THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CATHY ANN CORLEY,
Grievant,

v. **DOCKET NO. 2011-1589-DOC**

WORKFORCE WEST VIRGINIA,
Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Cathy Ann Corley, against her employer, Workforce West Virginia, on May 5, 2011. Her statement of grievance consists of four paragraphs, which can be summarized as a complaint about salary disparity after a new person was hired by Respondent at a starting salary higher than Grievant's. The relief sought by Grievant is:

> An investigation of salaries being paid to new hires with no experience in relationship to Grievant that has in excess of fourteen (14) years of experience. Grievant would like the Division of Personnel to justify paying a new hire more than the maximum rate set for a pay grade twelve (12). Grievant's salary be adjusted to reflect years of experience in position as related to previous employee evaluations and as it relates to salaries given to new hires.

A hearing was held at level one on May 24, 2011, and the grievance was denied at that level on June 2, 2011. Grievant appealed to level two on June 10, 2011, and a mediation session was held on July 25, 2011. Grievant appealed to level three on August 4, 2011. A level three hearing was held before Administrative Law Judge Jennifer L. Stollings-Parr on March 5, 2012, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Daniel T. Lattanzi, Esquire, of the Law Office of Roger D.

Forman, L.C., and Workforce West Virgina was represented by Doren Burrell, Senior Assistant Attorney General. This matter became mature for decision on April 6, 2012, on receipt of Grievant's proposed findings of fact and conclusions of law, and was then transferred to the undersigned Administrative Law Judge for administrative reasons on April 24, 2012. Respondent declined to submit written proposals.

Synopsis

Grievant has been working for Respondent for 15 years, and her classification is in pay grade 14. Respondent brought in a new employee as a reinstatement, in a pay grade 12 position, at a salary higher than Grievant's. The new employee had 28 years of service prior to her break in service, had two Masters' Degrees, and had served as Director of another state agency at one time. The salary of the new employee was higher than the salary requested by those making the hiring decision. Grievant did not demonstrate a violation of any law, rule, regulation, policy or procedure, or that she was otherwise entitled to the relief requested.

The following Findings of Fact are made based on the record developed at levels one and three .

Findings of Fact

1. Grievant has been employed by Workforce West Virginia ("WWV") for almost 15 years, and has almost 17 years of service with the State of West Virginia. She is classified as an Employment Program Specialist Senior, pay grade 14, and her salary is $34,500.00.

2. The salary range for pay grade 14 is $29,400.00 to $ 54,396.00. Grievant is being paid within the salary range for a pay grade 14.

3. WWV posted a vacancy for a Delinquency Control Specialist, pay grade 12. WWV has had trouble retaining employees in this classification.

4. Pam Steelhammer was interviewed for the Delinquency Control Specialist position. Michael Moore, Director of Unemployment Compensation for WWV, recommended to the WWV Deputy Executive Director that Ms. Steelhammer be hired for the position at the mid-point of the pay grade 12, which he believed was $37,278.00. When the hiring form was completed, the person completing the form did not write a dollar amount on the form for the salary requested, but rather wrote, "mid-point."

5. Joe Artis completed the form necessary for the hiring to be submitted to the Division of Personnel. Mr. Artis believed that the salary requested was the market rate on the Division of Personnel's Schedule of Salary Grades, effective February 1, 2009, which was $42,648.00, and this was the salary he placed on the form.

6. Ms. Steelhammer's hiring was approved, effective October 16, 2010, at a salary of $42,648.00.[1] Her hiring was treated as a reinstatement.

7. Ms. Steelhammer had 28 years of service with the State of West Virginia, prior to her break in service, and had served as Director of a state agency. She had never been an employee of WWV. Ms. Steelhammer has two Masters' Degrees.

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[1] While Grievant emphasized the fact that Ms. Steelhammer's salary was higher than what was intended to be recommended, the undersigned would note that even the salary Mr. Moore recommended for Ms. Steelhammer was higher than Grievant's salary.

8. The Division of Personnel reviewed Ms. Steelhammer's qualifications and approved the starting salary at the market rate.

9. The salary range for a pay grade 12 is $26,160.00 to $48,396.00. Ms. Steelhammer is being paid within the salary range for a pay grade 12.

10. Grievant applied for her current position, was offered the position, and accepted the position and the salary offered to her.

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 argued that it is unreasonable for Ms. Steelhammer to be paid so much more than Grievant, and that this difference in salary constitutes discrimination and favoritism. Grievant, however, did not address the law applicable to salary differentials which has repeatedly been followed by the Grievance Board, the West Virginia Equal Pay Act, and the application of that Act by the Supreme Court of Appeals of West Virginia.

Respondent pointed to the applicable case law, and argued there had been no violation of the law.

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). Both Grievant and Ms. Steelhammer are being compensated within their respective pay grades.

Further, the Division of Personnel's rules specifically allow for the reinstatement of a former state employee at an advanced salary. Section 5.8 of the Division of Personnel's rules provides as follows:

> 5.8. Pay on Reinstatement - The salary for an employee who is reinstated shall be at the minimum salary for the class including any applicable Board approved pay differential. However, an individual possessing pertinent training or experience above the minimum required for the class, as determined by the Director, may be appointed at a pay rate above the minimum, up to the market rate of the salary range, unless otherwise prescribed by the Board. For each pay increment above the minimum, the individual must have in excess of the minimum requirements at least six months of pertinent experience or equivalent pertinent training. The Director may authorize reinstatement at a rate above the market rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class, or where the reinstated employee's last salary as a classified employee was above the market rate.

143 C.S.R. 1. The record does not reflect the minimum qualifications for Ms. Steelhammer's position, but the Division of Personnel reviewed her qualifications, and determined that she could be paid the market rate as provided by this rule. The undersigned was provided with no evidence that this determination was incorrect. Grievant did not demonstrate a violation of this rule.

It should be noted that Personnel's Pay Plan Implementation Policy contains a provision entitled "Internal Equity," which 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.

By Respondent's calculations, this provision was not applicable as the pay differential was less than 20% and the two employees were not in the same classification; however, even if it were applicable, "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." *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). 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).

Grievant argued this situation constituted discrimination and favoritism. 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). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order 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., 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 salary is significantly less than Ms. Steelhammer's. However, Ms. Steelhammer and Grievant are not in the same classification, and as such, they are not similarly situated. Even if they were in the same classification, "[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). 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. In order 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., 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. Grievant is not similarly situated to the employee to whom she compared herself, as the two employees are not in the same classification or pay grade.

6. "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). Likewise, it is not discriminatory for employees in different classifications to be paid different salaries, and such differences in pay also do not constitute favoritism.

7. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or that she was otherwise entitled to the relief requested.

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
Acting Deputy Chief
Administrative Law Judge

Date: May 15, 2012