

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**LISA DRISCOLL,
Grievant,**

v.

DOCKET NO. 2017-2148-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES and
DIVISION OF PERSONNEL,
Respondents.**

DECISION

This grievance was filed by Grievant, Lisa Driscoll, on May 3, 2017. The statement of grievance reads, “[r]evision was made to WVDOP Pay Plan Policy on July 1, 2016. The first hire was made under this Policy recently in my assigned District. If an appointment above the minimum salary was made as laid out in Section III.A.1-2 a-d an inequality was created where a new employee is potentially earning more than senior staff and supervisors. Additionally, Section III.A. 3 allows for reemployment at a higher salary.” The relief sought by Grievant is “[a]n adjustment to my salary . . . in accordance to the experience that I had when I came to be employed by DHHR and the experience I’ve gained while employed by DHHR.”

A Notice of Waiver was issued at level one of the grievance procedure on May 25, 2017, waiving this grievance to level two. A mediation session was held on September 5, 2017, and Grievant appealed to level three on September 14, 2017. A level three hearing was held before the undersigned Administrative Law Judge on February 20, 2018, at the Grievance Board’s Westover, West Virginia office. Grievant appeared *pro se*, the

Department of Health and Human Resources was represented by James Wegman, Assistant Attorney General, and the Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on April 9, 2018, on receipt of the last of Respondents' written proposals. Grievant did not submit written proposals.

Synopsis

Grievant is employed by the Department of Health and Human Resources as a Child Protective Services Worker. Grievant discovered that newly employed Child Protective Services Workers have recently been hired at a starting salary higher than the minimum for the pay grade, based on experience and education, and higher than her salary after five years of employment. The Division of Personnel raised a timeliness defense arguing that Grievant knew her starting salary five years ago. The grievance was timely filed when Grievant learned that newly hired employees were being paid more than she was. Employers may pay new employees a starting salary above the entry level based on experience and education. The only requirement is that all employees be paid within the pay range for the classification, which was the case here with Grievant and the new hires. Grievant did not demonstrate that she was entitled to a pay increase.

The following Findings of Fact are made based on the record developed at the level three hearing.

Findings of Fact

1. Grievant has been employed by the Department of Health and Human Resources ("HHR") at the Bureau for Children and Families ("BCF") since May 16, 2012,

and is a Child Protective Services Worker (“CPS Worker”), pay grade 15. Grievant was hired at the minimum salary for the pay grade.

2. After three years of employment, CPS Workers receive a 3% increase in pay, which is a retention incentive. Grievant received a 3% increase in pay effective May 16, 2015, to \$32,628.00 annually.

3. The salary range for pay grade 15 is \$31,164.00 to \$57,660.00.

4. The average salary for a CPS Worker employed by HHR is \$32,871.78.

5. At all times since this grievance was filed, Grievant has been paid within the pay range of the pay grade for her classification.

6. HHR hired a CPS Worker on March 1, 2017, at a starting salary above the minimum for the pay grade, at \$32,906.00, based on the experience of the applicant. Also on March 1, 2017, HHR reinstated a former employee as a CPS Worker at a salary of \$35,000.00. On April 3, 2017, HHR hired a CPS Worker at a starting salary above the minimum for the pay grade, at \$32,925.14, based on the experience of the applicant. On October 2, 2017, HHR hired a CPS Worker at a starting salary above the minimum for the pay grade, at \$32,721.94, based on the applicant’s advanced degree. When funding allows, HHR considers experience and education when hiring new CPS Workers, and may offer a starting salary of 5% above the minimum salary for the pay grade for each 6 months of experience.

7. The Division of Personnel’s Pay Plan Policy allows employers the discretion to offer a starting salary to new employees of 5% above the minimum salary for the pay grade, up to the market rate, for each 6 months of “pertinent experience or equivalent pertinent training above the minimum qualifications in the class specification.” The Pay

Plan Policy also provides that salary advancements for employees being paid within the pay range for the pay grade are discretionary.

Discussion

Although not raised at the level three hearing as an issue it would continue to pursue, Respondent Division of Personnel asserted in its written proposals that the grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4, an issue it had raised at level two, and therefore it must be dismissed. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.*, Docket No. 01-41-351 (Nov. 13, 2001).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). The Division of Personnel asserts that Grievant has known what her starting salary was since she began her employment in 2012, and that she had 15 days from the date she knew what her starting salary was to file this grievance.

However, the "discovery rule exception" to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), provides that the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. This grievance arose when Grievant learned that other employees were being paid a starting salary higher than her salary when she began her employment and her salary at the time the grievance was filed. The grievance was timely filed.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

Grievant believes it is unfair that new employees are being hired by HHR at starting salaries higher than her starting salary, and higher than her salary after five years of employment. While Grievant's frustration with this situation is understandable, as Respondents pointed out, 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 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 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).

Further, “[i]t 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).

The Division of Personnel's Pay Plan Policy specifically allows employers the discretion to consider experience and education when setting the starting salary of new employees. In this case, Grievant and those new hires to whom she pointed are all being compensated with the pay grade for a CPS Worker. Nothing more is required. Grievant pointed to no law, rule, regulation, or policy violated by Respondent, or which would require Respondent to pay her a higher salary. Even in situations where an employee is making significantly less than other employees in the same classification, triggering the Division of Personnel's Pay Plan Policy internal equity provisions, the undersigned has no authority to require Respondent to increase Grievant's pay. “[T]he granting of internal equity pay increases is a decision that is within the discretion of the employer to make, and such increases are not mandatory or obligatory on the part of Respondent.” *Harris v. Dep't of*

Transp., Docket No. 2008-1549-DOT (Dec. 15, 2008), citing *Allen v. Dep't of Transp.*, Docket No. 06-DOH-224 (Jan. 31, 2007). Further,

Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy does not confer upon Grievant an entitlement to a salary increase should she prove her situation fits within the policy. It is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. . . . "The grievance board simply does not have the authority to second guess a state employer's employment policy." *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). 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).

Morgan v. Dep't of Health Human Res., Docket No. 07-HHR-131 (June 5, 2008). In fact, whether Respondent asks that any employee's salary be increased is within Respondent's discretion. The undersigned has no authority to require Respondent to undertake any discretionary action.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar.

13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. The “discovery rule exception” to the statutory time lines, as addressed by the West Virginia Supreme Court of Appeals in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), provides that the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. This grievance arose when Grievant learned that other employees were being paid a starting salary higher than her salary when she began her employment and her salary at the time the grievance was filed. The grievance was timely filed.

3. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

4. “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, 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).

5. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or that she was otherwise entitled to an increase in her salary.

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).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: April 19, 2018