THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AARON D. THOMPSON
Grievant,

v. **Docket No. 2018-0920-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant, Aaron Thompson, was employed by Respondent, Department of Environmental Protection, ("DEP"), from March 1, 2001, until his retirement on March 1, 2018. He worked mostly in the Environmental Resources Specialist 2 ("ERS 2") classification. Mr. Thompson filed a level one grievance form dated January 31, 2018, alleging violation of the attendance policy, contesting the amount of time he was required to take for a lunch break, and alleging that it was improper for another employee in his classification with less experience to be paid significantly more than him.[1] As relief, Grievant seeks to take a thirty-minute lunch break and to have equal pay.

A level one hearing was held and a recommended decision denying the grievance was issued on May 24, 2018. An order adopting the recommended decision was entered June 25, 2018. Grievant appealed to level two and a mediation was conducted on October 24, 2018. Grievant filed an appeal to level three dated the same day.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on February 27, 2019. Grievant personally appeared

[1] Since Grievant was retired at the time the level three hearing was held the parties agreed that the only remaining issue was Grievant's equal pay claim.

and was represented by Gordon Simmons, UE Local 170, WVPWU. Respondent appeared through Chad Bailey, DEP Director of Human Resources, and was represented by Anthony D. Eates, II, Deputy Attorney General. This matter became mature for decision on May 1, 2019, upon receipt of the last Proposed Findings of Fact and Conclusions of law.

Synopsis

When preparing to retire Mr. Thompson filed a grievance contesting the fact that a coworker in his same classification was paid more that him for the duration of their careers with the DEP. Grievant does not argue that the pay disparity is caused by discrimination, but rather that the initial and ongoing practice of Respondent was arbitrary and capricious. Even putting aside the timeliness issue that the two employees were initially hired at least seventeen years before the Grievance was filed, both employees were paid salaries within the paygrade for which they were assigned. Thus, Respondent's actions to pay them different salaries from the beginning was not improper. Additionally, Grievant produced no evidence proving that Respondent's actions were arbitrary or capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Aaron Thompson, Grievant, was employed by the Respondent, Department of Environmental Protection, in the Environmental Inspector-in-Training classification on March 1, 2001. His starting salary was set at $21,156. (Respondent Exhibit 1).

2. Grievant's prior experience included fifteen years in underground mining where he gained certification as a mine foreman, mine reclamation jobs, and State employment with the Division of Rehabilitation Services.

3. Grievant was promoted to Environmental Inspector classification on May 1, 2002 and made a lateral transfer from the Environmental Inspector 2 classification to the Environmental Resources Specialist 2 classification on February 23, 2004. Grievant remained in that classification until his retirement. (Respondent Exhibit 1).

4. At retirement, Grievant's salary was $41,038.60. *Id.*

5. Grievant compares his salary history with that of co-worker Keith Carte. Mr. Carte was first employed by DEP in the Environmental Inspector-in-Training classification on December 16, 2002. His starting salary was $32,004. He was reallocated to the Environmental Inspector classification in 2003 and promoted to the Environmental Inspector Specialist classification in 2005. (Respondent Exhibit 2).

6. Mr. Carte took an involuntary demotion without prejudice to the Environmental Resource Specialist 2 classification on July 1, 2012. His salary remained the same after the demotion. On July 1, 2014, his salary was $43,752. *Id.*

7. The paygrades for the classifications involved are:

- Environmental Inspector-in-Training Paygrade 14
- Environmental Inspector Paygrade 15
- Environmental Inspector Specialist Paygrade 16
- Environmental Resources Specialist 2 Paygrade 15

8. The pay range for Environmental Resources Specialist 2 is $31,164 - $57,660. The average annual salary for employees in the ERS 2 classification is $42,038.61.

9. There was no evidence presented regarding why Grievant's starting salary was significantly lower than Mr. Carte's. DEP Human Resources Director, Chad Bailey, testified that these hirings occurred before he was in his present position and he had no knowledge of the reasons for the different starting salaries. He speculated that there may have been a "special hiring rate" in effect when Mr. Carte was hired but he did not personally know.

10. There was a 34% difference between Grievant's salary and Mr. Cades salary when they were both hired as Environmental Inspectors-in-Training. The difference between their salaries had dropped to 6% when Grievant retired, eighteen years later.

11. On December 1, 2011, Grievant received a 10 % increase in his salary to bring his pay closer to the highest paid ERS 2 employed by the DEP. Such raises are called "internal equity increases." They are discretionary increases sought by the employer pursuant to the Division of Personnel Pay Policy Plan.

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 argues that Respondent's action of paying Mr. Carte a much higher starting salary was not based upon reasonable and legitimate criteria and was therefore

arbitrary and capricious. He opines that the pay disparity between the two employees over the remaining years continued this pay disparity.

Respondent points out that it has always paid both workers within the paygrade range required for their classification. Respondent argues that is its only obligation regarding equal pay. Respondent also points out that Grievant received an "internal equity" salary adjustment in 2011 when such adjustments became available.

The issue of whether a state agency is required to pay employees in the same classification the same salary 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). Since the issuance of that decision the Grievance Board has consistently held:

> The principle of "equal pay for equal work" is embraced by W. Va. Code § 29-6-10. *See AFSCME v. Civil Serv. Comm'n*., 181 W. Va. 8, 380 S.E.2d 43 (1989). In *Largent v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994) the West Virginia Supreme Court of Appeals noted that W. Va. 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. 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 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). (Emphasis added).

In this case, there is not proof that either Grievant or Mr. Carte were ever paid a salary outside of the pay grade for the classification in which they were hired or in the classification of ERS 2 when Grievant retired. Consequently, Respondent did not discriminate by paying Mr. Carte a higher salary than Grievant when the two were initially hired or in the years thereafter.

Grievant's representative adeptly tries to avoid the consequences of *Largent* by eschewing an allegation of discrimination. Rather he claims Respondent had no legitimate basis for paying the two workers such different salaries thus their action was arbitrary and capricious and invalid. [2] Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

[2] Even in decisions where the employer has wide discretion, the decisions must be made in a manner which is not arbitrary and capricious. *Mihaliak v. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998).

Grievant relies heavily upon the testimony of DEP HR Director Bailey in this regard. Director Bailey was asked why there was such disparity between the salaries of Grievant and Mr. Carte when they were hired roughly a year apart. Director Bailey answered that these workers were hired before he was the HR Director. He had no knowledge why either of them was given the salaries they received. He speculated that there may have been a "special hiring rate" in effect when Mr. Carte was hired, but he did not personally know.

Grievant opines that Mr. Bailey cannot offer a valid reason for the disparate starting salaries thus there is no indication that Respondent employed the intended factors in making the salary decision. This argument ignores the fact that Grievant has the burden of proof. It is not enough for Grievant to simply allege that Respondent's actions were arbitrary and capricious for the burden to then shift to Respondent. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)); *Turner v. Div. of Corrections,* Docket No. 2018-0860-MAPS (June 19, 2018). Grievant did not put on any evidence to demonstrate that Respondent relied upon improper factors in their decision to pay different salaries.

The Supreme Court in *Largent* pointed to a myriad of reasons why an agency might pay two employees different salaries. The Court ultimately found that an agency has met its obligation by paying the employees within the proper pay grade for their classification. Without evidence of some nefarious motive for Respondent's action, this is enough to survive scrutiny. Grievant did not prove that Respondent's decision to pay Grievant and

Mr. Carte different salaries when they started and during their employment was arbitrary or capricious.[3] Accordingly, the Grievance is **DENIED**.

Conclusions of Law

1. 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.*

2. W. Va. 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 v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

3. 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 v. W. Va. Div. of Health and Div. of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

[3] The issue of whether the Grievance was timely filed was not raised until Grievant's representative made it clear in his Proposed Findings of Fact and Conclusions of Law that he was relying mostly upon the salary discrepancy which occurred when the two employees were hired to support his claim. Grievant argued that his claim was timely because he did not discover the significant difference in the starting salaries until the level three hearing. Since this issue does not change the outcome of this case and was not raised by the parties prior to or during the hearing, it will not be addressed herein.

4. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate paygrade. *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).

5. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

6. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)); *Turner v. Div. of Corrections,* Docket No. 2018-0860-MAPS (June 19, 2018).

7. Grievant did not prove by a preponderance of the evidence that Respondent's decision to pay Grievant and Mr. Carte different salaries when they started and during their employment was arbitrary or capricious.[4]

Accordingly, the 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: May 31, 2019.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

[4] The issue of whether the Grievance was timely filed was not raised until Grievant's representative made it clear in his Proposed Findings of Fact and Conclusions of Law that he was relying mostly upon the salary discrepancy which occurred when the two employees were hired to support his claim. Grievant argued that his claim was timely because he did not discover the significant difference in the starting salaries until the level three hearing. Since this issue does not change the outcome of this case and was not raised by the parties prior to or during the hearing, it will not be addressed herein.