THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TAMMY STARKEY,
Grievant,

v. **DOCKET NO. 2009-1030-CONS**

DIVISION OF VETERAN'S AFFAIRS,
Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Tammy Starkey, on January 26, 2009. Her statement of grievance reads:

> Hired in at $34,608/annual salary. Now RN III's are offered $42,+++/annually. ____ (word illegible) during interview process.

The relief sought by Grievant is:

> Salary to be brought to same level as new hires. To be recognized for my advanced education and years of experience.

The grievance was originally consolidated with the grievance of Pamela Miller. 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 appeared *pro se* in person, the Division of Veteran's Affairs was represented by Nicole A. Cofer, Assistant Attorney General, and the Division of Personnel, which was a party to the consolidated grievance, 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, and the Division of Personnel would not be a party in Ms. Starkey's grievance. Ms. Starkey asked for a second day of hearing, which was held on May 21, 2010, before the undersigned, in the Westover office. This matter became mature for decision at the conclusion of that hearing, on May 21, 2010, as the parties declined to submit any written proposals.

Synopsis

Grievant, a Nurse III, began her employment with the West Virginia Veteran's Nursing Facility in Clarksburg, West Virginia, in September, 2008. 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. Respondent was precluded by statute from raising a timeliness defense for the first time at level three.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant began her employment with 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, in September, 2008, at a starting salary of $34,608.00. This was a special hiring rate approved by the Division of Personnel ("Personnel"), for persons who had more than the minimum experience requirements, and DVA was not authorized to offer a higher salary to new employees at that time.

2. Due to recruitment and retention problems, DVA requested a higher starting salary for Nurse III's. After Grievant was hired, the Division of 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.

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

4. Grievant resigned her employment with Respondent in May 2009. At the time of her resignation she was still earning a salary of $34,608.00.

5. DVA did not raise a timeliness defense at level one or level two.

Discussion

Respondent raised a timeliness defense for the first time at level three. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). However, W. VA. CODE § 6C-2-3(c)(1) clearly states that, "[a]ny assertion that the filing of the grievance was untimely *shall* be made at or before level two." (Emphasis

added.) Respondent did not raise this defense in a timely fashion, and is precluded by statute from raising it for the first time at level three.

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 argued that someone who interviewed the same day she did was offered a higher salary, and that she was not given the opportunity to negotiate a higher salary. Grievant has a misperception of what occurred. The key date is not the interview date, but the hiring date. At the time Grievant was hired, DVA was authorized to offer a starting salary to Grievant of $34,608.00, and no more. DVA was not authorized to negotiate a higher salary for Grievant, or anyone else. At some point after Grievant was hired, DVA received authorization to increase its special hiring rate to $42,000.00. Nurse III's hired after Grievant did not negotiate this higher salary, rather, it was the new special hiring rate. DVA could not increase Grievant's salary after she was hired, 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. Likewise, the undersigned has no authority to award discretionary pay 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.

Grievant's argument may be characterized as a discrimination claim. 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant's starting salary was significantly less than other Nurse III's hired shortly after she was. However, "[i]t is not discriminatory for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health and Human Resources/Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003).[1]

The following Conclusions of Law support the Decision reached.

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[1] Grievant testified she had been told that one employee had left her employment with DVA, so that she could be rehired at a higher salary. This testimony amounted to a rumor. It should be noted, however, that if an employee transfers to another state agency and is able to acquire a higher salary while with that agency, it would not be unusual or improper for that employee to be allowed to retain that salary. Whether this is what occurred is unknown.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). However, W. VA. CODE § 6C-2-3(c)(1) clearly states that, "[a]ny assertion that the filing of the grievance was untimely *shall* be made at or before level two." (Emphasis added.)

2. Respondent did not raise a timeliness defense in a timely fashion.

3. 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).

4. "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).

5. "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).

6. "[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).

7. 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); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

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

9. 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 during her employment with Respondent.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: October 8, 2010