

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ANITA SIMPSON, et al.,
Grievants,**

v.

DOCKET NO. 2013-2053-CONS

**DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.**

DECISION

Grievances were filed at level one of the grievance procedure by 68 Grievants on June 6 and 14, 2013. The statement of grievance is somewhat lengthy, but basically contends that Grievants deserve a raise, and that they are being discriminated against because new hires were being paid more than Grievants. The relief sought by Grievants as stated on the grievance form is illegible, but they are generally seeking an increase in pay.

It is unclear from the record whether a conference was held at level one before the grievance was denied at that level on July 1, 2013. Grievants appealed to level two on July 6 and 10, 2013, and a mediation session was held on September 23, 2013. Grievants appealed to level three on October 4, 2013. This grievance was placed in abeyance in 2014, and again in August 2015, while Respondent made efforts to obtain increased compensation for its employees. During the abeyance period, 42 Grievants were dismissed as parties for various reasons, leaving 26 Grievants.¹ A level three hearing was

¹ The remaining Grievants are Anita Simpson, Betty Aliff, Suzanna Workman, Lisa M. Lackey, Debra Yoder, Wendy M. Clayton, Dianna Owens, Regina Tichenor, Donna J. Webb,

held before the undersigned Administrative Law Judge on January 26, 2018, at the Grievance Board's Westover, West Virginia office. Only two of the Grievants appeared at the hearing, Betty Aliff and Charlene Moore, and they appeared *pro se*, and the Department of Veterans Assistance was represented Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on February 26, 2018, on receipt of the last of the parties written proposals.

Synopsis

Grievants are employed in various classifications at the West Virginia Veteran's Nursing Facility in Clarksburg, West Virginia. They are dissatisfied with their wages, and seek additional compensation. Respondent made several attempts after this grievance was filed to obtain pay increases for many of its employees, and several, if not all, of the Grievants received one or more salary advancements as a result of these efforts, all of which were discretionary on Respondent's part. Those Grievants who appeared for the hearing and placed evidence into the record are paid within the pay range for their respective pay grades, and it is likely that all Grievants are paid within the pay range for their pay grades. Grievants did not demonstrate a violation of any statute, rule, regulation or policy, or that they were entitled to additional compensation.

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

Melanie White, Michelle L. Ash, Crystal Clark, Stacie Simpson, Carol Nichols, Kim Stanton, Brenda Poling, Gracie Marsh, Charlene Moore, Melinda Jenkins, Penny Stalnaker, Debbie Burrows, Lorenda Glover, Lorri Weaver, Earl Powel, Pam Hillberry, and Rhonda Moore Dumire.

Findings of Fact

1. Grievant Aliff has been employed by the Department of Veterans Assistance ("DVA") at the West Virginia Veteran's Nursing Facility ("VNF") in Clarksburg, West Virginia, since April 2007, and is a Restorative Health Service Worker, pay grade 6. She has 33 years of experience performing Health Service Worker duties.

2. Grievant Moore has been employed by DVA at the VNF since 2010, and is an Office Assistant 2, pay grade 5.

3. The salary range for pay grade 5 is \$18,552.00 to \$34,332.00. The salary range for a pay grade 6 is \$19,488.00 to \$36,060.00.

4. At all times since this grievance was filed, Grievant Aliff and Grievant Moore have been paid within the pay range for the applicable pay grade. The record does not reflect whether any of the other Grievants have been paid within the pay range for their respective pay grades.

5. Some Health Service Workers employed by the VNF who have not worked at the VNF as many years as Grievant Aliff, received more compensation than she in 2016 for the entire year. The record does not reflect how much of this higher compensation, if any, was the result of overtime worked.

6. State employees are hired at the minimum salary for the pay grade unless the employing agency chooses to offer a salary above the minimum based on the new hire's prior experience, or unless the State Personnel Board has approved a special hiring rate for a particular classification for the employing agency. At the time Grievant Aliff was hired, the VNF had not chosen to recognize prior experience when hiring Health Service Workers, and Grievant Aliff accepted the offered minimum salary for the pay grade. The

VNF decided later to offer newly hired Health Service Workers a starting salary above the minimum salary for the pay grade for every 6 months of experience, up to a maximum of 25% above the minimum salary.

7. The VNF has the discretion to seek approval from the Division of Personnel to increase salaries of employees when there exists a difference in pay of at least 20% between employees in the same unit and classification with comparable training, experience, duties, responsibilities, performance level, and years of service. Increases in pay resulting from this situation are referred to as internal equity increases. A State employer must submit a request for such an increase in pay, with supporting documentation, to the Division of Personnel, and if the request is approved by the Division of Personnel, then it goes to the office of the Governor of the State of West Virginia for approval or rejection.

8. On July 2, 2014, Dr. Kevin Crickard, Administrator at the VNF, submitted a request to Cabinet Secretary Richard Thompson, requesting approval of a discretionary pay increase for a number of Health Service Workers at the VNF to address internal pay equity issues. This request was approved by the Division of Personnel and the Governor of the State of West Virginia, for a number of the employees listed in the proposals, but not all of the employees listed, and several employees received pay increases as a result.

9. Dr. Crickard submitted another request for a discretionary pay increase to address internal pay equity issues, dated September 14, 2015. Grievant Moore was one of the employees recommended for a discretionary pay increase. This request was not approved by the Division of Personnel with regard to Grievant Moore.

10. On April 13, 2016, Dr. Crickard submitted another request for a discretionary pay increase to address internal pay equity issues for Office Assistant 2s employed at the VNF, including Grievant Moore. This request was not approved by the Division of Personnel with regard to Grievant Moore. The record does not reflect whether it was approved for any other Grievant.

11. Sometime prior to June 2016, Dr. Crickard submitted another request for a discretionary pay increase for one or more employees. Sara P. Walker, Director of the Division of Personnel, informed personnel at the VNF that the request as it related to one employee did not meet the requirements of the Pay Plan Implementation Policy, and was therefore rejected. This notification also states that the Governor's Office had been sent a request to approve discretionary pay increases for three other employees, but that processing of such pay increases had been suspended by the Governor.

12. Due to recruitment and retention problems, in December 2016, DVA submitted a proposal for a special hiring rate and retention incentives for Health Service Workers. On December 15, 2016, the State Personnel Board approved a special hiring rate of \$23,920.00 for Health Service Worker positions, and retention incentives of a 5% increase in pay after 1 year, a 5% increase in pay after 3 years, and a 5% increase in pay after 6 years.

13. On January 30, 2017, Dr. Crickard submitted another request for approval of a discretionary pay increase for Office Assistant 2s. This request was not approved by the Division of Personnel.

14. As a result of the proposals submitted by Dr. Crickard and approved by the Division of Personnel, Grievant Aliff received a discretionary 10% pay increase effective

October 16, 2014. She also received a discretionary pay increase effective January 14, 2017, and she was to receive a 5% discretionary pay increase effective February 17, 2018.

15. Other Grievants receiving a discretionary pay increase in October 2014, were Michelle Ash, Debbie Burrows, Melanie White, Brenda Poling, Suzanna Workman, and Lorenda Glover.

16. In July 2017, the moratorium on merit increases for State employees, which had been in effect for several years, was lifted by the Governor of West Virginia. Grievant Moore received a 10% merit increase effective in November or December 2017.

17. Several other Grievants received merit increases effective in November or December 2017. Wendy Clayton, a Personnel Assistant, and Crystal Clark, a Food Service Supervisor, received 10% pay increases. Michelle Ash, a Dietary Office Assistant 2, Dianna Owens, a Purchasing Assistant, Penny Stalnaker, a Medical Records Assistant, Donna Webb and Carol Nichols, Laundry Aides, and Melinda Jenkins, a Housekeeper, all received 9% pay increases. Gracie Marsh, a Housekeeper, and Debra Yoder, a Storekeeper, received 8% pay increases. Pam Hillberry and Rhonda Moore Dumire, Recreational Assistants, received 7% pay increases, and Earl Powell, a Maintenance Worker, received a 6% pay increase.

18. The record does not reflect the classifications of any of the Grievants not set out in the foregoing Findings of Fact, or whether any of them have received any pay increases since this grievance was filed.

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).

As Respondent 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).

Grievants pointed to no law, rule, regulation, or policy violated by Respondent, or which would require Respondent to pay them a higher salary. Respondent, in fact, has made multiple attempts to obtain higher salaries for Grievants, and has been moderately successful, even though it had no obligation to make such efforts. These efforts apparently fell short of Grievants' expectations. Grievants refuse to acknowledge that “the 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). The undersigned has no authority to require Respondent to take additional action.

Grievant Aliff complained that she has 33 years of experience, for which she feels she has not been compensated, while she believes employees with much less experience than she are being paid more than she is. The only evidence of this difference in pay was the annual salary information Grievant Aliff obtained from the State Auditor's Office. This information does not indicate how much of this pay was attributable to overtime worked. Accordingly, it does not demonstrate whether the employee is being paid more than Grievant on an hourly basis, or whether the employee is simply working more overtime than Grievant.

Further, this argument may be characterized as a discrimination claim. 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant Aliff's starting salary may well have been significantly less than that of other Health Service Workers hired after she was. However, "[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).

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. “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).

3. “[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).

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., 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. “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).

6. Grievants did not demonstrate a violation of any statute, rule, policy or procedure, or that any of the Grievants was otherwise entitled to an increase in his or her salary during her employment with Respondent.

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: March 23, 2018