

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DARREN P. WISE,
Grievant,**

v.

Docket No. 2018-1482-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Darren Wise, is employed by the West Virginia Division of Highways as a Highway Engineer Trainee in District Six, and works out of the Moundsville, West Virginia office. On May 24, 2018, he filed a grievance stating, "On May 3, 2018, I was informed that under the new pay structure policy, my new rate of pay would be \$22.3346. When applied to me, the new policy based on EIT Certificate that I carried before my hire date nullified my co-op experience and merit increase. Essentially, reducing me to entry level pay for my position." As relief sought, Grievant stated, "I believe I should receive the increase based on EIT Certificate in addition to the increases I already received for co-op experience and merit and the increase should be back dated to the date the new rates became effective."

On August 17, 2018, Grievant filed another action stating, "On 8/23/18, I received a copy of the new hourly and salary pay scales. Despite my experience, training, and prior merit raises, I am at the bottom of the pay scale. The new policy was arbitrarily and capriciously applied to me and others similarly situated because it does not account for the above and gives the false impression that DOH complied with the pay raise voted on

by [the] legislature.” As relief sought, Grievant stated, “My previous co-op experience, EIT certificate, and merit raises should be added to my new baseline compensation so that I am placed in the equivalent range in the new pay scale.”

On November 9, 2018, Grievant filed another action stating, “On October 29, 2018, a Level II Mediation was held in 2018-1257-DOT at which the Division of Highways failed to send a representative with authority to resolve the grievance as required by paragraph 5.2.2. of Section 156-1-5 of the Code of State Rules. Additionally, DOH attendee was unfamiliar with the grievance.” As relief sought, Grievant stated, “Mediation should be rescheduled, and the Division of Highways required to send a representative with authority to resolve the grievance and the requisite knowledge of the grievance to facilitate productive discussions of the case. Cost of the 2nd mediation should be assessed to the DOH.”¹

The parties appeared before the undersigned on June 3, 2019, for a Level Three evidentiary hearing at the Grievance Board’s Westover office. Grievant appeared in person and by his counsel, Adam Barney, Berry, Kessler, Crutchfield, Taylor & Gordon. Respondent appeared through counsel, Keith Cox, and through Natasha White, Assistant Director of Human Resources. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on July 25, 2019.

Synopsis

Grievant was hired on February 18, 2014, as a Highway Engineer Trainee, in District Six, and works out of the Moundsville, West Virginia office. Grievant asserts that

¹By an Order dated February 26, 2019, these grievances were consolidated.

he is entitled to 10% above the new minimum pay schedule and credit for all of his raises, and a 5% increase for the one year of service having received his EIT Certificate. Consistent with applicable case law, Grievant and other Highway Engineer Trainees are being paid in accordance with the pay scale for their employment classification. Grievant is being compensated consistently with the pay plan policy. The record of this case does not support a finding that Respondent engaged in discrimination. Grievant contends that when the Division of Highways appeared through Matt Ball, Assistant Human Resources Director over Administration of Employee Benefits, for a mediation, that Mr. Ball did not have the authority to resolve the grievance. The record reflected that Mr. Ball had the authority of the Division of Highways to resolve certain issues at the mediation session. That issue is essentially moot since the case was heard at Level Three. Accordingly, this grievance is denied.

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

Findings of Fact

1. Grievant was hired on February 18, 2014, as a Highway Engineer Trainee, in District Six, and works out of the Moundsville, West Virginia office.
2. Grievant was given 10% over base pay due to having some co-op experience. Grievant was given other raises for merit increase and “across the board” raises over the next four years.
3. In the spring of 2018, Respondent, in response to legislation passed by the West Virginia Legislature providing across the board pay raises in the amount of 5% to State employees, began the process of implementing a new pay plan.

4. The goal of this plan was to satisfy the new legislation and improve recruitment and retention of employees for the Division of Highways. The feature of this plan was to raise the minimum salary and include raises for completing one year of service and for having passed a Fundamentals of Engineering Exam (EIT Certificate).

5. One of the effects of this legislation was that the new minimum hiring rate for Pay Grade 19 Highway Engineers Trainees would be \$44,244 per year. This new minimum can also be expressed as \$3,687 per month.

6. Per policy, Highway Engineer Trainees that have passed the Fundamentals of Engineering Exam (EIT Certificate) and have been employed with the DOH for twelve months shall receive a 5% increase over the base. Pursuant to policy, employees who meet the requirement and have received the 5% increase are brought to the new minimum plus the 5% increase.

7. The salary policy change went into effect on or about April 14, 2018. Prior to April 14, 2018, Grievant was making \$3,871.11 per month. The new base became \$3,687 per month, and Highway Engineer Trainees with the EIT Certificate and twelve months with the Division of Highways were given an additional 5%, or \$184.33.

8. Grievant's salary would have been unaffected by the new policy had he been making anything over \$3,871.33 per month. As a result of this creative accounting, Grievant realized an increase of \$0.22 per month.

9. The record established that approximately 40% of Respondent's Highway Engineer Trainees fall below the new hiring rate of \$44,244 per year. Upon implementation of the pay plan, the pay of those employees was raised to the new

minimum hiring rate. The pay of the remaining 60% would in essence be unchanged. Respondent's Exhibit No. 3.

10. If Grievant had not had his EIT Certification, his salary would have remained the same, which was still approximately \$180.00 above the new monthly base salary. It appears from the record that Grievant now makes a monthly salary of \$4,051.00.

11. Grievant contends that when the Division of Highways appeared through Matt Ball, Assistant Human Resource Director over Administration of Employee Benefits, for a mediation, that Mr. Ball did not have the authority to resolve the grievance.

12. The record reflected that Mr. Ball had the authority of the Division of Highways to resolve certain issues at the mediation session.

13. The record indicated that, regarding certain other issues, Mr. Ball did not have the authority to speak for the State Personnel Board, or the Division of Personnel.

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).

With respect to the salary component of this case, Grievant asserts that he is entitled to 10% above the new minimum and credit for all of his raises, and a 5% increase for the one year of service having received his EIT Certificate. He argues that alternatively, he should, at the very least, have received the 5% raise on top of his salary as it existed at the time of the new plan’s implementation. The Division of Highways asserts that Grievant has suffered no loss from the relevant pay plan policy. While Grievant feels that he is losing money because more employees around him are making approximately the same amount that he makes, he has not lost money and has, although minimally, been positively affected by the change in pay structure.

At the evidentiary hearing, Respondent offered the testimony of Natasha White, Assistant Director of Human Resources. Ms. White testified generally about the Respondent’s policies and procedures concerning Respondent’s pay plan pursuant to the authority granted in Senate Bill 2003. This legislation transferred authority from the Division of Personnel to the Commissioner of Highways to make determinations regarding pay, classification and qualifications of DOH employees.

One of the effects of this legislation was that the new minimum hiring rate for Pay Grade 19 Highway Engineers Trainees would be \$44,244 per year. This new minimum can also be expressed as \$3,687 per month. Per policy, Highway Engineer Trainees that have passed the Fundamentals of Engineering Exam (EIT Certificate) and have been employed with the DOH for twelve months shall receive a 5% increase over the base. Pursuant to policy, employees who meet the requirement and have received the 5%

increase are brought to the new minimum, plus the 5% increase. The salary policy change went into effect on or about April 14, 2018. Prior to April 14, 2018, Grievant was making \$3,871.11 per month. The new base became \$3,687 per month, and Highway Engineer Trainees with the EIT Certificate and twelve months with the Division of Highways were given an additional 5%, or \$184.33.

Grievant is understandably upset that the pay plan implemented by the Division of Highways does not provide him, and other employees, with a 5% raise as he only received a \$0.22 per month raise. 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).

"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). The record supports a finding that there was no scenario under the pay plan in which Grievant or others similarly situated employees would lose money under the pay policy. The somewhat limited record of this case does not support a finding that Respondent engaged in discrimination. The West Virginia Legislature through Senate Bill 2003 tried to assist the Division of Highways with recruitment by raising the base salary throughout West Virginia. Grievant advocates that the policy should read differently in order that his previous raises would be added to the new base. The record does not support such a conclusion.

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).

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. Consistent with *Largent, supra*, Grievant and other Highway Engineer Trainees are being paid in accordance with the pay scale for their employment classification. Inasmuch as the Grievance Board attempts to follow the well-recognized doctrine of *stare decisis*, the undersigned finds *Largent* controlling in regard to the pay issue in this grievance.

The undersigned acknowledges that the applicable pay plan policy does provide for a pay increment of 5% above the minimum salary, as was the implemented increment in this case, for six months of pertinent experience or training above the minimum qualifications. The commissioner may also pay an increment of up to 10% for professional certification or license held by the applicant. The policy also provides for raises on a discretionary basis for up to 10% in any 12-month period which will not exceed the maximum of the pay grade. These salary advancements appear to be synonymous with merit raises. The policy also grants the commissioner discretion to grant an in-range salary adjustment of up to 10% for an employee who has been assigned duties beyond those expected of his or her position. In any event, these raises are discretionary and the record before the undersigned does not support a finding that Respondent may have abused its discretion in not providing Grievant with the increments that he seeks.

Finally, the grievance concerning the mediation is now moot as it was consolidated and heard at the Level Three Hearing. "When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. 'Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].' *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)." *Pritt, et al., v. Dep't of Health and Human Res.*, Docket No.

2008-0812-CONS (May 30, 2008). Grievant's relief sought was to have another mediation and to have the Division of Highways pay for it. Having another mediation on an issue after the matter has been heard at Level Three would serve no purpose, and can be viewed as relief sought which cannot be granted.

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. 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).

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. The record established that Grievant is being compensated consistently with the pay plan policy. The record did not support a finding that Grievant is the victim of discrimination.

6. The mediation of a case that has advanced to Level Three would be without purpose and can be viewed as relief sought which cannot be granted.

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: August 15, 2019

Ronald L. Reece
Administrative Law Judge