

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TODD W. KEPLINGER,
Grievant,**

v.

Docket No. 2017-0795-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Todd W. Keplinger, filed this grievance on August 22, 2016, challenging his ineligibility in receiving a salary advancement under the internal equity provision of the West Virginia Division of Personnel's pay plan policy. Specifically, the prohibition against rounding up the percentage difference between employees' salaries to determine eligibility. Grievant seeks a 10% discretionary pay increase based on his long-term credentials or some other form of a discretionary pay raise.

This grievance was waived to Level Two on August 22, 2016, by the Level One Grievance Evaluator. A Level Two mediation session was conducted on November 2, 2016. Grievant perfected his appeal to Level Three on November 23, 2016. The West Virginia Division of Personnel was joined as a party respondent on September 1, 2016. Subsequently, the undersigned dismissed the Division of Personnel as an indispensable party on March 20, 2017. A Level Three evidentiary hearing was conducted before the undersigned on March 24, 2017, at the Grievance Board's Westover office. Grievant appeared *pro se*. The West Virginia Division of Highways appeared by its counsel, Jason

Workman. This case became mature for consideration upon receipt of the parties' fact/law proposals on April 28, 2017.

Synopsis

Grievant is challenging Respondent's failure to recommend to the West Virginia Division of Personnel a discretionary pay raise. Grievant is also challenging the Division of Personnel's prohibition against rounding up the percentage difference between employees' salaries to determine eligibility under the internal equity provision of the pay plan policy. The record established that Respondent used policy information provided by the Division of Personnel that a 19% salary difference could not be rounded up to meet the policy requirement of a 20% salary difference to qualify for the pay plan policy. Accordingly, Respondent did not recommend a discretionary pay increase for Grievant to the Division of Personnel. This action was not arbitrary and capricious or an abuse of discretion.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is classified as a Transportation Engineering Technologist.
2. Grievant is challenging West Virginia Division of Personnel's pay plan policy including his ineligibility in receiving a salary advancement under the internal equity policy provision of the policy. In particular, he contests the prohibition against rounding up the percentage difference between employees' salaries to determine eligibility. Grievant is not disputing that he is paid within the appropriate pay grade for his classification.

3. The West Virginia Division of Personnel's pay plan policy was updated in 2005. Certain avenues for pay increases in the policy were frozen and salary adjustments could not be provided under certain sections until 2011. One of the unfrozen salary advancement mechanisms was for internal equity increases. The West Virginia Division of Personnel's pay plan provides a potential discretionary salary increase to employees in situations in which one or more permanent, current employees are paid 20% less than other permanent, current employees in the same job classification and in the same work unit. If the required conditions are met, the employee could receive up to a 10% salary increase if the employees are found to be comparable.

4. In the past, the Division of Personnel would round any fraction above 19% to 20% to meet the required difference in salary between the employee and a similarly situated employee after the freeze was lifted in 2011. When the West Virginia Division of Personnel's pay plan was revised in 2014, the Division of Personnel required agencies to strictly construe the 20% margin and the percentages were not allowed to be rounded up. No discretionary increases that fell below the required 20% margin were forwarded to the Division of Personnel for its review and approval because the increase would be denied. The most recent pay plan policy, adopted in 2016, sets out it must be a 20% difference between the employees' salaries and no rounding is permitted.

5. There is not any employee in Grievant's classification that makes 20% more than Grievant. Grievant is ineligible for the discretionary salary advancement based upon pay inequity. Due to Grievant's pay differential not meeting the 20% threshold, Grievant's paperwork was not submitted to the Division of Personnel for review and potential approval because he did meet the required conditions.

Discussion

As 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); *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 assert that Respondent's procedure in determining eligibility for pay increases to address internal equity was unsound. Grievant makes this argument based upon commonly observed rules regarding calculation and rounding in response to the Division of Highways failure to round his 19% up to 20% in order to qualify.¹ Pay increases, including those based upon internal equity, are discretionary ones by the Respondent. The West Virginia Division of Personnel is responsible for establishing and applying a system of compensation for position in the classified service. Specifically, the State code authorizes the State Personnel Board to promulgate rules for the implementation and the administration of the classified employees' job classification and pay plans for which the Personnel Board is responsible.

¹These calculation and rounding rules, as well as rounding procedures, are more fully set out in Grievant's Exhibits 18 and 19.

The record is clear that when the West Virginia Division of Personnel's pay plan was revised in 2014, the Division of Personnel required agencies to strictly construe the 20% margin and the percentages were not allowed to be rounded up. No discretionary increases that fell below the required 20% margin were forwarded by the Division of Highways to the Division of Personnel for its review and approval because the increase would be denied. The most recent pay plan policy, adopted in 2016, sets out it must be a 20% difference between the employees' salaries and no rounding is permitted.

The State Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by State Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and 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). The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the Division of Personnel. *Moore, supra*. Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

It is undisputed that there is not any employee in Grievant's classification that makes 20% more than Grievant. Grievant is ineligible for the discretionary salary advancement based upon pay inequity. Due to Grievant's pay differential not meeting the 20% threshold, Grievant's paperwork was not submitted to the Division of Personnel for review and

potential approval because he did meet the required conditions. The Division of Highways required compliance with the Division of Personnel's directive that the 20% internal equity threshold must be met under the policy cannot be viewed as arbitrary and capricious or an abuse of discretion.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As 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); *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 Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of the Division of Personnel. *Moore v. W. Va. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

3. Grievant did not meet his burden of proof to demonstrate that the Division of Highways failure to recommend a discretionary pay raise to the Division of Personnel was arbitrary and capricious or an abuse of discretion.

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: May 23, 2017

Ronald L. Reece
Administrative Law Judge