agency such as the Department of Natural Resources transfers, then experience from other state entities should transfer as well.

The grievance was denied at level one on January 26, 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. 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 filed his request to

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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 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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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

transfer his grievance on September 25, 2007, in which he requested level two mediation. Thereafter, the parties filed an agreement to waive level one and level two of the new grievance procedure on February 19, 2008. Some delay in scheduling the matter resulted due to reasons unknown to the undersigned. It appears from the record that this resulted due to the parties not submitting agreed hearing dates, but some responsibility for delay may rest on the Grievance Board. A level three hearing was held before the undersigned Administrative Law Judge on June 2, 2009, in Elkins, West Virginia. Grievant represented himself, and Respondent was represented by Robert Miller, Esquire, Legal Division. This matter became mature for decision at the conclusion of the level three hearing on June 2, 2009, as the parties declined to submit any written proposals.

Synopsis

Grievant, an Equipment Operator 2, began his employment with the State of West Virginia on February 17, 2005, with the Division of Highways in Tucker County. His pay was the same as other Equipment Operator 2's in Tucker County with the same amount of service. Some two years later, in January 2007, Dickie Hedrick 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 salary, but was less than some other Equipment Operator 2's in Tucker County with fewer years of service with the State. Grievant possessed prior work experience; however, it was

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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).

not with the State of West Virginia. Grievant did not demonstrate that this difference in pay was discriminatory, or that it was otherwise improper.

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 February 17, 2005, at a rate of $8.68 per hour. Grievant was previously employed by a county public service district for more than ten years.

3. At the time Grievant began his employment with DOH, other new hires with the Equipment Operator 2 classification were paid the rate of pay between $8.31 and $8.70 per hour.

4. 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. 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.

5. On February 1, 2009, Grievant had a little more than four years of service with the State, and was making $10.55 per hour.

6. 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 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 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).

Grievant contends that it was unfair that his starting salary was not the same amount that Mr. Hedrick received when he transferred from the Division of Natural Resources to DOH. The record established Grievant did have some ten years of work experience with a county public service district and contends that should have been considered when DOH made his starting salary determination. Respondent argues that it was not discriminatory for Grievant to be paid at his hourly rate because he is not similarly situated to Mr. Hedrick. DOH further contends that Mr. Hedrick was entitled to his hourly rate beginning on January 1, 2007, because he transferred between State agencies and the "lateral class change" rule of the Division of Personnel ("DOP") applied.

DOP's Administrative Rule, § 3.52, defines "lateral class change" as "[t]he movement of any employee from one class to another class in the same pay grade." The same Rule provides in § 5.7 that "[a]ny employee who receives a lateral class change shall be paid the same salary received prior to the change." Pursuant to the provisions of the Rule, Mr. Hedrick was entitled to his starting salary because he moved from one class to another class in the same pay grade. Grievant did not. The record indicates that DOH, pursuant to the DOP's Rule, set Mr. Hedrick's hourly rate at the same amount he received prior to the transfer. It is understandable that Grievant would feel "cheated" by DOH not taking his prior county public service district employment into consideration when setting his starting salary; however, DOH was not under any DOP requirement to do so.

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).

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. Consistent with *Largent, supra*, Grievant and Mr. Hedrick are being paid in accordance with the pay scale for their employment classification, Equipment Operator 2.

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,
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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).

"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 addition, Mr. Hedrick transferred to DOH from the Division of Natural Resources, and Mr. Hedrick moved from a Supervisor position to an Equipment Operator 2. At the time Grievant began his employment with DOH, other new hires with the Equipment Operator 2 classification, with similar experience, were paid the rate of pay between $8.31 and $8.70 per hour. While it is understandable that Grievant would be unhappy that his hourly rate was not higher at the beginning of his employment, the circumstances of the start of his employment were not the same as Mr. Hedrick.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. 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).

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. 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'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).

4. "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).

5. Grievant is not similarly situated to Mr. Hedrick, nor did he otherwise demonstrate anything improper in Mr. Hedrick's hourly rate of pay being more than Grievant's starting hourly rate of pay upon Mr. Hedrick's transfer from the Division of Natural Resources to DOH.

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: June 30, 2009

Ronald L. Reece
Administrative Law Judge