WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID T. McCLUNG
Grievant,

v. **Docket No. 2011-1806-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

D E C I S I O N

Grievant, David Thomas McClung, filed this grievance against his employer, the West Virginia Division of Natural Resources, Respondent, on June 16, 2011, protesting the amount of compensation he is receiving as a Wildlife Manager. Grievant contends that he has been employed as a Wildlife Manager for 24 years, and that another employee of the same classification with less years of service as a Wildlife Manager, prior to his retirement, earned an annual salary that was greater than Grievant's salary. Grievant claims this pay disparity violates the principle of equal pay for equal work. Grievant seeks the relief of a "15% increase in annual salary."

Grievant requested a level one conference. In a letter dated June 22, 2011, Respondent exercised its authority pursuant to the Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.3 (2008) to waive the grievance to level two stating that it was without the authority to grant the relief requested. A mediation session was held on August 15, 2011. Grievant appealed to level three on August 24, 2011. A level three hearing was held before the undersigned Administrative Law Judge on February 6, 2012, in the Grievance Board's Charleston office. Grievant was present in person. Respondent was represented by Assistant Attorney General William R. Valentino.

This matter became mature for decision on February 20, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant, a state employee of approximately twenty-four years, was paid within the pay range of his Pay Grade and Classification. Grievant contends that a former employee of Respondent's, employed as a Wildlife Manager, the same classification as Grievant, earned a higher wage. Grievant did not allege pay disparity with any other employees classified as Wildlife Manager currently employed by Respondent. Grievant argues that this pay disparity violates the principle of equal pay for equal work and that he is entitled to a 15% annual salary increase. Respondent disagrees.

Applicable statutes, rules and regulations, coupled with relevant case law, provide that classified employees are to be compensated within their pay grade. 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. Grievant is being paid within the pay range of the pay grade assigned by the Division of Personnel to his respective classification. The salary of the unnamed employee in Grievant's classification was not demonstrated by any proffered documentation, although Grievant testified he believes it was $6,744.00 more than his annual salary, prior to the employee's retirement. Grievant did not establish by a preponderance of the evidence that he is mandated a pay increase. Nor did Grievant prove that Respondent has violated any rule, regulation, policy or statute in the circumstances presented. 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. David Thomas McClung, Grievant, is at all times relevant to this grievance matter, an employee of the West Virginia Division of Natural Resources, Respondent.

2. Grievant is employed by Respondent as a Wildlife Manager. Grievant has worked in that capacity for approximately twenty-four (24) years.

3. The Pay Grade salary range for a Wildlife Manager is $26,160 to $48,396 annually, PG12. Grievant is currently receiving $41,796 annually.

4. Grievant compares himself with an unnamed employee employed as a Wildlife Manager by Respondent for sixteen (16) years. Reportedly, the unnamed employee had approximately twenty-one (21) years' service with Respondent.

5. At the time of the Level three hearing, the unnamed employee had retired, and was no longer in the employ of Respondent.

6. The unnamed employee, despite fewer years of service as a Wildlife Manager and "alleged" inability to perform some duties of that classification, was paid a salary $6,744.00 greater than that of Grievant.[1]

7. Grievant did not offer evidence of Division of Personnel's (DOP) job specifications for the job classification Wildlife Manager.

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[1] Grievant alleged that the unnamed employee was unable to perform certain functions required of a Wildlife Manager, including Special Natural Resources Police duties and "archery in the schools" duties due to an unspecified criminal conviction. Other than Grievant's testimony attesting to his belief, no evidence to support this conjecture was presented.

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.*

WEST VIRGINIA CODE § 29-6-10 authorizes the DOP to establish and maintain a position classification plan for all positions in the classified service. This includes pay plans for all the positions within the classified service. State agencies, such as the Division of Natural Resources, which utilize such positions, adhere to the applicable classification and pay grade. "DOP is primarily concerned with administering a classification and compensation plan that equitably compensates similarly situated employees while maintaining appropriate recruitment and retention, thereby assuring that each state agency has sufficient qualified personnel to perform its assigned governmental function." *Travis v. Dep't of Health & Human Res.*, Docket No. 96-HHR-518 (Jan. 12, 1998). Also, the rules promulgated by the State Personnel Board are given force and effect of law and are

presumed valid unless shown to be unreasonable or not in conformance with the authorizing legislation. *Moore v. W. Va. Dep't of Health & Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). *See Callaghan v. W. Va. Civil Serv. Comm'n*, 273 S.E.2d 72 (W. Va. 1980).

Grievant is of the opinion that Respondent's actions in compensating him less than the comparative employee is improper. Grievant wants an increase in his salary. This is not a unique or unprecedented grievance, this issue has previously been addressed by this Grievance Board. 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 Pers.*, 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).

Grievant concedes that he has been paid within the pay grade required for his classification at all times. Grievant further concedes that Respondent has no obligation to pay employees within the same classification the same salary as long as they are all paid within the pay grade required for their classification. Nevertheless, Grievant alleges that Respondent violated the West Virginia Equal Pay Act.

Salaries may be affected by numerous factors not exclusively limited to experience and training. 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*.

Grievant is desirous of an increase in his salary. However, Grievant offered no evidence, other than the alleged pay disparity, to support his claim for a pay increase, and, in fact, refused to even name the employee to whom he wishes to be compared. Further, Grievant conceded that the unnamed employee is retired and is no longer employed by Respondent, thereby negating even a pretense of a current claim of unequal pay. Grievant offered no evidence that Respondent's actions in this matter are not in compliance with prevailing authority. "[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 v. W. Va. Div. of Health and Div. of Pers.*, 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). Grievant's contention that the unnamed employee was unable to perform certain duties is irrelevant, since Grievant concedes that this person was an employee in the same classification, and did not challenge his classification as such. In a nutshell, Grievant contends his situation is unfair.

Grievant, bearing the burden of proof in this non-disciplinary grievance, has failed to introduce any evidence that establishes wrongdoing or illegality by Respondent. The salary of Grievant is lawful. Grievant has failed to prove, by a preponderance of the evidence, that Respondent has any legal obligation to increase his pay. This grievance must be denied in accordance with the facts, applicable law, and circumstances as discussed above. Grievant has not established that his salary is in violation of any applicable and controlling statute, rule or regulation. Grievant is being paid in accordance with the pay scale for his classification. A mandatory duty to grant Grievant a salary increase, to the level comparable to that of another unnamed employee, was not established.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary case, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

2. The West Virginia State Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle

of equal pay for equal work. W. VA. CODE § 29-6-10(2). The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

3. "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 was 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).

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. W. Va. Div. of Health and Div. of Pers.*, 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 and Div. of Pers.*, 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. Pursuant to the preponderance of the evidence established in this grievance, Respondent is not required to grant Grievant a pay increase to the level comparable to that of an unidentified employee, who has since retired and whom it was proffered earned more money for the same job classification.

7. Grievant has failed to establish, by a preponderance of the evidence, that his salary is in violation of any mandatory rule, regulation or law.

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: July 31, 2012

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Landon R. Brown
Administrative Law Judge