

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**STEVEN R. McCOY,
Grievant,**

v.

Docket No. 2019-0247-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Steven R. McCoy, Grievant, filed a grievance against his employer the West Virginia Division of Highways ("DOH"), Respondent on August 6, 2018. The highlighted points of Grievant's protest tends to metamorphose with time, overall Grievant protests his wage and inability to be classified as a Transportation Realty Agent 3 sooner. The original grievance statement provides: "Grievant was obstructed in job applications by his supervisor who supplied references that were knowingly false, deliberately misleading, with reckless disregard for the truth, out of malice and, therefore, in bad faith.¹" As relief Grievant request: "To be made whole in every way including 7% back pay increase Grievant would have received with added interest."

A conference was held at level one on September 5, 2018, at which time Grievant had the opportunity to present facts underlying his grievance. After the conference, the claim was held in abeyance to provide the agency the opportunity to conduct further review of the issue. After consideration of the facts and circumstances surrounding the grievance, this grievance was denied at level one by a written decision dated December

¹ Grievant also provided a "Chain of Events" statement which is included and recognized in this grievance as a part of the record. Chain of Events statement from Grievant was submitted at the L-1 conference on September 5, 2018.

5, 2018. Grievant appealed to level two on December 10, 2018, and a mediation session was held on February 13, 2019. Grievant appealed to level three on April 11, 2019. A level three hearing was held before the undersigned Administrative Law Judge on July 26, 2019, at the Grievance Board's Charleston office. Grievant appeared in person and with his representative Gordon Simmons, UE Local 170, WV Public Workers Union. Respondent appeared through Administrative Services Manager D-2 Kathleen Dempsey and was represented by counsel Keith A. Cox, Esquire, DOH Legal Division. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision upon receipt of the last of the parties' fact/law proposals on or about August 28, 2019.

Synopsis

Grievant argues Respondent failed to timely advance him to the next level of his identified classification. Grievant maintains his supervisor unlawfully kept him from promptly progressing within the organizational ranks. Grievant is now classified as Transportation Realty Agent 3. Further, Grievant among other allegations contend his salary is unduly low in comparison to others. Grievant is compensated within the established salary range of the identified job classification.

Grievant failed to demonstrate a violation of any rule, policy, procedure, statute or regulation, or that he was otherwise entitled to the relief requested due to malfeasance by Respondent. Accordingly this grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed with DOH, Respondent since May 7, 2012. At the time this grievance was commenced Grievant was classified as a Transportation Realty Agent 2, Grievant is currently classified as a Transportation Realty Agent 3.²

2. Sandra Wanless is a Realty Manager and has been employed with the DOH since September 5, 1978. Ms. Wanless was Grievant's immediate supervisor in D-1. Wanless remained Grievant's direct supervisor through the relevant period of the instant grievance until her January 18, 2019 retirement.

3. Drema Smith is the Acting Director of Human Resources for DOH. Director Smith's office reviews and makes the classification determinations on all personnel transactions for DOH.

4. Sometime in July 2017 Grievant became aware of an opening for a temporary reassignment to District 2 as a Transportation Realty Agent 2.

5. Grievant did not get the temporary reassignment position despite the un rebutted information that the District 2 Realty Manager was short staffed.

6. Grievant is of the belief that had he been allowed to take the temporary transfer to District 2, it would have counted in his favor for future advancement. Further,

² Grievant's classification status was modified from a Transportation Realty Agent 2 to a Transportation Realty Agent 3 on or about December 22, 2018.

Grievant is of the opinion that his transfer could only have been hindered by his supervisor Realty Manager Sandra Wanless.

7. On August 22, 2017, Grievant applied for a Transportation Realty Agent 3 position in District 2, for which he was neither interviewed nor the recipient of a written acknowledgement of application.

8. Information of record tends to indicate Grievant's application was received.

9. In January, 2018 Grievant again applied for a Transportation Realty Agent 3 position in District 2.

10. At the time Grievant applied for the aforementioned Transportation Realty Agent 3 positions in District 2, Grievant was classified as a Transportation Realty Agent 2 in District 1.

11. Kathleen Dempsey, Human Resources Director for District 2 since November, 2017 was on the selection panel who interviewed applicants for the January, 2018, Transportation Realty Agent 3 posting in District 2. Director Dempsey testified at the level three hearing.

12. Dava Hearn, Realty Manager for District Manager for District 2 was also on the selection panel which interviewed applicants for the January 2018, Transportation Realty Agent 3 posting. Manager Hearn was not called to testify at the level three hearing.

13. Michelle Woodall ultimately became the successful applicant for the January, 2018 Transportation Realty Agent 3 position in District 2. Grievant learned of this on or about July 16, 2018.

14. Grievant interviewed for a Transportation Realty Agent 3 position in District 1 in February 2018. Grievant's Supervisor Sandra Wanless and District 1 Human Resources Director Sherry Parsons was on the selection panel.

15. Grievant was not selected for the District 1 Realty Agent 3 position.

16. Senate Bill 2003 "transferred authority from the Division of Personnel to the Commissioner of Highways to make determinations regarding pay, classification, and qualifications of DOH employees." Based upon Bill 2003, the DOH issued a Pay Plan Policy dated May 1, 2018 including new Hourly and Salary Pay Grade Schedules dated June 27, 2018. DOH is in the process of reviewing and establishing reallocation protocols.

17. Grievant completed a Position Description Form (PDF) as part of the reallocation paperwork sometime in Summer 2018. This paperwork was given to his supervisor.

18. A PDF is identified in West Virginia Division of Personnel (DOP's) Administrative Rule, W. Va. Code R. § 143-1-4.5, as the official document detailing the duties and responsibilities of a position and it is used by DOP to properly allocate positions within the classified service (and now DOH).

19. Grievant determined his supervisor did not complete her section of the form. He was advised the paperwork was still being reviewed and had not been forwarded to HR in October 2018.

20. Grievant thereafter completed a new PDF and forwarded it to Human Resources in October 2018 on his own behalf.

21. After receipt of the PDF in HR, Respondent requested Ms. Wanless complete the supervisor's portion of the form by email dated October 22, 2018. Ms. Wanless subsequently forwarded the supervisor's section of the PDF to Human Resources Division (HR).

22. By letter dated November 29, 2018 from Natasha White, Assistant Director Human Resources Division, it was determined that Grievant was performing "duties of a Transportation Realty Agent 3."

23. Grievant's classification status was modified from a Transportation Realty Agent 2 to a Transportation Realty Agent 3 on or about December 22, 2018. Grievant is paid within the established and duly recognized salary range for his job classification. See G Ex 2 and 3.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant is not happy with Respondent. He is of the belief that Respondent has been mistreating him. The allegation of mistreatment is a mix bag of disgruntled

allegations which transforms with the passage of time.³ Grievant contends that he should be making similar, if not more money than an identified co-worker (Michelle Woodall, Realty Agent 3) in D-2 in July of 2018. Grievant does not truly identify a violation of a specific rule, policy, procedure, statute or regulation.

Grievant, among other contentions, argues that he had been kept from timely advancing to the next level in his classification by his supervisor. He provided a "Chain of Events" statement wherein he professes his belief that she has kept him from getting called for interviews and/or being reallocated. A fellow Realty Agent in D-1 was reallocated in April 2018 and Grievant believes he was eligible at the same time. The supervisor did the necessary paperwork for the reallocated employee but allegedly refused to do such for Grievant. Grievant is adamant that his supervisor has been a constant hinder in his advancement. Grievant's reliance on layered hearsay to indicate his supervisor is not a strong supporter of his body of work isn't proof of malfeasance.⁴ Grievant does not persuasively establish that his supervisor has acted unlawfully.

Grievant did not dispute that he is being paid within the proper salary range for a Transportation Realty Agent 3, Grade 15. Grievant contends that he is paid on the low

³ Grievant's allegations against Respondent in the instant grievance from time to time is less than direct, tending to encompass several alternative theories. The WV Supreme Court has held that the grievance process is not to be a procedural quagmire where the merits of the cases are forgotten. Further, the grievance process is also not intended to be a guessing game for Respondents or this Grievance Board. Filing a cognizable claim is not an unreasonable procedural obstacle or trap. It is the most basic and simple of requirements to notify all of the nature of the grievance and the relief requested.

⁴ Grievant argues that he has been kept from advancing to the next level in his classification by his supervisor. Grievant maintains his supervisor has engaged in conduct which kept him from getting called for interviews and/or being reallocated to a Transportation Realty Agent 3 sooner. Grievant contends his supervisor's alleged comments regarding Grievant's work performance are egregious to the point of bad faith. This finder of fact is not persuaded.

end of the salary range and that he believes Michelle Woodall is paid on the higher end of the salary range while she is allegedly not as qualified as Grievant. Testimony of Grievant. See also G Ex 2, 3, and 4. Grievant wants a \$10,000 raise. Grievant is paid within the salary range applicable to his classification. For a state agency to pay employees in the same classification different salaries has long been settled by the West Virginia Supreme Court of Appeals in *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). 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. See *Largent*.⁵

Kathleen Dempsey testified that Michelle Woodall was hired from outside of the DOH which did allow for a different calculation for Woodall's salary. Director Dempsey also testified that Michelle Woodall was quite qualified for both the position that she was

⁵ In *Largent*, the West Virginia Supreme Court of Appeals noted that WEST VIRGINIA CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent, supra*, at Syl. Pts. 2, 3 & 4. 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). Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra* at 246. "It 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); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009).

hired and the salary that came with that position. L-3 Testimony Dempsey Ms. Woodall is paid within the salary range applicable to her identified job classification.

In addressing the delay in processing of Grievant's reallocation paperwork, the issue is more perceptual than factual. Former Supervisor Wanless was not called to testify. Grievant believes that the delays by his supervisor to complete the necessary paperwork for him was intentional. However, did Grievant prove that an alleged delay in processing his reallocation paperwork to be a policy violation or arbitrary and capricious? The answer is no. Procedures were followed, and requests were sent to the Grievant's supervisor to complete their portion of the forms. Respondent has established subject experts to review and determine all classification requests. However, there are approximately 125 different classifications used by DOH and since the passage of SB 2003 in December 2017, the HR division has been inundated with requests for classification reviews. Classification reviews are very time consuming. Grievant's paperwork was received in HR in October 2018. A positive determination was made within 45 days. Grievant's reallocation become effective on or near December 21, 2018. It is not uncommon for an agency to take several months to review and approve reallocation paperwork. In this case, it took less than sixty (60) days for the entire review process by HR. Grievant has failed to establish actionable misconduct.

Grievant has failed to demonstrate a violation of any procedure, policy, rule, statute or regulation, or otherwise establish that Respondent is obligated to grant Grievant an increase in his salary. Grievant's allegations against Respondent in the instant grievance from time to time is less than direct, tending to encompass several alternative

theories of unlawful actions, nevertheless Grievant did not persuasively demonstrate entitlement to the relief requested.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The subject of 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 (2018). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. It is well established that state 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. See *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994). "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 and Div. of Pers.*, 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. It is not unlawful for state employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade. See *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.*, Docket No. 02-HHR-366 (Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Buckland v. Div. of Natural Res.*, Docket No. 2008-0095-DOC (Oct. 6, 2008); *Boothe, et al., v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2009-0800-CONS (Feb. 17, 2011); *Lott v. Div. of Highways and Div. of Personnel*, Docket No. 2011-1456-DOT (Sept. 9, 2014); *Bowser, et al., v. Dep't of Health & Human Ser./William R. Sharpe, Jr. Hosp.*, Docket No. 2013-0247-CONS (Feb. 13, 2014). In essence, the employees are not being treated differently for pay purposes as long as they all are being paid within the pay grade appropriate to their classifications. *Deem et al. v. Div. of Motor Vehicles*, Docket No. 2016-1041-CONS (Nov. 30, 2016).

4. "A grievant is not entitled to a retroactive discretionary pay increase when there is no law, rule, or policy requiring the agency, DOP, or the Governor's Office to act within a certain timeframe on a request for a discretionary pay increase. *Green v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 2011-1577-DHHR (Oct. 1, 2012)" *Hapney v. Pub. Employees Insurance Agency, Dep't of Admin., and Div. of Personnel*, Docket No. 2013-0861-DOA (Feb. 24, 2014); *Hart v. Div of Highways and Div of Personnel*, Docket No. 2015-1717-DOT (May 23, 2016).

5. Grievant failed to demonstrate a violation of any rule, policy, procedure, statute or regulation.

6. Grievant failed to establish by a preponderance of the evidence that he is entitled to the relief requested.

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 (2018).

Date: October 15, 2019

Landon R. Brown
Administrative Law Judge