

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MICHAEL SUMMERS, et al.,
Grievants,**

v.

DOCKET NO. 2016-1879-CONS

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Several grievances were filed on June 29 and July 7, 2016, by employees of West Virginia University¹ against their employer, which were consolidated for hearing and decision at level one of the grievance procedure. The statements of grievance claim “unfair hiring practices” by Respondent asserting that new hires are being offered a fair market value rate of pay, rather than an entry-level salary. The relief sought by Grievants is a pay increase and backpay with interest, based on a “fair market value assessment of Grievants’ job responsibilities, taking into account credentials, licensing, experience and years of service with WVU.”

A conference was held at level one on July 21, 2016, and a decision denying the grievance was issued at that level on August 11, 2016. Grievants appealed to level two on August 18, 2016. A mediation session was held on November 4, 2016, and Grievants appealed to level three on December 1, 2016. A level three hearing was held before the

¹ The Grievants are Michael Summers, James David Haldeman, James L. Wolfe, Jr., Michael A. Cramer, Brian Clarke Weimer, Timothy Lee Haldeman, Lisa Murray-Jeffords, Phillip Ryan Shaffer, and Richard A. Mobley. Grievant Mobley and Grievant James Haldeman retired after the filing of this grievance.

undersigned Administrative Law Judge on November 1, 2017, at the Grievance Board's Westover office. Grievants appeared *pro se*, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision on December 1, 2017, the deadline for submission of written argument. Both parties submitted post-hearing written argument by the deadline.

Synopsis

Grievants believe they are being treated unfairly and should be awarded a pay increase because new employees may be receiving a starting salary above entry level for the pay grade. Grievants did not demonstrate that Respondent has violated any law, rule, regulation, policy, or procedure. 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") as Plumbers, Electricians, or Telecommunications Techs, all in pay grade 13. Most of the Grievants are required to have a license for their area of expertise.
2. Grievants' salaries are all within the pay range for their pay grade.
3. In May 2015, WVU put in effect changes to the recruitment and hiring process for new employees, and began offering a salary above the entry level for the pay grade for the position where it was determined to be appropriate.

4. Grievants have been employed by WVU for periods ranging from 3 years to 25 years. Most of all of the Grievants began working at the entry level for the pay grade. None of the Grievants were hired after April 2015.

5. Grievants' salaries have not been adjusted as a result of the 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).

Grievants believe they are being treated unfairly because new employees are being hired at salaries above the entry-level for the pay grade, with some of these new employees being paid more than Grievants, while Grievants have been loyal employees, and their salaries have not been adjusted. Respondent indicated that when the money is available for all employees in Grievants' work areas to receive salary adjustments, the same will be considered for feasibility. Otherwise, Respondent pointed out that Grievants are being paid within their pay grade range, which is all that is required.

WEST VIRGINIA CODE § 18B-9-4 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.” *Jones, et al., v. W. Va. Univ.*, Docket No. 2016-0225-CONS (Oct. 18, 2017). 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 employer² is not required to pay these employees at the

² 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.*

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 asserted that *Largent* is distinguishable from their situation based on a factual difference. Grievants’ reading of *Largent* is that it involved a nursing shortage, and they assert that there is no shortage of applicants for a plumbing vacancy. Whether that is true or not is of no relevance to the application of the legal principles set forth in the *Largent* decision. The two Syllabus points set forth above are clear statements of the law, and are just as applicable to this factual situation as they were to the factual situation in the *Largent* case.

Grievants also alleged that Respondent violated its practices, placing into evidence a document entitled “Frequently Asked Questions,” dated September 2012, which they found on Respondent’s website. This document, on its face, is applicable to a new salary

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.

structure which went into effect in October 2012, not 2015. The document does not in any way indicate that it has any applicability to the more recent changes in hiring practices, and will not be further addressed. 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. While it is understandable that Grievants are unhappy with this situation, “[t]he 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).

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. 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*.

5. 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: January 3, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge