

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**DONALD WALKER,  
Grievant,**

**v.**

**Docket No. 2019-0358-PSC**

**PUBLIC SERVICE COMMISSION,  
Respondent.**

**DECISION**

Grievant, Donald Walker, filed this action against his employer, Public Service Commission, alleging that, "Grievant receives a significant lower salary (approximately \$15,000 per year) than two similarly situated employees, Eric deGruyter and Edwin Clarkson. Grievant alleges a violation of W. Va. Code § 6C-2-2(d) & (h) (discrimination & favoritism); W. Va. Code 29-6-10; and W. Va. CSR 143-1-5.1." Grievant's Relief Sought is, "Grievant seeks equalization of his salary with Mr. deGruyter and Mr. Clarkson, retroactive benefits and back pay with interest to the maximum extent allowable by law." The record at Level Three reflects that Grievant no longer intends to compare his salary or duties to those of Edwin Clarkson.

A Level One conference was conducted by Public Service Commission Chairman Michael A. Albert on October 10, 2018. By decision issued on November 13, 2018, Mr. Albert denied the grievance. On February 7, 2019, a Level Two mediation session was conducted. Grievant perfected his appeal to Level Three on February 13, 2019. A Level Three evidentiary hearing was conducted on May 23, 2019, at the Grievance Board's Charleston office by Administrative Law Judge Billie Thacker Catlett. Grievant appeared

in person and by his counsel, John Everett Roush, American Federation of Teachers - WV, AFL-CIO. Respondent appeared by its counsel, Belinda B. Jackson. This case became mature for consideration on June 24, 2019. This case was reassigned to the undersigned on August 16, 2019, for administrative reasons.

### **Synopsis**

Grievant is employed by Respondent as a Technical Analyst. Grievant seeks an increase in salary under a claim of discrimination and, generally, pursuant to a claim of equal pay for equal work. The record did not support a finding that Grievant was the victim of discrimination. Under applicable law, it is not considered discriminatory for employees in the same classification to be paid different salaries. The record did not support a finding that Grievant was entitled to an increase in pay under the applicable pay policy.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant is employed by Respondent as a Technical Analyst. Grievant has worked for Respondent for approximately fourteen years.
2. Prior to his employment at the Public Service Commission in 2008, Grievant worked as a Programmer Analyst 2 at the Department of Health and Human Resources. Grievant's starting salary at the Public Service Commission was based upon the salary he earned at DHHR, which hires its employees at entry salary levels. Grievant's starting salary at the Public Service Commission was low in comparison to the salaries of those employees in his classification title.

3. The Division of Personnel's salary range for Technical Analyst, pay grade 22, is \$47,352 to \$87,612. Grievant's current salary is \$57,491.

4. Eric deGruyter is employed by the Respondent as a Technical Analyst. Mr. deGruyter has worked for the Respondent for approximately thirty-eight years.

5. A significant discrepancy between Grievant's salary and that of Mr. deGruyter has existed since Grievant came to work at the Public Service Commission in 2008.

6. As employees classified in the Technical Analyst job title, Grievant and Mr. deGruyter perform similar duties. These duties include investigating and providing written reports on factual circumstances and providing testimony at hearings for contested regulatory cases for the legal staff; investigating informal complaints; giving formal and informal advise concerning technical issues to the public and staff; and preparation of a portion of the annual report that goes to the West Virginia Legislature.

7. Grievant and Mr. deGruyter occasionally work together on issues concerning depreciation related to electrical utilities and electrical generating plants that use natural gas as the source of fuel. Grievant performs his duties mainly in the area of electrical utilities whereas Mr. deGruyter works with natural gas utilities. The most significant difference between the duties of Grievant and Mr. deGruyter is that Mr. deGruyter works with all depreciation issues.

8. Grievant and Mr. deGruyter share the same work site, work hours, supervisor, and the benefits. The only significant difference in the terms of their employment with the Public Service Commission is the discrepancy in their salaries.

9. Grievant and Mr. deGruyter are excellent and valued employees of the Public Service Commission.

10. Mr. deGruyter has a BS from Davis and Elkins College in Math and Physics and a BS in Industrial Engineering from West Virginia University. Mr. deGruyter has worked for the Public Rapid Transit System and as an instructor for West Virginia University.

11. Grievant has a BS in Electrical Engineering from Penn State and a master's degree in Psychology from Marshall University. Grievant worked for Appalachian Power for ten years, as a counselor with his own practice, and for approximately 6 years for the West Virginia Department of Health and Human Resources.

12. Earl Melton is the Public Service Commission's Chief Engineer and the supervisor of Grievant and Mr. deGruyter. As with most agencies, Mr. Melton opined that the salaries of his employees are too low and that makes it difficult to recruit engineers.

13. When Grievant first began work at the Public Service Commission in 2008, his salary was within the salary range of Technical Assistant II, although at the lower end of the range.

14. Elizabeth Sharp, Human Resources Manager at the Public Service Commission, believed the large discrepancy between Grievant's salary and that of Mr. deGruyter seems to largely result from a historical accident. Mr. deGruyter worked for the Public Service Commission for a number of years prior to 2005, when the Public Service Commission was given a little more discretion with salaries. Grievant started work for the Public Service Commission when that agency was given a directive to adhere more stringently to the Division of Personnel's salary guidelines.

## Discussion

As 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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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's argument is that he has been the victim of discrimination. 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'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The record of this case established that Grievant's salary falls within the range of his classification and pay grade. The holding of the West Virginia Supreme Court of Appeals in *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994), continues to be instructive in examining the issue raised by Grievant. The West Virginia Supreme Court of Appeals held that "employees 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. Additionally, 128 C.S.R. 62, § 19.4 states 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 . . . ." As noted by the West Virginia Supreme Court of Appeals in *Largent*, 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." *Id.* at 246. A State employee's salary is the result of many factors, especially when the employee has worked for the State for many years. See *White, et al. v. W. Va. State Police and Div. of Personnel*, Docket No. 05-DPS-168 (July 28, 2005). The difference in Grievant's pay and Mr. deGruyter's pay can be explained by many of the factors set forth in *Largent*. No evidence admitted in this record reflects that Grievant is paid outside the pay grade of his job classification.

Grievant did not establish that he was the victim of discrimination based upon the record of this case. The employee to whom Grievant compares himself, Mr. deGruyter, is not similarly situated to Grievant. Although Mr. deGruyter and Grievant are both classified as Technical Analysts and their duties are similar, the record established that Mr. deGruyter has far more state tenure and more experience as an engineer than Grievant. "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).

Finally, Grievant seeks a raise in his salary to the point where it is equal to that of Mr. deGruyter. The Division of Personnel's Pay Plan Policy permits state agencies to award discretionary pay increases (up to 10% of current salary) to employees who can demonstrate that their pay falls 20% or more below that of other permanent employees in the same job classification and with the same agency-defined work unit. Respondent's Exhibit No. 1. The Pay Plan Policy also provides that in determining whether employees have comparable years of classified service, "Employees with over 20 years in the classified service may be compared to employees within five (5) years of classified service." Pay Plan Policy at III.E.2.c.2. Grievant has not shown that his tenure in the classified service is comparable to that of Mr. deGruyter as set forth in the policy. The discretionary increase permitted under the policy is limited to ten percent of the employee's salary. Such an increase, if granted, would amount to \$5,800 annually, not the roughly \$15,000 that Grievant seeks.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As 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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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).

2. 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'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. "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).

4. 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 v. West Virginia Division of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994).



5. Grievant did not meet his burden of proof and demonstrate that he was the victim of discrimination. The record did not support a finding that Grievant was entitled to an increase in pay.

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: September 12, 2019**

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**Ronald L. Reece**  
**Administrative Law Judge**