WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS CELESTINE
Grievant,

v. **Docket No. 2009-0256-MAPS**

WEST VIRGINIA STATE POLICE,
Respondent.

_____D E C I S I O N

Grievant, Thomas Celestine, filed a grievance against the Respondent, West Virginia State Police, on August 26, 2008, protesting to be permanently transferred and alleging entitlement to an increase in salary. As relief Grievant sought, "to be officially transferred to the auto shop as a Mechanic II with a starting salary of $24,736.50 a year and back pay as of June 5, 2008."

A level one conference was conducted on September 4, 2008. By correspondence dated September 15, 2008, the grievance was denied. Grievant appealed this decision on September 16, 2008. The level two mediation session conducted on January 26, 2009, was unsuccessful. On February 2, 2009, Grievant appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on March 24, 2009, in the Grievance Board's Charleston office. Grievant appeared pro se, representing his interest, and Respondent was represented by Virginia Grottendieck Lanham, Assistant Attorney General. The matter of the relief sought was discussed prior to hearing evidence in this matter. Grievant submitted that he has been officially transferred to the auto shop as a Mechanic 2. Therefore, that portion of his grievance has been rendered moot. All parties agreed that the only remaining issue is that of salary. This case became mature

for decision on April 9, 2009, the mailing deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant voluntarily transferred from the position of Building Maintenance Mechanic to the position of Mechanic 2. This alteration in employment with Respondent, a state agency, constituted a lateral transfer in that both positions are within the same pay grade. Grievant argues that his salary is below the starting wage for a Mechanic 2 with the West Virginia State Police. Pursuant to relevant and applicable legislative rules, an employee who receives a lateral class change shall be paid the same salary received prior to the change. Further, discretionary pay increases are currently prohibited by the Governor's office. Agents of Respondent unsuccessfully requested authorization to increase Grievant's salary. In response to the instant grievance Respondent argues Grievant was laterally transferred and is being compensated within his pay classification, and, while it is unfortunate, nothing can be done at this time to increase his salary.

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

Findings of Fact

1. Grievant is a civilian employee of the West Virginia State Police ("WVSP"), who was employed as a Building Maintenance Mechanic in January of 2006.

2. Grievant applied for a position within the WVSP as a Mechanic 2 in the auto shop, and is qualified for that position.

3. Grievant has been permanently assigned to the position of Mechanic 2, after having been temporarily assigned to that position on June 5, 2008.

4. The positions of “Maintenance Mechanic” and “Mechanic 2" are classified by the Division of Personnel as job classifications compensated at Pay Grade 7. The Pay Grade 7 salary range is from $15,816.00 to $29,268.00 per year.

5. Grievant’s salary at the time of filing the instant grievance was $19,344.00 per year.[1] Grievant’s salary is within the pay range of his designated classification and pay grade.

6. During the relevant time period of this grievance the starting salary for individuals hired as a Mechanic 2 by Respondent is undisputedly $23,900.00 per year.[2]

7. The West Virginia Governor’s Office by Memorandum dated April 29, 2005, suspended the ability of agency heads to provide discretionary pay raises for their employees. Relevant to this grievance, such Memorandum has been reinforced with a subsequent Memorandum from Cabinet Secretary Spears dated December 8, 2005. Secretary Spears, among other responsibilities, is the agency head of the West Virginia State Police, Respondent.

8. By letter dated June 4, 2008, a superior of Grievant’s and an individual of rank requested authority to increase Respondent’s salary subsequent to his pending

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[1] Grievant’s salary as of the date of the level three hearing was $20,400.00 per year. The increase in Grievant’s salary was not in relation to, or as result of, the issue(s) of this grievance.

[2] Five individuals, who have recently been hired or accepted a Mechanic 2 position did so with a starting salary of $23,900 a year. Further, it is acknowledged by the parties that if the position of Mechanic 2, now occupied by Grievant, were open to the general public, the starting salary would be approximately $23,900.00 per year.

permanent transfer to the auto shop. This request was sent to Secretary Spears. Such request has not been granted.

9. Grievant has officially been transferred to the auto shop of Respondent as a Mechanic 2 but has not been granted an increase in salary as a result of the change in employment.

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); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

Grievant wants an increase in salary. Grievant highlights that others hired as a Mechanic 2 are hired at a salary in excess of his salary, as a laterally transferred employee. Grievant notes the Equal Pay Act and alludes to the compensation of employees, who perform work under similar working conditions that require equal skill, effort and responsibility. Grievant does not allege discrimination by the West Virginia State Police in not increasing his salary.

WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified service.[3] This includes pay plans for all the positions within the classified service. State agencies, such as the WVSP, which utilize such positions, adhere to the applicable classification and pay grade. "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health & Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). Also, the rules promulgated by the State Personnel Board are given the force 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 & Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

WEST VIRGINIA CODE OF STATE RULES § 143 C.S.R. 1. 5.7 (2007) "Pay on Lateral Class Change" specifies that "any employee who receives a lateral class change shall be paid the same salary received prior to the change except in cases where the change is to an agency or job class for which the Board has approved, or the Legislature has authorized, a higher pay range for the pay grade." Further, while agencies have in the past

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[3] Section 5.1 of DOP's Rules notes the purpose and intent of the classification plan is to "[t]o attract qualified employees and retain them in the classified service" and the State Personnel Board "shall endeavor to provide through the pay plan adequate compensation based on the principles of equal pay for equal work among the various agencies and on comparability to pay rates established in other public and private agencies and businesses."

had some discretion to grant limited increases in employees salaries, in limited circumstances, such option is not currently available to the instant Respondent. Discretionary pay increases must be approved through the Governor's Office and currently such authorization is not being granted.[4] *See* finding of fact 7.

In this case, there is no dispute that there is a gap between Grievant's salary and that of any new hire that Respondent could or would hire to fill the position. However, Grievant, who bears the burden of proof in this non-disciplinary grievance, has been unable to introduce any evidence that establishes wrong doing or illegality by the Respondent. Respondent's actions in this matter are in compliance with prevailing authority.

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 Pers.*, 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

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[4] Commonly referenced as the Puccio Memorandum or the Governor's Office Directive, discretionary salary increases have effectively been removed from state agencies' purview. This moratorium on discretionary salary increases has been in place since April of 2005. As of the date of this decision, the Governor's directive was still in effect, and recommendations for discretionary salary increases were not being approved.

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

"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). Respondent's actions in this matter were in compliance with governing legislative rules. While Grievant may find the

rules to be unfair in this instance, Respondent must follow them[5] and is not acting arbitrarily by doing so.

Salaries may be affected by numerous factors not exclusively limited to experience and training. 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.* Further, as this Grievance Board has previously noted, "[u]nfortunate as it may be, the provisions of the Governor's office edict are clear, and discretionary salary increases are prohibited." *Saas v. Dep't of Transp.*, Docket No. 07-DOH-005 (July 25, 2007). *Kelley v. W. Va. Dep't of Health & Human Res./Div. of Pers.*, Docket No. 07-HHR-109 (Nov 18, 2008).

_____Respondent must conduct its activity in accordance with governing authorities. Respondent is not acting contrary to law with regard to the salary provided to Grievant. "The Grievance Board's role is not to act as an expert in matters of classification of positions, job market 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, an abuse of discretion, or contrary to law.

_____The evidence adduced throughout the procedural steps of this grievance demonstrates that Respondent acted responsibly. Respondent did not act arbitrarily or

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[5] An administrative body must abide by the remedies and procedures properly established to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

capriciously with regard to the salary of the Grievant when he was transferred to the position of Mechanic 2.

While it is unfortunate for Grievant and perhaps unduly harsh, Respondent's ability to increase his salary is being prevented by policy and directives. Grievant's salary is lawful. This grievance must be denied in accordance with the facts, applicable law, and circumstances as discussed above. Grievant has not established that his salary is in violation of any applicable and controlling statute, rule or policy. Grievant is being paid in accordance with the pay scale for his classification and regrettably Respondent is barred from increasing his salary to the level comparable to that of a new hire.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "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. "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).

3. "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 Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

4. "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 and Div. of Pers.*, 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).

5. Grievant has failed to establish by a preponderance of the evidence that his salary is in violation of any applicable law, rule, regulation or policy.

6. In the circumstances presented, Respondent is not empowered to grant Grievant an increase in his established salary.

Accordingly this grievance must be **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: May 4, 2009

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Landon R. Brown
Administrative Law Judge