

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FRED M. GWILLIAMS
Grievant,

v.

Docket No. 2017-1590-MAPS

**REGIONAL JAIL AND CORRECTIONAL FACILITY
AUTHORITY/WESTERN REGIONAL JAIL
and DIVISION OF PERSONNEL,**
Respondents.

DECISION

Fred M. Gwilliams, Grievant, filed this grievance against his employer, Regional Jail and Correctional Facility Authority/Western Regional Jail (“RJA”), Respondent, on January 25, 2017, protesting his salary. The original grievance statement provides, “I started working at WRJ/RJA on 23 February 2015 starting wage of \$23088.00 per year. Since my hiring date several individuals were hired at SCRJ at rate of \$29900.00 per year and individuals at SWRJ at a considerable amount higher than my salary. Grievance is Unfair wages” [sic]. The Relief Sought reads, “Equal pay of \$29900.00 and back pay from my start date of 02-23-2015” [sic].

A conference was held at level one and the grievance was denied at that level on February 24, 2017. Grievant appealed to level two on or about March 2, 2017, and a mediation session was held on April 7, 2017. An *Order of Joinder and Order of Unsuccessful Mediation* was entered on April 10, 2017. The West Virginia Division of Personnel (“DOP”) was joined as a necessary Respondent party. Grievant appealed to level three on April 24, 2017. A level three hearing was held before the undersigned Administrative Law Judge on September 18, 2017, at the Grievance Board’s Charleston

office. Grievant appeared *pro se*.¹ Respondent RJA was represented by William R. Valentino, Assistant Attorney General. Respondent DOP was represented by Wendy Campbell, Assistant Director and its counsel, Karen O'Sullivan Thornton, Assistant Attorney General. 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 October 13, 2017. All parties submitted fact/law proposals.

Synopsis

Grievant avers that he commenced employment with Respondent's Western Regional Jail in the classification of Building Maintenance Supervisor 1 ("BMS1") at a salary of \$23,088 per year. He has become aware that some other individuals were subsequently hired as BMS1s at the South Central Regional Jail with a starting salary of \$29,900 per year and further discovered that other similarly situated employees at the Southwestern Regional Jail are paid an unspecified amount more than his annual salary. Grievant contends this constitutes unfair wages and seeks equal pay of \$29,900 per year as relief as well as back pay to his date of hire.

It is well established that employees in the same classification, who are performing the same or similar 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. *Largent v. W. Va. Div. of Health and Div. of Pers.*, 192 W. Va. 239, 452 S.E.2d 42 (1994) This has

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

been a common issue before the Grievance Board and the controlling case law is clearly established. Grievant has at all times relevant to this grievance matter been paid within the pay range of the pay grade assigned to the Building Maintenance Supervisor 1 classification. 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 occupies a position with the RJA at the Western Regional Jail ("WRJ") in Barboursville, WV, that is classified as a Building Maintenance Supervisor 1 (BMS1), pay grade 9. Grievant Testimony, DOP Ex 1-3

2. Grievant was previously a State employee employed by the RJA at WRJ as a Correctional Officer 1, pay grade 9 from September 16, 2013, to July 2, 2014. He was initially hired with a starting salary of \$10.85/hour. Grievant received a salary adjustment on July 1, 2014, that brought his salary to \$11.10/hour. L-3 Testimony Grievant, DOP Ex 2, Testimony Wendy Campbell, Assistant Director, Classification and Compensation Section, DOP

3. Grievant voluntarily resigned from his position on July 2, 2014. At the time of his resignation, Grievant's salary was \$11.10/hour. L-3 Testimony Grievant and Campbell and DOP Ex 2

4. Grievant was rehired by Respondent RJA as a Building Maintenance Supervisor 1 effective February 23, 2015, at a salary of \$11.10/hour, the same salary he

was making when he left RJA in 2014. *Id* L-3 Testimony, DOP Ex 1-2

5. Grievant sought a higher salary when he was rehired; however, he was told that \$11.10/hour was the most that WRJ would pay him. He accepted the offer of the job and the salary and began working on February 23, 2015. See Grievant Testimony, DOP Ex 1-2

6. Respondent RJA submitted the necessary personnel transaction to Respondent DOP to rehire Grievant. In the justification section of the transaction the following language was included “Employee hired above entry-level salary as \$23,088.00 was best negotiated salary”. See DOP Ex 1, Testimony Campbell.

7. The BMS1 position is a pay grade 9, and the compensation range for pay grade 9 is \$22,584 - \$41,784. Grievant is paid within the range of the paygrade assigned to the classification of the position he occupies and was hired with a salary above the minimum for the paygrade. See DOP Ex 3, Testimony Campbell.

8. Shortly after Grievant began working at Western Regional Jail (“WRJ”) he was sent to South Central Regional Jail (“SCRJ”) to assist with building maintenance issues since that facility was having difficulty hiring building maintenance staff.

9. Grievant discovered that other individuals were hired as BMS1s at the South Central Regional Jail with a starting salary of \$29,900 per year and that other similarly situated employees at the Southwestern Regional Jail are paid an unspecified amount more than his annual salary.

10. Respondent RJA offered a rationale for why employees at SCRJ might be paid at a higher salary. L-3 Testimony April Darnell, RJA Human Resources Director.

11. SCRJ has had a high employee turnover rate. As such, a decision was made to bring new hires in at a higher rate of pay in an effort to retain them for a longer period of time. See Testimony Darnell. Respondent RJA maintains that salary differentials between the Western Regional Jail and South Central Regional Jail are the result of market forces, lack of retention, and general conditions of work at the South Central Regional Jail which require higher salaries to recruit and retain employees.

12. After the present grievance was filed, Human Resources Director Darnell, reviewed information on Building Maintenance Supervisor positions. Darnell determined that the salary differentials did show a 20% difference between Grievant and other current employees in the same job classification. Ms. Darnell submitted Pay Plan Policy ("PPP")² discretionary pay increase requests,³ based on the Internal Equity provision of the policy, for employees who met the requirements of such.⁴ See Testimony Darnell, DOP Ex 4.

13. Respondent RJA submitted a request to DOP for Grievant to receive a 10% Internal Equity discretionary pay increase on April 20, 2017. The request was approved through all levels of approval with final approval by the Governor's Office on May 3, 2017. See DOP Ex 6, Testimony Campbell.

14. Respondent RJA submitted the necessary personnel transaction to

² The PPP is the uniform policy for the use and application of the salary schedule for the classified service consistent with merit principles as established by the DOP. See Testimony Campbell.

³ An agency is under no obligation to seek discretionary pay increases for its employees. See Testimony Campbell.

⁴ It was unclear from Human Resources Director Darnell's testimony whether this was done just for employees at WRJ or at all RJA facilities. See Testimony Darnell.

effectuate the discretionary pay increase for Grievant with an effective date of May 27, 2017. See DOP Ex 7.

15. Grievant has at all times relevant to this grievance matter been paid within the pay range of the pay grade assigned to the Building Maintenance Supervisor 1 classification. See Testimony Darnell, Testimony Campbell.

16. While the Respondent RJA must comply with Respondent DOP law, rules and policies, it is Respondent RJA (not the DOP) that sets the starting salaries of its employees. Respondent DOP reviews Respondent RJA's personnel transactions to ensure that the starting salaries comply with applicable state employment law, rule and policy. See Testimony Campbell.

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 asserts that he should receive a pay increase to bring his salary to the same salary as employees hired into Building Maintenance Supervisor positions at SCRJ; however, Grievant can point to no law, rule or policy that requires RJA to provide him with the salary increase he seeks. In this case, the RJA rehired Grievant at a salary of \$11.10/hour, \$1,924.00/month or \$23,088/year. The Building Maintenance Supervisor 1 position is assigned to pay grade 9. The compensation range for pay grade 9 is \$22,584 - \$41,784. The RJA used its discretion to hire Grievant with a salary above the minimum of the compensation range.

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).

This has been a common issue before the Grievance Board and the controlling case law is clearly established. The principle of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. See *AFSCME v. Civil Serv. Comm'n.*, 181 W. Va. 8, 380 S.E.2d 43 (1989). In *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994) the West Virginia Supreme Court of Appeals noted that W. Va. 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. See *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); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011).

Grievant has at all times relevant to this grievance matter been paid within the pay range of the pay grade assigned to the Building Maintenance Supervisor 1 classification. Furthermore, any issue(s) relating to the “Internal Equity” provision of the Division of Personnel Pay Plan Implementation Policy have been resolved in favor of Grievant. This policy states:

3. 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.

State employers may grant salary increases of up to 10% to employees who are paid at least 20% less than similarly situated employees, pursuant to the Pay Plan Implementation Policy; however, the granting of such increases is purely within the discretion of the employing agency. Respondent determined that Grievant was paid 20% less than other BMS1s. Respondent acted outside the grievance process to request a discretionary pay raise of 10% for Grievant pursuant to this policy, which request was approved. An agency's decision to recommend or not recommend a discretionary pay increase [and the amount of any such increase] generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008.) Furthermore, the Grievance Board has no authority to require RJA to exercise its discretion to recommend that Grievant be paid a higher salary. *Dennison v. Dep't of Veterans Assistance*, Docket No. 2017-0901-DVA (June 23, 2017). Nevertheless, Respondent RJA submitted a request to DOP for Grievant to receive a 10% Internal Equity discretionary pay increase on April 20, 2017. The request was approved through all levels of approval with final approval by the Governor's Office on May 3, 2017. Respondent RJA submitted the necessary personnel transaction to effectuate the discretionary pay increase for Grievant with an effective date of May 27, 2017.

Grievant failed to establish that his current salary is in violation of any applicable and controlling statute, rule or regulation.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of 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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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, the employer has not met its burden. *Id.*

2. 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).

3. "[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. 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 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); *Celestine v. State Police*, Docket No. 2009-0256-MAPS (2009). See *AFSCME v. Civil Serv. Comm’n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

4. Grievant’s hiring by Respondent RJA, within the compensation range of the posted classified position, is consistent with applicable policy, rule and law.

5. Grievant failed to prove by a preponderance of the evidence that he is currently entitled to any mandatory pay increase in that his salary was within the pay range of the pay grade assigned to his job classification.

6. An agency’s decision to recommend or not recommend a discretionary pay increase [and the amount of any such increase] generally is not grievable. *Lucas v. Dep’t of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008.) Furthermore, the Grievance Board has no authority to require Respondent to exercise its discretion to

recommend that Grievant be paid a higher salary. *Dennison v. Dep't of Veterans Assistance*, Docket No. 2017-0901-DVA (June 23, 2017).

7. Grievant has not established by a preponderance of the evidence that he is entitled to additional salary equal to the purported salaries of identified employees at SCRJ. Grievant failed to establish that his current salary is in violation of any applicable and controlling statute, rule or regulation.

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: November 7, 2017

Landon R. Brown
Administrative Law Judge