

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**RICHARD JONES, et al.,  
Grievants,**

**v.**

**DOCKET NO. 2016-0225-CONS**

**WEST VIRGINIA UNIVERSITY,  
Respondent.**

**DECISION**

A number of grievances were filed by employees on August 26, 27, and 29, 2015, against their employer, West Virginia University, which were consolidated for hearing and decision. The statements of grievance generally claim discrimination in compensation, asserting that other employees with whom Grievants work are receiving additional compensation for outside work experience. The relief sought by Grievants is additional compensation for outside work experience, and backpay with interest.

A hearing was held at level one on September 15, 2015, and a decision denying the grievance was issued at that level on September 30, 2015 . Grievants appealed to level two on October 9, 2015. Thereafter, other grievances were filed involving the same issue, and these grievances were waived to level two and consolidated with this grievance. A mediation session was held on July 12, 2016. Grievants appealed to level three on July 25, 2016.

A pre-hearing telephonic conference was held by the undersigned Administrative Law Judge on February 17, 2017, with Respondent's counsel and Grievants' representatives to discuss how to proceed with this matter involving such a large number

of Grievants.<sup>1</sup> At that time, Grievants were given until March 24, 2017, to state, in writing, what additional facts needed to be placed into the record, a statement of the laws, rules, policies, or guidelines they were asserting had been violated, and the authority of the undersigned to grant relief. Respondent was given two weeks from receipt to submit a response. Some of the Grievants appeared *pro se*, with designated employee representatives, and some were represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. A few of the Grievants' employee representatives submitted the required written statement, and Respondent submitted a response on April 21, 2017. After the March deadline had passed, Patrick E. McFarland, Esquire, entered an appearance on behalf of the Grievants represented by the West Virginia Education Association, and requested additional time to submit a written statement. This request was granted, and the deadline for submissions was extended to May 17, 2017. When this deadline passed with no additional submissions from any Grievant, the undersigned concluded that an hearing at level three was unnecessary, and set a deadline of August 14, 2017, for submission of Proposed Findings of Fact and Conclusions of Law. The undersigned later discovered that Mr. McFarland had not been sent a copy of this Order, and the deadline for submissions

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<sup>1</sup> The Grievants are Richard Jones, Roberta Bartolina, Jeffrey Bolyard, Christina Bosley, Eva Boyce, Chandel Hawley, Larry Hawley, Scott Heinze, Lisa Huey, Argyle Sheets, Richard Weber, Kerry Whoolery, Jr., Sandra Wise, Gary Swinburn, Glen Blon, Sr., Ronald Bishop, Donna Cadier, Christopher Chico, Ralph Decker, Randy Dodson, William Exline, Bradley Freeze, Dustin Hartley, Charles Lanham, Jr., Marty Lipscomb, Michael Moneypenny, Michael Nixon, Joseph Pompura, Susan Ramsey, Michael Robinson, Nicole Robinson, Darnell Singleton, Aaron Srednicki, Sherrie Stohler, Willard Teets, Kenneth Wade, Lori Keslar, Elias Matz, Tiersten Stemple, Thomas Shorow, Roy Brockett, David Collins, Keith Jenkins, Robert Loya, James Mitchell, Jr., James Stevens, Kent Hastings, Robert Malone II, Paul Fitzpatrick II, Isaac Evans, Brian Bland, Robert Lawson, Arthur Sterling, Jr., Randall Nestor, Randy Nestor, Chad Hall, Charles Ice, Jerry Lambert, Robert Readd, Dwayne Field, Wesley Moore, Juan DeLeon, James McNeill, Charles Shrader II, James Dawson, Scott Calvert, Raymond Ebner, Rodney Morris, Delores Richards, Diana Lawson, Barbara Cook, Amanda Fitchett, Florence Waxler, and Diana Ridgway.

was extended to September 8, 2017. No individual Grievants or employee representatives submitted written proposals, and this matter became mature for decision on September 8, 2017.

### **Synopsis**

Grievants believe they have been discriminated against and should be awarded a pay increase because new employees may be receiving a starting salary above entry level for the pay grade based on several factors. Grievants did not demonstrate that Respondent has violated any law, rule, regulation, policy, or procedure, or that they are similarly situated to the new employees. More importantly, however, Respondent is not required to compensate all employees at the same level. All that is required is that the employees be properly classified and be paid within the pay range for the classification's pay grade.

The following Findings of Fact are properly made from the record developed at level one.

### **Findings of Fact**

1. Grievants are employed by West Virginia University ("WVU") in various classifications, including Trades Specialist I and II, Trades Specialist Lead, Campus Service Worker, PRT<sup>2</sup> Electronics Specialist I and III, Assistant PRT Operator, PRT Systems Operator, Boiler Technician, Electronics Technician II and III, Technician II, PRT Technician I, II, and III, and PRT Systems Supervisor.

2. Grievants' salaries are all within the pay range for their pay grades.

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<sup>2</sup> PRT is an acronym for Personal Rapid Transit, a unique transportation system that runs through the WVU campus.

3. In an effort to address recruitment and retention issues, to recruit the best and brightest talent, and to address a disparity between starting salaries and local market conditions, in mid-May 2015, WVU put in effect changes to the recruitment and hiring process for new employees. WVU began evaluating factors such as market rate, an applicant's educational level, certifications, prior work experience, and references in determining the starting salary for new employees, and offering a salary above the entry level for the pay grade for the position where it was determined to be appropriate.

4. The record does not reflect when any Grievant was hired, or the salary of any Grievant when hired. None of the Grievants was hired after mid-May 2015.

5. Grievants' salaries have not been adjusted as a result of this change in the recruitment and hiring process.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

Respondent argued Grievants are not similarly situated to newly hired employees, and that it may set salaries based on many factors, so long as employees are properly classified and are paid within the pay grade for the classification. Those Grievants who submitted a written explanation of the legal basis for their claims asserted that they had been discriminated against because they had not been offered a salary higher than the minimum for the pay grade when hired as some new hires have, and that they have been told that, if they bid on a job or are promoted, their years of experience will not be evaluated in determining their salary. Finally, these Grievants asserted that they were being discriminated against because some of the other Grievants in this matter who are in a different department have had pay corrections, while they have not. As to this third point, the record contains no evidence to support this assertion, and even were it true, there is no evidence as to the reason for any salary adjustment or that all these Grievants are similarly situated. This argument will not be addressed further.

As to the argument that Grievants have been told their experience will not be considered for salary determination purposes when bidding on a job or when they are promoted, what Grievants have been told may happen in the future is not grievable. This is speculative and no relief is available until an employee is actually offered a position and a salary. The undersigned would note, however, as Respondent's witnesses pointed out, that there are rules in place with regard to salary advancements which Respondent must follow when an employee is promoted.

Grievants pointed to WEST VIRGINIA CODE §§ 18B-9-1, 18B-9-2, and 18B-9-4 as support for their arguments. These CODE Sections are designed to implement a "complete, uniform system of personnel classification and compensation," and set forth

certain guidelines, none of which support Grievants' arguments. To the contrary, WEST VIRGINIA CODE § 18B-9-4 specifically states that "despite any differences in salary that may occur, a classified employee is equitably compensated in relation to other classified employees in the same pay grade if" several conditions exist, the first of which is, "[h]is or her annual salary is at least the minimum salary that was required for his or her pay grade and years of experience on July 1, 2001, on the salary schedule included in this section." This statutory provision is echoed in the Procedural Rules governing classification and compensation of classified employees, stating that any classified employee "whose base salary is at least at the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade. . .". 133 C.S.R. 8, §19.4.

These provisions are in line with the well established legal principal in this state 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 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<sup>3</sup> is not required to pay these employees

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<sup>3</sup> The Grievance Board has specifically indicated that the principles set forth in *Largent, supra.*, apply to higher education employees. *Hartley v. Bd. of Trustees/W. Va.*

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).

Otherwise, Grievants have not alleged a specific violation of any statute, rule, regulation, or policy, nor have they alleged that they are somehow entitled to a pay increase. Absent some showing that they were entitled to a pay increase, the undersigned has no authority to hand out pay raises. “The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources*, Docket No. 97-HHR-461 (June 9, 1999).” *Frame v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

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*Graduate College*, Docket No. 96-BOT-347 (Mar. 31, 1997). Indeed, higher education classified employees are assigned a classification and pay grade with a pay range just as state employees are assigned a classification and pay grade with a pay range.

Grievants assert they have been discriminated against. 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).

First, Grievants may compare themselves only to employees in the same classification as each Grievant, which they have not done. “[E]mployees who do not have the same classifications are not performing ‘like assignments and duties’ . . . and cannot show they are similarly situated for discrimination and favoritism purposes.[’]” *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam*), *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.*, Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.*, Docket No. 2013-2251-CONS (July 22, 2014).” *Crockett and May v. Wayne County Bd. of Educ.*, Docket No. 2014-1698-CONS (Feb. 19, 2015). The record reflects that Grievants are aware of only one Campus Service Worker

and two new employees in the plumbing department, physical plant, whose classifications were not identified, who may have been hired at a salary above the minimum for the pay grade.

Second, Grievants did not demonstrate that the same set of circumstances existed at the time they were hired as the circumstances when the new recruitment and hiring process was put in place. More importantly, the Grievance Board has specifically stated that “[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). Pay differences may be “based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interest of the employer. See generally *West Virginia University v. Decker*, [191] W. Va. [567], 447 S.E.2d 259 (1994).” *Largent, supra*. “In the area of salary adjustments, an employer should be able to take into account different credentials and different qualifications of employees. Imposing too many restrictions on employers at the hiring, or salary compensation level has a counterproductive effect on the goals of civil right statutes in general.” *Decker, supra*. Offering new hires a higher starting salary than any Grievant was offered does not constitute discrimination.

The following Conclusions of Law support the Decision reached.

#### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

2. "An employer may pay like-classified employees different salaries as long as these salaries are within the pay grade for that classification. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994)." *Hartley v. Bd. of Trustees/W. Va. Graduate College*, Docket No. 96-BOT-347 (Mar. 31, 1997).

3. Grievants did not demonstrate that Respondent violated any law, rule, regulation, policy or procedure, or that they otherwise are entitled to a pay increase.

4. 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).

5. “[E]mployees who do not have the same classifications are not performing ‘like assignments and duties’ . . . and cannot show they are similarly situated for discrimination and favoritism purposes.[’] *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999)(*per curiam*), *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.*, Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark, et al., v. Preston County Bd. of Educ.*, Docket No. 2013-2251-CONS (July 22, 2014).” *Crockett and May v. Wayne County Bd. of Educ.*, Docket No. 2014-1698-CONS (Feb. 19, 2015).

6. Pay differences may be “based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interest of the employer. *See generally West Virginia University v. Decker*, [191] W. Va. [567], 447 S.E.2d 259 (1994).” *Largent, supra*. “In the area of salary adjustments, an employer should be able to take into account different credentials and different qualifications of employees. Imposing too many restrictions on employers at the hiring, or salary compensation level has a counterproductive effect on the goals of civil right statutes in general.” *Decker, supra*.

7. “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).

8. Offering new hires a higher starting salary than any Grievant was offered does not constitute discrimination.

9. Grievants did not demonstrate they are entitled to a salary increase.

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).

**Date: October 18, 2017**

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**BRENDA L. GOULD**  
**Deputy Chief Administrative Law Judge**