

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TINA R. DENNISON,
Grievant,**

v.

Docket No. 2017-0901-DVA

**DEPARTMENT OF VETERANS ASSISTANCE,
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Tina R. Dennison, filed this grievance against her employer the Department of Veteran Assistance (“DVA”), Respondent, on August 29, 2016. The Statement of Grievance reads “I was hired on 08/20/2016 as a reinstatement. I have been given a salary SIGNIFICANTLY less than I made in 2011 when I left the State employment”. The Relief Sought reads “I would like to be reinstated to my salary that I had in 2011. I would like to be made whole in every way.”

A hearing was held at level one on September 13, 2016, and the grievance was denied at that level on January 4, 2017. Grievant filed a level three appeal based upon the level one decision. A grievant may not skip level two and proceed directly to level three after a level one hearing was conducted. A level two mediation session was held on December 29, 2016. Grievant appealed to level three on January 4, 2017. An *Order of Joinder* was entered joining the Division of Personnel (“DOP”) as an indispensable party on January 26, 2017. A level three hearing was held before the undersigned Administrative Law Judge on May 8, 2016, in the Grievance Board’s Charleston office. Grievant appeared *pro se*.¹ Respondent Department of Veterans Assistance was

¹ “*Pro se*” is translated from Latin as “for oneself” and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black’s Law Dictionary*,

represented by Mark S. Weiler, Assistant Attorney General. Respondent Division of Personnel was represented by Wendy Campbell, Assistant Director, Classification and Compensation Unit with legal counsel, Karen O'Sullivan Thornton, Assistant Attorney General. Respondent DVA requested and was provided an extension for submission of fact/law proposals. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about June 16, 2017. All parties submitted fact/law proposals.

Synopsis

Grievant was previously employed with a different West Virginia State agency. Grievant asserts that she should be reinstated to employment in State government making the same salary she made when she voluntarily resigned from employment. Grievant was hired for a classified full-time permanent employee position within the salary range of the position as posted. Grievant did not establish by a preponderance of the evidence that she is entitled to the salary she was making when she voluntarily resigned from State government nearly six years ago, nor at the salary she was making as a temporary employee. Grievant's hiring within the salary range of the posted classified position follows applicable policy, rule and law regarding pay on reinstatement of a former State employee. The grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

8th Edition, 2004 Thompson/West, page 1258.

Findings of Fact

1. Grievant occupies a position in the Department of Veteran Assistance (“DVA”) at the West Virginia Veterans Home (“Veterans Home”) in Barboursville, WV. Grievant is classified as a Licensed Practical Nurse (“LPN”).

2. Grievant was previously a State employee employed by the Department of Health and Human Resources (“DHHR”) from 2004 to 2011. She voluntarily resigned from her position at the DHHR effective August 7, 2011. At the time of her resignation, Grievant’s salary was approximately \$15.77/hour. See Grievant testimony.

3. On or about May 1, 2016, Grievant began working for the DVA as a temporary licensed practical nurse at the West Virginia Veterans Home located in Barboursville, West Virginia. See Grievant testimony and DOP Ex 5 and 6.

4. Beverly Crews, former employee of the DVA, testified that she sat in on the interview when Grievant was hired as a temporary employee and that her notes indicated that the salary would be \$14.00/hour.

5. Grievant was hired as a temporary employee to work as a LPN at a salary of \$14.00/hour with no benefits. Grievant did not receive health insurance, retirement, annual, or sick leave benefits. See Grievant’s Testimony; DOP Ex 5 and 6.

6. Sometime after her being hired as a as a temporary employee, Grievant applied for a posted LPN position. The position was posted on June 13, 2016, as a Licensed Practical Nurse Classified Position, pay grade 8, \$21,504 - \$39,792.² See DVA Ex 2.

² The job posting specified salary information including the pay grade and pay range.

7. In August 2016, Grievant was hired by Respondent DVA as a classified full-time permanent employee with benefits.

8. W. VA. CODE § 29-6-10 authorizes the W. Va. Division of Personnel (“DOP”) to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies which utilize such positions must adhere to that plan in making assignments to their employees. The Division of Personnel’s Rules related to compensation state that they apply to employees in the classified service (143 C.S.R. 1 § 5).

9. Respondent DVA submitted the necessary personnel transaction to DOP to reinstate Grievant. The transaction included backup documentation which contained, among other things, a letter from Thomas L. McBride, Administrator, Veterans Home, providing the starting salary for the Grievant would be \$27,040.00/year, which equates to \$13.00/hour. See DOP Ex 5-6 and L-3 Testimony.

10. Grievant was reinstated to classified full-time permanent employee position on August 20, 2016. Grievant’s classified full-time permanent position included State benefits. The \$27,040.00 annual salary is 25.74% above the minimum pay rate of the pay range for pay grade 8.³

11. The salary range set by the W. Va. Division of Personnel for LPNs at the WVVH is \$21,504 - \$39,792. The State Compensation Plan provides for a special hiring rate for LPN’s at DHHR’s Sharpe and Bateman Hospitals and at DVA’s Veterans Nursing

³ An employing agency has the discretion to pay above the minimum pay rate if the employee has qualifying experience. See DOP Ex 1 and testimony Rebecca White.

Facility in Clarksburg. There is not a special hiring rate for LPN's at the Veterans Home. See DOP Ex 8 and testimony Rebecca (Becky) White Manager, DOP.

12. DOP reviewed the submitted documentation requesting Grievant's starting salary for the full-time LPN position. No specific promises were made to Grievant indicating her starting salary would be above salary stated on the job posting.

13. Grievant and one other DVA employee are the highest paid LPN's at the Veterans Home. These two DVA employees are each paid \$13 /hour. See DVA Ex 6 and Thomas McBride testimony.

14. DOP Administrative Rule, W. Va. Code R. §143-1-5.8, reads: "Pay on Reinstatement. - - The salary for an employee who is reinstated shall be established in accordance with subdivision 5.4.b of this rule." See DOP Ex 1.

15. W. Va. Code R. §143-1-5.4. reads:

Entry Salary. - - The entry salary for any employee shall be no less than the minimum of the compensation range for the job classification. The Director may authorize appointment above the minimum for an individual possessing pertinent training or experience above the minimum required for the class. The Director may authorize appointment at a rate above the marker rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

See DOP Ex 1.

16. Grievant was unable to identify any law, rule or policy that required Respondent DVA to reinstate her at the salary she was making when she left DHHR in 2011, nor at the same rate she was being paid as a temporary employee. See Grievant's L-3 testimony.

17. There is no DOP law, rule or policy that requires an employing agency to reinstate a former State employee to the salary they were receiving when they left State

government employed by a different state agency. Testimony Rebecca (Becky) White, Manager, DOP.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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). "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) Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant asserts that she should have been reinstated to employment in State government making the same salary she made when she voluntarily resigned from Department of Health and Human Resources (DHHR) nearly six years ago; however, Grievant can point to no law, rule or policy that requires Respondent DVA to reinstate her receiving the same salary she made when she worked for DHHR.

W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies which utilize such positions must adhere to that plan in making assignments to their employees. *Patton v. Consol. Pub. Retirement Bd.*, Docket

No. 2010-0882-DOA (July 12, 2011); *Toney v. W. Va. Dep't of Health & Human Resources*, Docket No. 93-HHR-460 (June 17, 1994).

DOP Administrative Rule, W. Va. Code R. §143-1-5.8, reads: “Pay on Reinstatement. - - The salary for an employee who is reinstated shall be established in accordance with subdivision 5.4.b of this rule.” W. Va. Code R. §143-1-5.4. reads:

Entry Salary. - - The entry salary for any employee shall be no less than the minimum of the compensation range for the job classification. The Director may authorize appointment above the minimum for an individual possessing pertinent training or experience above the minimum required for the class. The Director may authorize appointment at a rate above the marker rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

Respondent DVA hired Grievant to a permanent LPN position, pay grade 8 at the Veterans Home on August 20, 2016, with the salary of \$27,040 annually, which translates to \$13.00/hour. DOP treated the hiring of Grievant to a full-time classified LPN position as being a “reinstatement.” (See Rebecca White Testimony); (See DOP Exhibit 5 - Internal Employee Placement Review Documents); (See DOP Administrative Rule, W. Va. Code R § 143-1-3.75). The salary for an employee who is reinstated is to be established in accordance with W. Va. Code R § 143-1-5.4b, which indicates Grievant’s starting salary must be no less than the minimum compensation range for the LPN classification. An employing State agency does have the discretion to request a higher appointment salary for authorized appointments above the minimum range if such appointment is warranted by training, experience or need. See Administrative Rule of the WV Division of Personnel, DOP Ex 1. Proper authorization is required. Such increases are subject to authorization or limitation of the appointing authority, the State Personnel Board (aka DOP) and/or Governor’s Office. E.g. see DOP’s Pay Plan and

Salary Administrative rules. Further, it may be prudent to note that “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).

The pay range for a pay grade 8 position is \$21,504 - \$39,792 annually. Grievant's salary complies with the DOP's Rule regarding Pay on Reinstatement. Grievant's salary represents an approximate 25.74% increase over the minimum of the pay range for pay grade 8 to which the LPN classification is assigned.

Grievant testified she was never promised \$15.77 per hour. Grievant testified she was never promised \$14.00 per hour with benefits. Grievant is not relying on a false representation or concealment of material fact. Grievant testified that she was aware of the pay range for LPNs at the West Virginia Veterans Home and that Respondent had the discretion to hire LPNs within the identified pay range. Grievant's current salary is above the minimum salary for her assigned pay grade. (DOP Exhibits; also see Rebecca White Testimony.) Respondent established Grievant's salary is within the salary range identified on the job posting. DOP signed off and/or approved the Grievant's starting salary. Grievant's salary complies with the DOP's rule regarding pay on reinstatement. Grievant failed to meet her burden of proof. Further, the undersigned is not aware of any law, rule or regulation that requires that Respondent DVA to pay Grievant the same hourly rate she received while employed at Mildred Bateman Hospital in 2011. Grievant's hiring within the salary range of the classified position posted is in compliance with DOP law, rule and policy regarding reinstatement of a former State employee.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id*

2. W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies which utilize such positions must adhere to that plan in making assignments to their employees. *Patton v. Consol. Pub. Retirement Bd.*, Docket No. 2010-0882-DOA (July 12, 2011); *Toney v. W. Va. Dep't of Health & Human Resources*, Docket No. 93-HHR-460 (June 17, 1994).

3. The DOP Administrative Rule, W. Va. Code R. §143-1-5.8, reads: "Pay on Reinstatement. - - The salary for an employee who is reinstated shall be established in accordance with subdivision 5.4.b of this rule." W. Va. Code R. §143-1-5.4. reads:

Entry Salary. - - The entry salary for any employee shall be no less than the minimum of the compensation range for the job classification. The Director may authorize appointment above the minimum for an individual possessing pertinent training or experience above the minimum required for the class. The Director may authorize appointment at a rate above the marker rate where the appointing authority can substantiate severe or unusual recruiting difficulties for the job class.

4. Grievant has not shown, by a preponderance of the evidence, that she is entitled to reinstatement at the salary she was making when she voluntarily resigned from State government nearly six years ago, nor at the salary she was making as a temporary employee.

5. 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). The undersigned has no authority in this case to require Respondent to exercise its discretion to recommend that Grievant be paid a higher salary.

6. Grievant failed to identify a law, rule or policy that would require Respondent DVA to pay her either of the salaries she previously make under alternative working conditions.

7. Grievant's hiring, within the salary range of the posted classified position, follows applicable policy, rule and law regarding reinstatement of a former State employee.

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: June 23, 2017

Landon R. Brown
Administrative Law Judge