WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ARLIE MATNEY, ET AL.,
Grievants,

v. **Docket No. 2009-1413-CONS**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

This is a consolidated grievance filed by Grievants, Arlie Matney, David W. Stroupe and Randall Lee Patterson against Respondent Department of Transportation/Division of Highways (DOH), on or about April 7, 2009, asserting that the newest crew leaders of Respondent received a 15% promotion raise while each of the Grievants received only a 5% increase in salary upon their promotion to crew leader. Each request as relief, "to be given the additional 10% pay increase the newer less experienced crew leaders received."

A consolidated hearing was held at level one on April 16, 2009, and the grievances were denied at that level on May 5, 2009. Grievants proceeded to level two and a mediation session was held on September 16, 2009. Grievants appealed to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on January 12, 2010, in the Grievance Board's Beckley office. Grievants appeared *pro se*, and Respondent was represented by counsel, Robert Miller, Division of Highway's Legal Division.

This case became mature for decision on February 26, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Respondent, by counsel, submitted a fact/law document.

Synopsis

Grievants were reclassified from Transportation Crew Chief Maintenance to a Transportation Crew Supervisor 1 classification in 2007. Grievants contend that they, individually, should receive an increase in pay because newly promoted crew leaders received a fifteen percent increase in salary. Grievants assert that Respondent unlawfully discriminated against them by not giving each the same percentage pay increase that was given to other DOH employees subsequently promoted.

The process of reclassification and promotions are not interchangeable administrative actions. Respondent asserts this grievance is not timely. Respondent highlights that when promoted, Grievants were moved to a pay grade which was one pay grade above their prior classification, and received a pay increase accordingly. Upon reclassification, a pay increase was not required. Respondent established it acted in accordance with WEST VIRGINIA CODE and West Virginia Division of Personnel's rule, regulation and policy regarding Grievant's salaries. Grievants are and were properly compensated pursuant to applicable rules and procedures at the time of Grievants' promotions and reclassification. Grievants failed to meet their burden. Grievants, in the circumstances of this matter, did not establish discrimination by Respondent. 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. There are three Grievants in this grievance matter, Arlie E. Matney, David W. Stroupe and Randall Lee Patterson. The three Grievants were reclassified from

Transportation Crew Chief Maintenance to Transportation Crew Supervisor 1 on September 1, 2007. Each were changed from pay grade 13 hourly, to pay grade 12 wage.

2. Grievant Arlie E. Matney (hereinafter "Matney") is classified as a Transportation Crew Supervisor 1 (TRCRSV1), pay grade 12 salary, in McDowell County Maintenance in District 10 (D10) with the Division of Highways (DOH) with 19.3 years of service. Grievant Matney was promoted from Transportation Worker 3 Equipment Operator (TW3EQOP), pay grade 12 hourly, to Transportation Crew Chief Maintenance (TCCMAIN), pay grade 13 hourly, effective September 16, 2006. He received a 5% pay increase from $13.37/hr. to $14.04/hr. for the one grade increment.

3. Grievant David Stroupe is classified as a TRCRSV1 or crew leader, pay grade 12 salary, in McDowell County Maintenance in D10 of the DOH, with 26.6 years of service. Grievant Stroupe was promoted from TW3EQOP, pay grade 12 hourly, to TCCMAIN, pay grade 13 hourly, effective October 16, 2003. He received a 5% pay increase from $13.61/hr. to $14.29/hr. for the one pay grade increment

4. Grievant Randall Patterson is classified as TRCRSV1, pay grade 12 salary, in McDowell County Maintenance in D10 of the DOH, with 16.1 years of service. He was promoted from Transportation Worker 3 Equipment Operator (TW3EQOP), pay grade 12 hourly, to Transportation Crew Chief Maintenance (TCCMAIN), pay grade 13 hourly, effective June 16, 2007. He received a 5% pay increase from $12.51/hr. to $13.14/hr. for the one pay grade increment.

5. The West Virginia Division of Personnel (DOP) is the State Agency charged with classifying positions in the West Virginia Classified Service. *See* W. VA. CODE §§ 29-6-1 *et seq*. DOP has established rules, regulations and procedures applicable to classified

positions and the compensation of employees in the positions. *See* W. VA. CODE R. §§143-1 *et seq*.

6. In 2007, the West Virginia State Personnel Board approved and implemented a statewide reclassification plan of all DOH employees classified as TCCMAIN. All DOH employees classified as TCCMAIN were reclassified to TRCRSV1 effective September 1, 2007.[1] Respondent Exhibit 6. (R. Ex. 6).

7. The pay grade for the TRCSRV1 classification is pay grade 12. The salary range for a pay grade 12 hourly equals that of a pay grade 8 salary. *See* West Virginia Division of Personnel Schedule of Salary Grades and the West Virginia Division of Personnel Hourly Pay Schedule. (R. Ex. 1).

8. Grievants' classifications changed to TRCRSV1 effective September 1, 2007, in accordance with the implemented statewide reclassification plan. (R. Ex. 6).

9. Grievants did not receive a raise when they were reclassified from TCCMAIN to TRCRSV1. Grievants' compensation changed from an hourly wage to a salary. The dollar amount of compensation received by each Grievant remained at the level it was prior to reclassification.[2]

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[1] "Reclassification" is defined as the revision by the State Personnel Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved. W. VA. CODE R. §143-1-3.76.

[2] On September 1, 2007, when the TCCMAIN classification was eliminated, Grievants were reclassified to TRCRSV1, pay grade 12 salary. Grievants' rates of pay at the time of reclassification fell within the pay range of pay grade 12 salary for the TRCRSV1 classification; they received no change in their pay rates. *See* WV DOP Administrative Rule § 5.4(f)2(a)(2). Issue discussed, infra.

10. The compensation/wage provided to Grievants is and was within Pay Grade 12. The salary range for Pay Grade 12 (eff. July 1, 2002) was $22,224 to $41,112 annually. The salary range for Pay Grade 12 (eff. February 1, 2009) is $26,160 to $48,396 annually.

11. Leonard P. Cooper is classified as a TRCRSV1, pay grade 12 salary, in McDowell County Maintenance in D10 of the DOH, with 11.8 years of service. He was promoted from TW3EQOP, pay grade 12 hourly to TRCRSV1, pay grade 12 salary, effective April 1, 2009. He received a 15% pay increase from $12.83/hr. to $2558.00/mo. for the three pay grade increment.

12. Thomas A. Wooldridge is classified as a TRCRSV1, pay grade 12 salary, in McDowell County Maintenance in D10 of the DOH, with 20.1 years of service. He was promoted from TW3EQOP, pay grade 12 hourly to TRCRSV1, pay grade 12 salary, effective January 16, 2009. He received a 15% pay increase from $15.33/hr. to $3056.00/mo. for the three pay grade increment.

13. Linda Sheppard is classified as a TRCRSV1, pay grade 12 salary, in McDowell County Maintenance in D10 of the DOH, with 27.2 years of service. She was promoted from Transportation Worker 2 Craftsworker, pay grade 11 hourly to TCCMAIN, pay grade 13 hourly, effective June 1, 2005. She received a 10% pay increase from $12.58/hr. to $13.84/hr. for the two pay grade increment.

14. With regard to classified positions, there exists WEST VIRGINIA CODE and DOP Administrative Rules and Regulations applicable to an employee's compensation and salary adjustments upon reclassification and/or promotion. The process of a promotion or reclassification are not interchangeable administrative actions. Reclassification may

encompass or generate a promotion for a classified employee. Not all promotions require or entail reclassification. DOP has policy to address compensation issues generated by one or both of the processes.

15. There exists numerous DOP rules and regulations governing reclassification of a classified position. A particularly relevant DOP Administrative Rule applicable to compensation upon reclassification of a job classification can be found at Administrative Rule § 5.4(f)2. Specifically, West Virginia Division of Personnel Administrative Rule § 5.4(f)2 states*:*

> 2. Pay on Reclassification
>
> a. Higher minimum
>
> 1. When a class is reassigned by the Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum shall be adjusted to the new minimum.
>
> 2. **Where the salary of the incumbent coincides with a pay rate of the new range, the salary shall remain unchanged.**

(Emphasis added)

16. There exists extensive DOP rules, regulations and policies applicable to compensation issues that may arise with the promotion of a classified employee. Generally, a classified employee promoted to a higher classification by proper authority receives a salary adjustment of 5% differential per pay grade up to a maximum of 15% beyond current salary, or an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. *See* WV DOP Pay Plan Implementation Policy. (R. Ex. 3).

17. It is uncontested that Grievants learned of the pay percentage increases of Thomas A. Wooldridge and Leonard P. Cooper in April of 2009.

Discussion

Timeliness

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. . . .

Grievants contend they are within the required time period for filing this grievance, as they learned of the 15% pay increase others received within fifteen days of filing the grievance. Respondent avers and provided evidence as to when Grievants were aware of their reclassification. These are two different issues.

In January and April of 2009, two new Transportation Crew Chiefs received a 15% pay raise when they were promoted to their positions. It is uncontested that Grievants learned of the pay percentage increases of Thomas A. Wooldridge and Leonard P. Cooper on or about April 4, 2009. Grievants filed the instant grievance on April 7, 2009. Grievants do not assert their positions are misclassified but contend upon their "promotion" they were not compensated to the degree that current DOH employees are receiving salary increases.[3] Grievants want an increase in their individual salaries contending pay inequity which they characterize as constituting discrimination.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule and stated at Syllabus Point 1, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."[4] This Grievance Board has consistently recognized that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck.

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[3] Grievants each received an increase upon their promotion in the amount of 5% for Stroupe in 2003, 5% for Matney in 2006 and 5% for Patterson in 2007. They highlight and grieve that Cooper and Wooldridge each were awarded 15% increase in 2009. Reference was also made that Linda Sheppard was given 10% in 2007.

[4]"It is not the discovery of a legal theory which triggers the statute, but the event. . . ." *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

Grievants were all classified as TW3EOP, pay grade 12 hourly, when they were promoted to the TCCMAIN, pay grade 13 hourly position. Each received an increase of 5% for the one pay grade increment. Grievants were not granted an increase in compensation on September 1, 2007, when they were reclassified from TCCMAIN to TRCRSV1. Grievants were aware of their reclassification in 2007. Specifically, WV DOP Administrative Rule Section 5.4(f)2 addresses Pay upon Reclassification. When a class is reassigned by the Personnel Board to a salary range having a higher minimum, the salaries of those incumbents below the new minimum are adjusted to the new minimum. Where the salary of the incumbent coincides with a pay rate within the new salary range, the salary generally remains unchanged. Grievants' rates of pay at the time of reclassification fell within the pay range of pay grade 12 salary for the TRCRSV1 classification; they received no change in their pay rates. *See* DOP Administrative Rule § 5.4(f)2(a)(2), "[w]here the salary of the incumbent coincides with a pay rate of the new range, the salary shall remain unchanged."

No grievance was pursued in 2007 with regard to reclassification and/or the amount of compensation Grievants were entitled upon reclassification. If the instant grievance is a classification grievance contesting those actions then it is untimely.[5] The Grievants were aware of the material facts and definitive decisions regarding their compensation upon reclassification in 2007, and had ample opportunity to proceed with a grievance at that time. However, Grievants' claims are for pay inequity. In that this is a pay dispute, there

[5] Grievants, in association with other allegations, have also complained that they were not given a raise on September 1, 2007, when they were reclassified from TCCMAIN to TRCRSV1. This issue raised in 2009 is untimely.

is support for the proposition that it was a continuing violation which resulted in a new event for filing a grievance with the issuance of each new paycheck. *See Martin*, *supra.* Further, as a disparative treatment matter, the time to file the grievance could only have been brought after the comparative event.

Grievants became aware that newly promoted Transportation Crew Chiefs received a 15% pay raise when the identified employees were promoted in 2009. This grievance was filed on or about April 7, 2009, which is *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. Grievants complain that they were not given a raise on September 1, 2007, when they were reclassified from TCCMAIN to TRCRSV1 is untimely. However, recognizing this consolidated claim as a grievance alleging pay inequity, Respondent's motion to dismiss based on timeliness is denied with regard to this grievance and allegations of discrimination.

Merits

Grievants assert they should have received a 15% pay increase but it is not abundantly clear as to when Grievants' contend this entitlement is triggered, either at the time of their promotions or at the time subsequently promoted individuals received a 15% salary increase. As discussed above, it is determined Grievants' position must be that they acquired standing for allegations of unfair treatment/discrimination upon the granting of subsequent employees' promotions or this grievance is untimely. Grievants became aware that two new Transportation Crew Chiefs received a 15% pay raise when they were promoted to their current positions, while each of the Grievants only received a 5%

increase upon promotion.[6]

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievants contend that they have been treated unfairly and discriminated against because when subsequent DOH employees were promoted to crew leader positions they received more of a pay increase upon being promoted than Grievants. Grievants aver that they are much more experienced and better trained. Grievants contend that their salaries should be increased by 10% so that the percentage increases on their promotions are equal, and Grievants' salaries will be higher than those of newly promoted individuals, Mr. Wooldridge and Mr. Cooper.

Respondent contends that it has complied with applicable Division of Personnel policies regarding the salary increases for promotions and reclassification. Further,

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[6] Grievants, each received their last promotion in the amount of 5% for Stroupe in 2003, 5% for Matney in 2006 and 5% for Patterson in 2007.

Respondent DOH asserts that the percentages for Grievants are different as a result of the September 1, 2007 statewide reclassification that occurred after Grievants' promotions and before that of subsequent 2009 promotions. The 2007 reclassification action, among other attributes, served to eliminate the TCCMAIN classification at a pay grade 13 hourly, and to merge the duties into that of the TRCRSV1, pay grade 12 salary. *See* FOF 6 and 7.

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 the DOH, 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). "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 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). Grievants challenge of Respondent's actions is a difficult undertaking.

Grievants assert they were discriminated against because others promoted to the TRCRSV1 classification were given a 15% pay raise. W. VA. CODE § 6C-2-2(d) defines

discrimination 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." 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

_____Grievants aver and genuinely believe that they are similarly situated to individuals who received fifteen percent increases for a promotion for which Grievants only received a five percent salary increase. Factually this is not accurate. Grievants were not similarly situated to the individuals they identify and compare themselves. In comparing these employment situations, a critical factor is the time of the promotion; specifically, whether a promotion in question occurred before or after the September 1, 2007, effective date of the statewide reclassification. Further, the salary differences between Grievants and the comparative employees was complicated by the diverse path the employees experienced to reach the TRCRSV1 position (reclassification or promotion).

_____In an attempt to establish uniform policy for pay regulations and salary schedules of classified service personnel, DOP has established specific rules and regulations applicable to employees' compensation, when an employee's job classification is altered.

However, it is recognized that the process of a promotion or reclassification are not interchangeable administrative actions. *See* FOF 14. *Also, see* WV DOP Pay Plan Implementation Policy and WV DOP Administrative Rule Section 5.4(f)2, Pay on Reclassification.

Grievants in this action were promoted to their TCCMAIN positions in 2004, 2006, and 2007. DOP Pay Plan Implementation Policy, among other provisions, authorizes that an employee promoted to a higher classification by proper authority receives a salary adjustment of 5% differential per pay grade up to a maximum of 15%, or an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. The change in classification was one pay grade. Each received an increase of 5% for the one pay grade increment. This is a lawful application of DOP policy.

The 2007 reclassification served to change incumbent crew leaders, classified as TCCMAIN and paid according to the hourly pay schedule, to TRCRSV1 classification and paid according to the salary pay schedule. As a result of the pay schedule change, promotions from TW3EQOP to TRCRSV1 became four pay grade increments. *See* FOF 7; R. Ex.1 and L3 testimony, Director of the Human Resources Division, Jeff Black. The identified comparative employees who received 15% salary increases were promoted after the 2007 reclassification and the change in their respective pay grade was in excess of one pay grade.

Grievants were all classified as TW3EQOP, pay grade 12 hourly, when they were promoted to the TCCMAIN, pay grade 13 hourly position. In compliance with the DOP Pay Plan Implementation Policy, they received an increase of 5% for the one pay grade increment. On September 1, 2007, when the TCCMAIN classification was eliminated,

Grievants were reclassified to TRCRSV1, pay grade 12 salary. Grievants' rates of pay at the time of reclassification fell within the pay range of pay grade 12 salary for the TRCRSV1 classification; consequently, by policy, they received no change in their pay rates. DOP Administrative Rule § 5.4(f)2(a)(2*)*. The promotions of Mr. Wooldridge and Mr. Cooper from TW3EQOP to TRCRSV1 became effective after the reclassification and were subject to the same provisions of the DOP Pay Plan Implementation Policy. Pay grade 12 hourly is equivalent to pay grade 8 salary. *See* R. Ex. 1 and FOF 7. Thus, despite the four pay grade increment, Mr. Wooldridge and Mr. Cooper were limited to 15% maximum increase allowed under the DOP Pay Implementation Policy. The application of DOP Pay Plan Implementation Policy was consistently applied by Respondent. The facts and circumstances of the diverse percentage increases were not the same. Grievants are not similarly situated to the identified classified individuals promoted in 2009.[7] Respondent's actions were rationale and reasonable and they do not constitute discrimination, in the facts of this case.

Lastly, Grievants assert that they were subjected to discrimination or favoritism because comparative employees with less seniority received a higher salary than they do. This issue has been addressed numerous times by this Grievance Board, citing *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court noted that W. VA. CODE § 29-6-10

[7] This point has also been explained in other terms. Grievants are not similarly-situated to Mr. Wooldridge or Mr. Cooper in that Grievants were covered under the hourly pay schedule upon promotion while Mr. Wooldridge and Mr. Cooper were covered under the salary pay schedule resulting in different increment increases for pay on promotion. *See* May 9, 2009 Level one decision.

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* supra. at Syl. Pts. 2, 3 & 4. 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). 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. at 246. In this case, the salary differences between Grievants and the comparative employees includes how and when the employee reached their current position as a result of reclassification or promotion. Grievants and the other TRCSRV1 are all being paid within the appropriate pay grade for their classifications. The principle of "equal pay for equal work" is embraced by W. VA. CODE § 29-6-10. *See AFSCME v. Civil Serv. Comm'n.*, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that 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*, 192W. Va. 239, 452

S.E.2d 42 (1994); *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). It is not discrimination for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dep't. of Health and Human Res.*, Docket No. 02-HHR-366 (Sept. 18, 2003). Grievants did not prove, by a preponderance of the evidence, that the difference between their salaries and the salaries of identified comparative employees, Wooldridge, Cooper, and Sheppard was the result of discrimination.

Grievants did not prove essential elements of their various claims by a preponderance of the evidence. Grievants did not provide sufficient justification or evidence to establish Respondent violated any identified rule, regulation or statute. Respondent WVDOT/DOH has demonstrated rationale and reasonable justification of its actions and determinations. In the facts of this matter, Respondent's determinations are not arbitrary, capricious or clearly wrong. Consequently, the grievance is DENIED.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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. *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).

2. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). "[T]he time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. Pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. This Grievance Board recognizes that, in accordance with *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S.E.2d 399 (1995), salary disputes alleging pay disparity are continuing violations, which may be grieved within fifteen days of the most recent occurrence, i.e., the issuance of a paycheck. For the purpose of the timeliness, an act of discrimination is a continuing practice so long as the alleged discrimination occurred within 15 days prior to the filing of the grievance. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995); *Board of Education of Wood County v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002), *overruled on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

4. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). 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).

5. 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 the Department of Transportation/Division of Highways, 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). With regard to classified positions there exists West Virginia Division of Personnel Administrative rules and regulations applicable to classified employees' compensation and salary adjustments upon promotion and upon reclassification. *See* W. VA. CODE R. §§143-1 et seq.

6. The Public Employees Grievance Board is authorized by statute to provide relief to employees for discrimination, favoritism, and harassment, as those terms are defined in W. VA. CODE § 6C-2-2.

7. 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,
> (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);*See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievants were not subjected to unlawful discrimination in that they were not treated differently from other similarly situated employees. The policy regarding their individual salary adjustment was applied as it related to their classification change.

9. Pursuant to applicable WVDOP rules and regulations, a one level pay grade increase constituted a 5% increase in salary. DOP Pay Plan Implementation Policy. This is the salary adjustment that Grievants received at the time of their promotions to TCCMAIN positions in 2004, 2006, and 2007. This is a lawful application of DOP policy.

10. West Virginia Division of Personnel Administrative Rules § 5.4(f)2(a)(2) provides that "[w]here the salary of the incumbent coincides with a pay rate of the new range, the salary shall remain unchanged."

11. Respondent established that its actions with regard to Grievants' compensation upon reclassification were in compliance with West Virginia Division of Personnel Administrative Rules. *See* § 5.4(f)2(a)(2).

12. Respondent established that its actions with regard to the salary increases of recently promoted Transportation Crew Supervisors 1 were in compliance with West Virginia Division of Personnel Administrative Rules.

13. Grievants did not meet their burden.

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: October 1, 2010

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Landon R. Brown
Administrative Law Judge