THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS G. CASTO,

Grievant,

v. **DOCKET NO. 2009-0647-PSC**

PUBLIC SERVICE COMMISSION
AND DIVISION OF PERSONNEL,

Respondents.

DECISION

Thomas G. Casto ("Grievant") challenges the decision of Respondents Public Service Commission ("PSC") and the Division of Personnel ("DOP"), denying him a requested change in classification and a salary increase. The November 7, 2008, "Statement of Grievance" states "Equality in pay (I'am [*sic*] receiving about 10,000 dollars less in salary than officers with less training and qualifications than I have. This results in unfair pay practices in the department." As relief, Grievant seeks "[c]hange of qualification [*sic*] to Utility Inspector and 2 years of back pay with comparable pay for this position."[1]

The PSC waived Level One, finding that it did not have authority to grant the requested relief. Thereafter, the DOP was joined as an indispensable party. A February 5, 2009, Level Two mediation was unsuccessful. A Level Three hearing was held before the undersigned Administrative Law Judge ("ALJ") in Charleston, West Virginia, on April

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[1] Mid-way through the Level Three hearing, the Grievant began to argue that he should be properly classified as a Utilities Inspector 3. Grievant filed a response after the Level Three hearing where he seeks that "his pay be equal to that of the said Weight Enforcement Officers; no more no less, and his classification be changed to Utility Inspector." Level Three, Grievant's "*Response*," April 27, 2009. This ALJ compares the Grievant's duties to both the Utilities Inspector 1 classification and the Utilities Inspector 3 classification.

6, 2009. Grievant appeared *pro se*. Respondent PSC appeared by and through its counsel, Belinda B. Jackson. Respondent DOP appeared by and through its counsel, Karen O'Sullivan Thornton, Assistant Attorney General.

This matter became mature for decision on or about April 27, 2009, the deadline for submitting proposed findings of fact and conclusions of law. Grievant has filed a "Response" to the Level Three hearing. Respondents have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant argues that he should be classified as a Utilities Inspector 1 or Utilities Inspector 3. Further, and alternatively, he maintains that he should be given a salary increase based upon "salary equity" and/or discrimination.

The Weight Enforcement Officer classification is the "best fit" for the Grievant's position. Grievant has cited no rule or law entitling him to a salary increase. Accordingly, this grievance must be **DENIED**.

Based upon a detailed review of the entire record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by the State of West Virginia since March 3, 2003. He began his state employment with the Division of Highways ("DOH") and transferred to the PSC when the Legislature transferred the responsibility for highway weight enforcement from the DOH to the PSC.

2. Grievant is classified as a Weight Enforcement Officer at pay grade 10. He has

served in this classification since December 1, 2003. His current salary is $23,724 per year.

3. Grievant's duties concern weighing semi-trucks, measuring semi-truck heights and checking semi-truck fuel decals. Grievant also enforces seat belt and traffic laws for semi-truck operators. Grievant does not supervise or train other motor carrier inspectors. Occasionally, he assists the West Virginia State Police with situations involving semi-trucks. *See* Level Three, Testimony of Thomas G. Casto.

4. In its 2003 Legislative Session, the West Virginia Legislature transferred the responsibility and personnel for enforcement of motor carrier size and weight standards from the DOH to the PSC. Those employees, who are classified within the Weight Enforcement series of classifications, are assigned to pay grades 8, 10, 12 and 14. This transfer included the Grievant.

5. At the time of the transfer of these duties and personnel, the PSC was already charged with conducting motor carrier inspections for compliance with the applicable safety laws. These inspections were conducted by employees of the PSC classified within the Utility Inspector series of classifications, which are assigned to pay grades 8, 10, 12 and 14.

6. In the 2004 legislative session, the Legislature amended the prior year's legislation to authorize the Commission "to delegate motor carrier inspector duties to weight enforcement officers as it considers appropriate, following successful training and certification of individual officers, who shall then have the same authority as motor carrier inspectors under this section [and] . . . to delegate weight enforcement duties to motor carrier inspectors." W.VA. CODE § 24A-7-7(a). In the ensuing months, the Commission

undertook voluntary cross-training of all weight enforcement and motor carrier inspectors who agreed to the training. At the current time, all but two of the Commission's weight enforcement officers and motor carrier inspectors have been cross-trained and are performing some duties of both positions. Grievant is among those who voluntarily cross-trained, and is currently performing some duties of both positions.

7. Ms. Deborah Garbark is classified as a Weight Enforcement Supervisor, at a pay grade 12, and has been employed by the State since February 10, 1979, for a total of 30 years and 2 months of service. Her current salary is $33,420. Mr. Rudolph Yarnevic is classified as a Weight Enforcement Officer, at pay grade 10, and has worked for the state since August 2, 1982, for a total of 26 years and 9 months. His current salary is $29,886. Both of these employees have worked for the state in excess of 20 years longer than the Grievant. Moreover, Ms. Garbark's classification is in a higher pay grade than that of the Grievant.

8. The Weight Enforcement Officer classification provides, in part, as follows:

> **Nature of Work**
> Under general supervision, an employee in this class performs at the full-performance level and weighs and inspects vehicles and combinations of vehicles to ensure compliance with the motor vehicle laws pertaining to size and weight restrictions and road tax registration. Work is performed outdoors in all types of weather and includes heavy lifting. Performs related work as required.
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> **Distinguishing Characteristics**
> This classification is distinguished from the classification of Weight Enforcement Worker by the fact that an employee in this classification performs weight enforcement duties at the full-performance level under general supervision.
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> **Examples of Work**
> May conduct a roving mobile patrol and unscheduled inspections of motor vehicles.
> Responds to inquiries from operators of inspected vehicles and the general public regarding West Virginia motor vehicle laws.
> May investigate complaints regarding the possible violation of West Virginia motor

vehicle laws.
Sets up signs and road markers in order to stop vehicles for weighing.
Unloads and sets up portable and permanent scales and directs vehicle to proper position for weighing and inspection.
Weighs vehicles and measures for width, length, height, and axle placement.
Inspects oversize and overweight permits, temporary road tax permits, weigh bills, or other pertinent papers and compares with recorded measurements to determine compliance with motor vehicle laws.
Issues citations and makes arrests for violations pertaining to size, weight, and road tax regulations.
Prepares evidence for trial and testifies in court as a state witness.

9. The pay range for the Weight Enforcement Officer classification is $23,724 to $43,896.

10. The Utility Inspector 1 classification provides, in part, as follows:

Nature of Work
Under general supervision, at the beginning level, performs inspections of the physical plant, property, operational procedures and records of public utilities, licensed motor carriers, railroads and pipeline operators regulated by the Public Service Commission (PSC). The work may involve exposure to hazardous materials and work environment. Must be a certified Law Enforcement Officer for enforcing commercial motor vehicle safety and weight restriction laws with arrest and citation authority. Travel in a designated region of the state is required. Performs related work as required.

Distinguishing Characteristics
Performs at the beginning level. Learns policies and procedures, standards of conduct for uniforms and equipment. Assists higher level inspectors while conducting inspections.

Examples of Work
Assists in and performs inspections of utility properties and equipment, operating procedures and records.
Gathers information to determine compliance with codes, laws and regulations governing utilities.
Performs vehicle and safety inspections on motor carriers regulated by PSC.
Reports violations and explains requirements and procedures to obtain compliance.
Assists in the prosecution of violators and in testifying in court or before the Public Service Commission.
Performs inspections of railroad tracks and equipment for compliance with federal and state railroad safety regulations.

Investigates railroad accidents and determines causes.
Writes reports of inspections and investigations and maintains appropriate records.

Knowledge, Skills and Abilities
Knowledge of the facilities and operations of the assigned utility area.
Knowledge of the codes, laws and regulations of the assigned utility area.
Ability to conduct inspections and investigations of utility properties, operations and records.
Ability to prepare written reports of inspections and investigations.
Ability to maintain appropriate records.
Ability to maintain effective relationships with utility officials, employees and the public.

11. The pay range for the Utilities Inspector 1 classification is $21,504 to $39,792.

12. The Utilities Inspector 3 classification provides, in part, as follows:

Nature of Work
Under general supervision, performs conducts complex inspections of the physical plan, property, operational procedures and records of public utilities, licensed motor carriers, railroads and pipeline operators regulated by the Public Service Commission (PSC). Supervision may be exercised over other utility inspectors. The work may involve exposure to hazardous materials and work environments. Travel in a designated region of the state is required. Performs related work as required.

Distinguishing Characteristics
This position performs as the lead worker by supervising and training other utilities inspectors and personnel.

Examples of Work
Supervises the work of other utilities inspectors.
Performs complex inspections of utilities properties and equipment, operating procedures and records.
Determines compliance with codes, laws and regulations governing utilities.
Performs vehicle and safety inspections on motor carriers regulated by PSC.
Reports violations and explains requirements and procedures to obtain compliance.
Initiates prosecution of violators and testifies in court or before the Public Service Commission.
Performs inspections and investigations and maintains appropriate records.
Trains other utility inspectors.

13. The pay range for the Utilities Inspector 3 classification is $26,160 to $48,396.

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., W. VA. CODE R. § 156-1-3 (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 more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant raises two arguments in this matter. First, he argues that his position is "misclassified" and he should properly be reallocated[2] to the classification of Utilities Inspector 1 or Utilities Inspector 3. Secondly, he maintains that there is a violation of the general concepts of pay equity, and he is being discriminated against based upon pay. This grievance must be denied because the "best fit" for the Grievant's position is the Weight Enforcement Officer classification, and Grievant is being paid within the appropriate salary range for his position.

WEST VIRGINIA CODE § 29-6-10 authorizes the West Virginia Division of Personnel to establish and maintain a position classification plan for all positions in the classified services. State agencies which utilize these positions, such as the PSC, must adhere to

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[2] Reallocation is defined as the "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." W.VA. CODE R. § 143-1-3.75.

that plan in making assignments to its employees. *See Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994).[3] In this misclassification grievance, the focus is upon whether the Grievant's duties for the relevant period of time more closely match those of another cited classification specification than the classification to which he is currently assigned. *See generally Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989).

The key to the analysis is whether Grievant's current classification of Weight Enforcement Officer constitutes the "best fit" for his position's required duties. *See Simmons v. W. Va. Dep't of Health & Human Res./Div. of Pers.*, Docket No. 90-H-433 (Mar. 28, 1991). The predominate duties of the position in question are controlling. *Broaddus v. W. Va. Div. of Human Servs.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Moreover, class specifications are descriptive only and are not meant to be restrictive. The mention of one duty or requirement does not preclude others. *Coates v. W. Va. Dep't of Health & Human Res.*, Docket No. 94-HHR-041 (Aug. 29, 1994).

Analysis of the "best fit" for the Grievant's position begins with consideration of the

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[3] WEST VIRGINIA CODE § 24A-7-7(a) provides, in pertinent part, that:

> [t]he [Public Service] [C]ommission is authorized to delegate motor carrier inspector duties to weight enforcement officers as it considers appropriate, following successful training and certification of individual officers, who shall then have the same authority as motor carrier inspectors under this section. The commission is also authorized to delegate weight enforcement duties to motor carrier inspectors.

The authorizations contained in WEST VIRGINIA CODE § 24A-7-7(a) and the general nature of DOP classification specifications permit the Commission to assign duties of both weight enforcement officers and motor carrier safety inspectors to each class of appropriately trained employees.

job classification specifications at issue. That is, the duties of the Grievant's position must be compared to the specifications of the Weight Enforcement Officer classification and the Utilities Inspector 1 and 3 classifications. Generally, personnel job specifications contain five sections, as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These classification specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For the purpose of position comparison, the "Nature of Work" section of a classification specification is its most critical section. *See generally Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

Upon review of the specific evidence presented in this matter, the utilities inspector classification series is not the "best fit" for the Grievant's position. The classification of Utilities Inspector 1 generally involves the inspection "of the physical plant, property, operational procedures and records of public utilities, licensed motor carriers, railroads and pipeline operators regulated by the Public Service Commission (PSC)."[4] The Utilities Inspector 3 classification specifically states that the "position performs as the lead worker by supervising and training other utilities inspectors and personnel."

Grievant testified that his duties concern inspecting semi-trucks and enforcing certain safety laws related to semi-trucks. Grievant "weighs and inspects vehicles and

[4] It is noted that even if the Grievant were moved to this classification, he would not receive the pay increase he seeks.

combinations of vehicles to ensure compliance with the motor vehicle laws pertaining to size and weight restrictions and road tax registration." Weight Enforcement Officer Specification, Finding of Fact 8 *supra*. Grievant testified that he neither trains nor supervises other employees.

While the Grievant does seem to perform some duties associated with the Utilities Inspector 1 classification (law enforcement tasks), it must be recognized that WEST VIRGINIA CODE § 24A-7-7(a) permits the PSC to transfer such duties between the classifications. *See* Footnote 3 *supra*. Moreover, "[t]he fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class." W.VA. CODE R. § 143-1-4.4(d).

Upon consideration of the Grievant's duties, the Weight Enforcement Officer classification is the "best fit." Grievant has not established that it is "more likely true than not" that the Utilities Inspector 1 classification or the Utilities Inspector 3 classification is the best fit. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Insofar as the Grievant argues entitlement to a salary increase based upon inequities, Grievant is not entitled to a salary increase because he is 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). The Grievant is paid within the appropriate pay range for his classification. The pay range for the Weight Enforcement Officer classification is $23,724 to $43,896, and the Grievant's current annual salary is $23,724. Grievant has not proven, by a preponderance of the evidence, that he is entitled to a pay increase.

Related to the pay equity argument, Grievant also avers that he is being discriminated against. WEST VIRGINIA CODE § 6C-2-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish either a discrimination or favoritism claim under the grievance statute, Grievants must prove, by a preponderance of the evidence:

> (a) that he has been treated differently from one or more similarly-situated employee;
> (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 Grievant.

See Frymier v. Higher Education Policy Comm'n, 221 W.Va. 306, 655 S.E.2d 52 (2007).[5] *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). Grievant's claim that he has been discriminated in his pay is unavailing. He attempts to compare his own pay to that of two other long-term state employees who admittedly perform different duties, one of whom is even classified at a higher level in the class series. In order to prevail on a claim of discrimination, Grievant must show that he has been treated differently than similarly-situated employees. *Bd. of Educ. v. White,* 216 W.Va. 242, 605 S.E.2d 814 (2004). The

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[5] *Frymer* was decided based upon the definition of "discrimination" found in the previous grievance statute. W. VA. CODE § 18-29-2(m). However, the definition found in the present statute is virtually identical. W. VA. CODE § 6C-2-2(d).

employees to whom the Grievant attempts to compare himself are not similarly situated. Both have greater years of service and one is in a different classification. More importantly, "[i]t is not discriminatory for employees in the same classification to be paid different salaries." *Hill v. Dep't of Env. Protection, et al.*, Docket No. 06-DEP 346 (February 16, 2007); *Thewes & Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003). Grievant has not proven discrimination by a preponderance of the evidence.

In summation, Grievant has not established that the Utilities Inspector 1 or the Utilities Inspector 3 classification is the "best fit" for his duties. Nor has he established a violation of law relating to inequitable pay. Grievant's salary is within the salary range for his position. This ALJ empathizes with the Grievant's situation: it is clear he is well qualified and performs his duties above and beyond the minimum requirements. However, this ALJ has no authority to grant Grievant a pay raise, and the Grievant has not met his burden of proving his claims by a preponderance. This grievance must be denied.

The following conclusions of law are appropriate:

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 Public Employees Grievance Bd., W. VA. CODE R. § 156-1-3 (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 more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In order to prevail upon a claim of misclassification, a grievant must prove by a preponderance of the evidence that his duties for the relevant period of time more closely match those of another cited classification specification than the classification to which he is currently assigned. *See generally Hayes v. W. Va. Dep't of Natural Res.*, Docket No. NR-88-038 (Mar. 28, 1989).

3. Grievant has not established, by a preponderance of the evidence, that the Utilities Inspector 1 classification or the Utilities Inspector 3 classification is the "best fit."

4. 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. Syl. Pts. 2 & 3*, Largent v. W.Va. Div. of Health & Div. of Pers.*, 192 W.Va. 239, 452 S.E.2d 42 (1994). 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 & Human Res.*, Docket No. 05-HHR-315 (May 16, 2006).

5. Grievant has failed to prove, by a preponderance of the evidence, that he is

entitled to a mandatory pay increase pursuant to DOP policy or *Largent v. West Virginia Division of Health & Division of Personnel.*, 192 W.Va. 239, 452 S.E.2d 42 (1994).

6. In order to establish either a discrimination or favoritism claim under the grievance statute, Grievants must prove, by a preponderance of the evidence:

> (a) that he has been treated differently from one or more similarly-situated employee;
> (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.

See Frymier v. Higher Education Policy Comm'n, 221 W.Va. 306, 655 S.E.2d 52 (2007). *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

7. Grievant has not established discrimination by a preponderance of the evidence. "It is not discriminatory for employees in the same classification to be paid different salaries." *Hill v. Dep't of Env. Protection, et al.*, Docket No. 06-DEP 346 (February 16, 2007); *Thewes & Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003).

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* W. VA.

CODE R. §156-1-6.20 (2008).

Date: May 19, 2009

Mark Barney
Administrative Law Judge