WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID FARRELL GREEN,
Grievant,

v. **Docket No. 2009-1441-DOT**

DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, David Farrell Green, filed this grievance against the Department of Transportation/Division of Highways ("DOH"), Respondent protesting what he perceived to be unfair compensation practice. The original grievance was filed on April 13, 2009 and the grievance statement provides:

> I have been employed with the DOT-Highways since 08-13-1990, I was promoted to a Foreman (TRCRSV1) on 11-16-05 with a 5% pay rate increase, on 04-01-09 Mr. Tom Ellis was promoted to a TRCRSV1 with a 15% pay increase, his wages are .92 cents more per hr [.]

Grievant's requested relief:

> I feel it is an unfair practice to promote someone into a position with a 15% increase thus giving them a higher (beginning) rate of pay as an individual that has served in this position for 4 and a half years, this has caused low moral among the TRCRSV's that have worked hard to earn the respect from their fellow workers and management. Upper management had several closed door meetings with Mr. Ellis; therefore everyone knew the outcome of the job interviews and who the successful candidate for the position would be.
>
> 1. To be treated fairly;
> 2. Every candidate should have the same opportunity for an interview with upper management; they should not be partial to any one candidate.
> 3. Existing TRCRSV's salary be made equal.

The parties signed a waiver agreement on or about April 27, 2010 agreeing to proceed directly to level three of the grievance process. *See* W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held before Administrative Law Judge (ALJ) Mark A. Barney on December 4, 2009, at the Grievance Board's Hearing Facilities in Beckley, West Virginia. Grievant appeared *pro se*, and Respondent was represented by Robert Miller, Esquire, DOH Legal Division.

This matter became mature for decision on January 18, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. In fact, no party submitted a written proposed findings of fact and conclusions of law document. Thereafter, this case was reassigned to the undersigned Administrative Law Judge due to the resignation of ALJ Barney.

Synopsis

Grievant, a state employee of approximately twenty years, was paid within the pay range of his Pay Grade and Classification. Grievant contends the actions of Respondent in promoting another employee with less seniority to his same position of classification, "Transportation Crew Supervisor," and increasing that employee's salary to an amount in excess of his own is unfair. Respondent provided its actions in this grievance were in accordance with regulating Division of Personnel procedure and applicable West Virginia Code.

Grievant failed to prove his or the highlighted comparative employee's compensation was in violation of policy controlling state employee compensation. Respondent did not act in an arbitrary or capricious manner in establishing Grievant's salary. Grievant did not establish Respondent acted contrary to applicable law, rule or regulation with regard to providing identified employees' salary within the pay range of the relevant classification pay grade. 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. Grievant is employed by the Department of Transportation/Division of Highways, Respondent, as a Transportation Crew Supervisor (TRCRSV1). Grievant has approximately twenty years of employment with the State of West Virginia and has been employed as a TRCRSV1 since 2007.

2. The job classification of TRCRSV1 is compensated pursuant to pay grade 12, which has a salary range of $26,160 to $48, 396 annually. *See* Division of Personnel ("DOP") Classification and Compensation Plan.

3. During his career, Grievant was promoted from TCCMAIN to TRCRSV1 classification and received a five (5%) percent pay increase with the promotion. Grievant's current salary is within the pay grade range of his classification.

4. In 2007, the West Virginia Division of Personnel, revised a number of classification titles of Respondent. This reclassification process altered and affected Transportation Worker/Transportation Crew Supervisor Series positions.

5. The Transportation Crew Chief classification was abolished; the classifications of Transportation Crew Supervisor 1 & 2 and Transportation Worker 4 were revised. Personnel of Respondent in the effected job classifications were adjusted in accordance with applicable Division of Personnel *Administrative Rule*.[1]

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[1] The reclassification of the identified incumbent employee was done in accordance with Subdivision 4.6 (a) of the Division of Personnel *Administrative Rule* and was effective September 12, 2007. See also DOP Pay Plan Implementation Policy.

6. A change in classification of Transportation Worker 2/ Equipment Operator (TW2EQOP) to TRCRSV1 necessitates an alteration in pay grades.

7. Employee Tom Ellis is the comparative employee identified by Grievant to highlight a difference in wages of a less senior employee with that of his own. Grievant compares the compensation adjustment and ultimate salary of employee Ellis to that of his own as a TRCRSV1.

8. As a result of reorganization by Respondent, authorized and sanctioned by DOP, Tom Ellis' job classification as an employee of Respondent was altered. He was promoted from the classification of TW2EQOP to TRCRSV1.

9. The alteration of classification from TW2EQOP to TRCRSV1 is a step-up in pay grade. Employee Ellis was promoted from an hourly pay scale to a salary classification. Employee Ellis' salary was increased by 15%.

10. Employee Ellis' salary is within the pay grade range of his assigned classification, Transportation Crew Supervisor (TRCRSV1).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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.*

Grievant contends that it is unfair that an employee with less seniority is compensated at a level in excess of his own salary. Grievant is of the opinion that Respondent's actions in compensating him less than the identified comparative employee is improper. He contends this is unfair. Grievant cited no authority to support his contention, and such a pay grade disparity is not contrary to law. Grievant wants an increase in his salary. Grievant is being paid within the pay range of the pay grade assigned by Personnel to his classification.

This is not a unique or unprecedented grievance, this issue has previously been addressed by the Grievance Board. It is a well-discussed concept that state employees in the same classification need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

For purposes of the Public Employees Grievance Procedure, discrimination means 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) (2008). To establish a discrimination or favoritism 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); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In *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 of Appeals noted that WEST VIRGINIA CODE § 29-6-10 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. "It is not discriminatory

for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009).

The increase in the comparative employee's salary was the result of reclassification implemented by Respondent and the West Virginia State Personnel Board. The reclassification as proposed and approved abolished the Transportation Crew Chief classification; revised the classification for Transportation Crew Supervisor 1, Transportation Crew Supervisor 2 and Transportation Worker 4. The process generated an alteration in numerous (approximately 368) incumbent employees with varying rates of pay.

Employee Ellis' salary increase was a result of a step-up in classification. Applicable DOP rule and regulation authorize an increase in salary of classified employees. DOP Pay Plan Implementation Policy, Section III. C. provides;.

> When an employee is promoted, his/her pay shall be adjusted as follows:
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> 1. Salaries at the minimum rate of the current classification shall be adjusted to the minimum rate for the job classification to which the employee is being promoted.
> 2. Salaries within the range of the current classification shall be increased by one 5% increment per pay grade range advanced to a maximum of 3 pay grade ranges or to the minimum rate of the higher pay grade, whichever is greater.

The increase in the comparative employee's compensation is recognized and authorized by West Virginia Code and applicable policy. When Grievant was promoted to his current classification, it was a step-up of one pay grade, he received a 5% increase. Both identified employees are paid within the designated pay range of their classification.

Respondent's decision to pay a higher salary to employee Ellis was not arbitrary and capricious. As a result of reorganizing the organizational structure and work assignments in the Agency's county maintenance organizations, the job classification of numerous employees was altered. Specifically, employee Ellis was promoted from an hourly pay scale to a salary classification. Employee Ellis' salary was increased by 15%. This was not done as an intentional slight to Grievant and his years of service. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." Employee Ellis is compensated within the pay grade range of his assigned classification, Transportation Crew Supervisor (TRCRSV1).

Grievant has failed to prove by a preponderance of the evidence that Respondent has any legal obligation to increase his pay.

Under the circumstances presented, Grievant has not established that his salary is the result of unlawful discrimination or that Respondent has violated any law, rule or policy. Grievant had the burden in this matter, and in the absence of evidence that he was entitled

to a pay increase or that the named comparative employee was improperly compensated, this grievance must be DENIED.

The following conclusions of law are appropriate in this matter:

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 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).

2. An employee who challenges the pay grade or classification to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1995); *Bennett v. Dep't of Health and Human Res.*, Docket No. 93-HHR-518 (June 23, 1995); *Johnston v. Dep't of Health and Human Res.*, Docket No. 94-HHR-206 (June 15, 1995); *Thibault v. Div. of Rehab. Serv.*, Docket No. 94-RS-061 (May 31, 1995); *Frame v. Dep't of Health and Human Res.*, Docket No. 94-HHR-140 (Nov. 29, 1994). *See O'Connell v. W. Va. Dep't of Health and Human Res.*, Docket No. 95-HHR- 251 (Oct. 13, 1995).

3. Grievant is compensated within the pay grade assigned to his classification. This is proper.

4. In order to establish either a discrimination or favoritism 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); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. "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).

6. WEST VIRGINIA CODE § 29-6-10 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 v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994). "It is not discriminatory for employees in the same classification to be paid different salaries." *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366 (Sept. 18, 2003); *See Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009).

7. Grievant did not prove that the difference in his pay and that of the identified comparative employee was the result of unlawful discrimination.

8. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a

manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

9. Grievant did not prove that Respondent's decision to pay an employee with less years of service a greater salary, but still within the same pay grade as his, was arbitrary and capricious.

10. Grievant failed to prove by a preponderance of the evidence that Respondent violated any applicable rule, policy or statute in not granting him a higher rate of compensation.

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: April 26, 2010

Landon R. Brown
Administrative Law Judge