THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAMELA MILLER,
Grievant,

v. **DOCKET NO. 2009-1012-MAPS**

DIVISION OF VETERAN'S AFFAIRS AND
DIVISION OF PERSONNEL,
Respondents.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Pamela Miller on February 12, 2009. Her statement of grievance reads:

> Nurse III positions have been filled at salary of $42,000/yr. when I started Oct. 1, 2007 at $34,608.

The relief sought by Grievant is:

> I want my salary increased to at least $42,000 and back wages for the difference between the two salaries from at least [sic] the first Nurse III was hired at $42,000 if not from beginning.

The grievance was originally consolidated with the grievance of Tammy Starkey, and was assigned Docket Number 2009-1020-CONS. The grievance was denied at level one on February 24, 2009. Grievants appealed to level two, where a mediation session was held on May 20, 2009. Grievants appealed to level three on August 6, 2009. A level three hearing was held before the undersigned Administrative Law Judge on January 15, 2010, at the Grievance Board's Westover, West Virginia office. Grievant Miller represented herself, the Division of Veteran's Affairs was represented by Nicole A. Cofer, Assistant Attorney General, and the Division of Personnel was represented by Karen O'Sullivan

Thornton, Assistant Attorney General. Grievant Starkey appeared briefly by telephone. At the conclusion of the hearing on January 15, the record was held open to allow Ms. Starkey to review the record developed and advise as to whether another day of hearing would be necessary. A telephone conference was held on March 8, 2010, to discuss how the parties wished to proceed, and at that time it was decided that Ms. Miller's grievance should be severed from that of Ms. Starkey. This matter became mature for decision at the conclusion of the telephone conference on March 8, 2010, as the parties declined to submit any written proposals.

Synopsis

Grievant, a Nurse III, employed at the West Virginia Veteran's Nursing Facility in Clarksburg, West Virginia, was hired on October 1, 2007. She accepted the starting salary of $34,608.00. After Grievant was hired Respondent was able to get an increase in the starting salary for Nurse III's approved, of $42,000.00, and hired several Nurse III's at this higher salary. Grievant is paid within the pay range for her pay grade, and did not demonstrate a violation of any statute, rule, regulation or policy. Although Respondent would like to increase Grievant's salary, it is prohibited from granting discretionary pay increases. The Grievance Board likewise has no authority to award discretionary pay increases.

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 Division of Veteran's Affairs ("DVA") as a Nurse

III, pay grade 16, at the West Virginia Veteran's Nursing Facility in Clarksburg, West Virginia. She was hired on October 1, 2007, at a starting salary of $34,608.00. This was a special hiring rate approved by the Division of Personnel ("Personnel"), and DVA was not authorized to offer a higher salary to new employees at that time.

2. Since she was hired Grievant has received one pay increase, which was a 3% pay increase received by all state employees.

3. The salary range for pay grade 16 is $33,036.00 to $61,128.00.

4. Due to recruitment and retention problems, DVA requested a higher starting salary for Nurse III's. Personnel approved a special hiring rate of $42,000.00 for those persons hired into Nurse III positions who had more than the minimum experience requirement. DVA hired several Nurse III's at a salary of $42,000.00, after Grievant was hired. Some of these employees will be performing the same tasks as Grievant, and Grievant is training them.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the 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). *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 did not articulate any legal argument to support her grievance. Her frustration essentially was that it was not fair that employees hired after she was, who will be performing the same duties she is performing, and whom she is training, are being paid over $6,000 more per year than she. DVA would like to rectify this situation, but is unable to do so because this would be a discretionary pay increase, and DVA has had its authority to grant discretionary pay increases removed. In April 2005, former Chief of Staff for Governor Joe Manchin, III, Larry Puccio, issued a Memorandum to all state agencies advising that all discretionary pay increases had to be approved by Personnel and by the Governor's office, and there should be no discretionary pay increases, including merit increases.

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 Personnel*, 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 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).

Personnel's Pay Plan Implementation Policy contains a provision entitled "Internal Equity," which seems applicable to the instant situation, and reads as follows:

> In situations in which one or more employees are paid at least 20% less than other employees in an agency-defined organizational unit and the same job class who have comparable training and experience, duties and responsibilities, performance level, and years of State/classified service, the appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to each employee in the organizational unit whose salary is at least 20% less than other employees in the unit. Internal equity increases shall be limited to once every five years for the same job class in the same organizational unit.

However, "the granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of Respondent. Moreover, discretionary increases are clearly prohibited by the Governor's moratorium, which remains in effect." *Harris v. Dep't of Transp.*, Docket No. 2008-1549-DOT (Dec. 15, 2008), citing *Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). Further, even absent this moratorium,

> Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievant an entitlement to a salary increase should she prove her situation fits within the policy. It is within the agency's discretion to recommend a salary increase of up to 10%

> for employees who fit within the situation described in the policy. . . . "The grievance board simply does not have the authority to second guess a state employer's employment policy." *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008).

Morgan v. Dep't of Health Human Res., Docket No. 07-HHR-131 (June 5, 2008). While these circumstances certainly do seem unfair, the undersigned simply has no authority to resolve this situation.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the 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). *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).

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. "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*, 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).

4. "[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of Respondent. Moreover, discretionary increases are clearly prohibited by the Governor's moratorium, which remains in effect." *Harris v. Dep't of Transp.*, Docket No. 2008-1549-DOT (Dec. 15, 2008), citing *Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007).

5. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or that she was otherwise entitled to an increase in her salary.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Administrative Law Judge

Date: June 17, 2010