THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID G. LAXTON,

Grievant,

v. **Docket No. 2009-0686-DHHR**

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
WELCH COMMUNITY HOSPITAL AND
WEST VIRGINIA DIVISION OF PERSONNEL,**

Respondent.

DECISION

David Laxton, Grievant, is employed by the West Virginia Department of Health and Human Resources ("DHHR") at Welch Community Hospital. Grievant was originally employed at the Hospital as a Painter. Later he applied for and received a position as a Plumber. Mr. Laxton filed a level one grievance form dated March 23, 2009. In his statement of grievance Mr. Laxton wrote:

> Requesting equal pay as two other employees in same job title. I am not receiving equal pay as other plumbers within state system. I hold a master plumber's license.

As relief Grievant seeks "[t]o be compensated equally for similar positions."

At level one, a decision dated March 30, 2009 was rendered holding that the chief administrator's designee was without authority to resolve the grievance. Grievant appealed to level two. Prior to the level two mediation, an Order was entered on June 24, 2009, joining the West Virginia Division of Personnel ("DOP") as a party to the grievance. A level two mediation was held on October 22, 2009, and an Order was entered the next day.

Grievant appealed to level three and amended the relief he was seeking to include

compensation for license fees and training he was required to attend. A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on October 12, 2010. Grievant personally appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[1] Respondent DHHR was represented by Jennifer K. Akers, Assistant Attorney General and Respondent DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. At the close of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. All parties submitted fact/law proposals, the last of which was received by the West Virginia Public Employees Grievance Board on December 1, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant applied for a position as a plumber that was previously held by a coworker who retired. When Grievant took the plumber position he moved from pay grade eight to pay grade nine and received a five percent wage increase. Grievant argues that he should have been paid the same pay as the coworker who retired or the same as other employees in the plumber classification. Respondent argues that Grievant is paid in the appropriate pay grade and received the appropriate wage increase for moving up one pay grade in the State's pay plan. Grievant failed to prove that he was required to receive a higher wage and the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

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[1] West Virginia Public Workers Union

Findings of Fact

1. Grievant was initially employed by Respondent DHHR at the Welch Community Hospital ("Hospital") in September 1999. At that time Grievant was in the painter classification.

2. Employees in the painter classification are paid in pay grade eight. That pay grade ranges from $21,504 to $39,792 per year.

3. As part of Grievant's duties, he assisted coworker Bobby Dalton who was a plumber. Mr. Dalton had been working at the Hospital for far longer than Grievant.

4. When Bobby Dalton retired, the plumber position he held was posted. Grievant Laxton applied for and received that position.

5. Employees in the plumber classification are in pay grade nine. That pay grade ranged from $22,584 to $ 41,784 per year.

6. Grievant Laxton did not ask what his salary would be in the plumbing position. He assumed that he would be paid the same salary that Mr. Dalton was paid when he retired. Instead, he received a five percent increase for moving from pay grade eight to pay grade nine, which resulted in a new base salary of $24,780. Grievant's new base salary is within the range required for pay grade nine.

7. There are six other plumbers employed by Respondent at the State Hospital and Grievant presented evidence that demonstrated that they were all paid at a higher rate than Grievant in 2009. Grievant's Exhibit 4. Two other plumbers employed at the Hospital make as much as $3,000 more per year in base salary than Grievant.[2]

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[2] The salary information offered by Grievant came from the State Auditor's website which reports annual total compensation. This figure does not accurately reflect the base salary of employees because it contains overtime and other salary enhancements which vary widely from position to position in the same classification.

8. All plumbers employed by Respondent DHHR are paid within the range established by Respondent DOP for pay grade nine. All of them receive different base pay depending on such factors as how long they have been employed by the State, what classification and pay grade into which they were initially employed and the salary they each received when they were originally appointed to State employment.

9. Grievant held a valid plumber's license issued by the West Virginia Division of Labor when he was employed as a plumber by the DHHR and when he filed the present grievance. Grievant's Exhibit 3.[3]

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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).

Grievant argues that his base pay as a plumber is so much lower than the base pay of other plumbers working for Respondent DHHR at the Hospital, that it violates the provisions of the DOP *Pay Plan Implementation Policy*. Grievant's Exhibit 11. Grievant

[3] The copy of Grievant's plumber's license provided as Grievant's Exhibit 3 indicates that the license expired on December 31, 2009. It is not clear whether Grievant has taken necessary steps to renew that license or what steps are required to do so.

points to two particular provisions of the policy to support his position. First, Grievant points to Section III A. 3. of the policy related to "Internal Equity" which states the following:

> The appointing authority shall be responsible for assuring that original appointments above the entry rate are applied in a consistent manner with due consideration to the salaries and relative qualifications of incumbent employees in the same classification.

Grievant's Exhibit 11. Grievant argues that he has similar or higher qualifications[4] to other plumbers employed by DHHR, and paying him a significantly lower salary is in violation of this section of the policy.

Grievant's reliance upon this provision of the pay plan policy is misplaced. This provision applies to "original appointments" which means the first time the employee is hired into State classified employment. Grievant's acceptance of the plumber position was not an original appointment but a promotion within the classification plan. Consequently, this provision has no application in this matter.

The second provision of the DOP *Pay Plan Implementation Policy,* relied upon by Grievant, also relates to "Internal Equity." Section III. D. 3. of the policy states:

> Internal Equity. 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.

Grievant's Exhibit 11. This provision allows a state agency to give employees who are paid

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[4] Grievant testified that some of the plumbers employed by the DHHR are not licensed as plumbers by the Commissioner of Labor.

a base salary of at least 20% less than others in their classification to receive an in-range salary increase of 10%. Grievant argues that Respondent is in violation of this policy because Grievant is paid a base salary of more than 20% less than other plumbers at the Hospital.

Grievant did not present any evidence related to the training and experience, performance level or years in classified State employment of the other employees. Such information would be necessary to demonstrate that Grievant should be given an equity increase pursuant to this provision. More importantly, the policy specifically states that "appointing authority *may* recommend an in-range salary adjustment." (Emphasis added). The Grievance Board has consistently held that the use of the word "may" in a policy indicates that such equity salary adjustments are discretionary. The policy does not create a mandatory enforceable duty to provide equity pay raises. *See Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008).

Finally, Grievant argues that paying him a significantly lower base pay than the other employees within the plumber classification, constitutes discrimination pursuant to the statutory grievance procedure. This argument also falls short. 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); *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. 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 as long as they are paid within the appropriate pay grade for their classification. *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); *Boothe et al.,* Docket No. 2009-0800-CONS (Feb. 17, 2011). In the present case, it is undisputed that Grievant and all of the other plumbers employed at hospitals operated by Respondent DHHR receive base pay that falls within the appropriate pay grade for that classification; pay grade nine. Consequently, Grievant has not proven that Respondent is guilty of discrimination.

At level three, Grievant requested the additional relief that he be reimbursed for the cost of obtaining his plumber's license from the Commissioner of Labor. Grievant did not prove that Respondent had a mandatory duty to make such payments to him. Because Grievant failed to meet his burden of proof regarding any of his allegations, the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears 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).

2. DOP *Pay Plan Implementation Policy* Section III. D. 3 related to internal pay equity does not create a mandatory, enforceable duty to provide equity pay raises. *See Morgan v. Department of Health Human Resources*, Docket No. 07-HHR-131 (June 5, 2008).

3. 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);
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> (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).

4. 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. West Virginia Division of Health and Division of Personnel*, 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, as long as they are paid within the appropriate pay grade for their classification. *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); *Boothe et al.,* Docket No. 2009-0800-CONS (Feb. 17, 2011).

5. Grievant and all of the other plumbers employed at hospitals operated by Respondent DHHR receive base pay that falls within the appropriate pay grade for that classification; pay grade nine. Consequently, Grievant has not proven that Respondent is guilty of discrimination.

Accordingly, the 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 14, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE